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Domestic Application of Treaties

David L. Sloss

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Introduction[1]

There has been dramatic growth in treaty-making since the Second World War: more than 50,000 treaties were registered with the United Nations between 1945 and 2013.[2] Meanwhile, with the rise of globalization, the boundary separating domestic law from international law has become increasingly permeable. Consequently, over the past few decades, States have made greater use of treaties to regulate activity that was previously regulated exclusively by domestic law. For example, under the 1993 Hague Convention on Intercountry Adoption,[3] ninety-nine States have agreed to regulate child adoption on a transnational scale.[4] Additionally, States have concluded numerous treaties that protect the rights of private parties, including, for example, treaties related to international human rights law,[5] international humanitarian law,[6] and international refugee law.[7] As a consequence of these three trends—growth in the number of treaties, increasing overlap between treaties and

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[1] The second edition of this chapter closely tracks the first edition, but takes advantage of new scholarship to provide coverage of additional countries. The earlier version focused primarily on 21 countries. This version addresses the domestic application of treaties in 28 countries. The most important new book in the field is a book edited by Professors Nollkaemper, Shany and Tzanakopoulos, which grew out of an International Law Association (ILA) study group on engagement of domestic courts with international law. See A Nollkaemper, Y Shany and A Tzanakopoulos (eds) *Engagement of Domestic Courts with International Law* (forthcoming 2020) ("Engagement"); A Tzanakopoulos, ILC Study Group Report, 'Principles on Engagement of Domestic Courts with International Law' (2016) available at <http://www.ila-hq.org/index.php/study-groups>.

[2] See United Nations Treaty Series Cumulative Index <http://treaties.un.org/Pages/CumulativeIndexes.aspx>. In contrast, States concluded about 16,000 treaties during the nineteenth century. See JF Witt, 'Internationalism and the Dilemmas of Strategic Patriotism' (2006) 41 Tulsa L Rev 787, 791.

[3] Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (adopted 29 May 1993, entered into force 1 May 1995) 1870 UNTS 167.

[4] See Status Table, Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption <http://www.hcch.net/index_en.php?act=conventions.status&cid=69>.

[5] See eg International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

[6] See eg Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1959) 75 UNTS 135.

[7] See eg Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

domestic law, and a growing emphasis on private rights—domestic courts today play a prominent role in treaty application.

Traditional scholarship on the domestic application of treaties has focused on the distinction between monist and dualist legal systems.[8] Part I of this chapter explains that distinction: in brief, the monist-dualist divide hinges on the role of the legislative branch in incorporating and implementing treaties domestically. Although the monist-dualist framework helps illuminate important *formal* differences among States, Part I suggests that scholarly preoccupation with the formal distinction between monism and dualism tends to obscure key *functional* differences among States.

Hence, the remainder of the chapter adopts a functional approach, focusing primarily on the role of domestic courts in promoting compliance with treaty obligations and protecting treaty-based private rights. Part II explains the distinction between horizontal, vertical, and transnational treaty provisions. Part III addresses the functional distinction between nationalist and transnationalist approaches to judicial application of treaties.[9] Part IV discusses the crucial role of domestic courts in promoting compliance with treaty obligations, especially transnational and vertical treaty obligations.

The functional analysis in Parts II to IV shows that domestic courts play a key role in protecting private rights under transnational treaty provisions and promoting compliance with those provisions, but they play virtually no role in promoting compliance with horizontal treaty provisions. This is generally true for both monist and dualist States. The story with respect to vertical treaty provisions is more complicated. When domestic courts adopt a transnationalist approach, they play a key role in protecting private rights under vertical treaty provisions and promoting compliance with those provisions. When domestic courts adopt a nationalist approach, vertical treaty provisions may be under-enforced. There does not appear to be any significant correlation between a State's formal classification as monist or dualist and the tendency of domestic courts in that State to function in a nationalist or transnationalist mode.

I. Monism and Dualism

The terms 'monism' and 'dualism' generate considerable confusion because there is no single, agreed definition of the terms. Some scholars employ the terms to describe contrasting theoretical perspectives on the relationship between international and domestic law.[10] Used in this sense, dualism 'emphasizes the distinct and independent character of the international

[8] See nn 10-19 and accompanying text.

[9] The ILA Study Group adopted the terminology of "avoidance," "contestation," and "alignment" to describe different functional approaches to the engagement of domestic courts with international law. See ILA Study Group Report (n **Error! Bookmark not defined.**) 16 [37]. Broadly speaking, the transnationalist approach involves alignment of domestic law with international norms, whereas the nationalist approach involves avoidance or contestation.

[10] See eg J Crawford (ed), *Brownlie's Principles of Public International Law* (8th edn OUP, Oxford 2012) 48-50.

and national legal systems'..[11] In contrast, monism 'postulates that national and international law form one single legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent'.[12] Some monist theorists assert the supremacy of international law over domestic law, but this is not an essential feature of monist theory.

Other scholars employ the terms monism and dualism to describe different types of domestic legal systems.[13] Used in this sense, dualist States are States in which 'the constitution . . . accords no special status to treaties; the rights and obligations created by them have no effect in domestic law *unless legislation is in force to give effect to them*'.[14] In contrast, '[t]he essence of the monist approach is that a treaty may, without legislation, become part of domestic law once it has been concluded in accordance with the constitution and has entered into force for the state'.[15] As Professor Aust correctly noted, many national constitutions 'contain both dualist and monist elements'.[16]

This chapter uses the terms monism and dualism in the second sense, to describe different types of domestic legal systems. Dualist States are States in which *no treaties* have the status of law in the domestic legal system; *all* treaties require implementing legislation to have domestic legal force.[17] Monist States are States in which *some* treaties have the status of law in the domestic legal system, even in the absence of implementing legislation.[18] In most monist States, there are some treaties that require implementing legislation and others that do not. There is substantial variation among monist States as to which treaties require implementing legislation. Moreover, monist States differ considerably in terms of the hierarchical rank of treaties within the domestic legal order. Despite these variations, all monist States have one common feature: at least some treaties have the status of law within the domestic legal order.

The question whether a treaty requires legislative implementation after the treaty enters into force internationally must be distinguished from the question whether legislative approval is necessary prior to treaty ratification. In most dualist States, the executive has the constitutional authority to conclude treaties that bind the nation under international law

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[11] Ibid 48.

[12] Ibid 48.

[13] See eg A Aust, *Modern Treaty Law and Practice* (3d edn, CUP, Cambridge 2013) 159-77.

[14] Ibid 167 (emphasis in original).

[15] Ibid 163.

[16] Ibid 162.

[17] In many dualist States, customary international law has domestic legal force, even in the absence of implementing legislation. See eg N Jayawickrama, 'India' in D Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (CUP, Cambridge 2009) 244–5 ('Sloss').

[18] These definitions constitute a slight departure from standard terminology. However, these definitions have the advantage of drawing a clear distinction between monism and dualism. Applying these definitions, almost all States can be neatly classified as either monist or dualist without significant overlap between the categories.

without obtaining prior legislative approval.[19] The executive's power to conclude treaties without prior legislative approval helps explain why, in dualist States, implementing legislation is necessary to grant treaties domestic legal force. In most monist States, though, the constitution requires legislative approval for at least some treaties before the executive can make an internationally binding commitment on behalf of the nation.[20] The fact that the legislature approves (some) treaties before they become binding on the nation helps explain why, in monist States, some treaties have the status of domestic law even in the absence of implementing legislation. In sum, in both monist and dualist States, it is rare for a treaty to have domestic legal force unless the legislature has acted either to approve the treaty before international entry into force, or to implement the treaty after international entry into force.[21]

The following sections summarize key features of monist and dualist systems. The analysis touches upon the domestic legal systems of twenty-eight States, relying heavily on two previously published volumes that present a comparative analysis of national treaty law,[22] and one forthcoming volume on domestic courts and international law.[23] Those twenty-eight States include seven dualist States: Australia, Canada, Ghana, India, Israel, Nigeria, and the United Kingdom. The other twenty-one (monist) States are: Albania, Argentina, Austria, Belgium, Chile, China, Colombia, Egypt, France, Germany, Iran, Japan, Mexico, the Netherlands, Poland, Russia, South Africa, Spain, Switzerland, Thailand, and the United States.

A. Dualist States

Almost all the British Commonwealth States follow the dualist approach for treaties.[24] Apart from Commonwealth States, Israel, Denmark, and other Nordic States also follow a dualist approach.[25] The key distinguishing feature of dualism is that no treaties have the formal status of law in the domestic legal system unless the legislature enacts a statute to incorporate the treaty into domestic law.[26] Such statutes must be distinguished from legislative acts that authorize the executive to make a binding international commitment, which, as noted above,

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[19] See nn 28-29.

[20] See n 81 and accompanying text.

[21] See DB Hollis, 'A Comparative Approach to Treaty Law and Practice' in DB Hollis, MR Blakeslee, and LB Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden 2005) 32–45 ('*NTLP*').

[22] See *NTLP* (n 21); Sloss (n 17).

[23] See Engagement (n 1).

[24] See Aust (n 13) 194–5.

[25] See ibid.

[26] See DR Rothwell, 'Australia' in Sloss (n 17) 128–30; M Copithorne, 'Canada' in *NTLP* (n 21) 95–101; Christian N. Okeke, The Use of International Law in the Domestic Courts of Ghana and Nigeria, 32 Ariz. J. Int'l & Comp. L. 371, 395-96 (2015) (Ghana); K Thakore, 'India' in *NTLP* (n 21) 351; R Lapidoth, 'Israel' in *NTLP* (n 21) 396; Okeke, supra, at 405-08 (Nigeria); and I Sinclair, SJ Dickson and G Maciver, 'United Kingdom' in *NTLP* (n 21) 733.

are unnecessary in these systems.[27] In many dualist States the executive consults with the legislature before concluding 'important' treaties.[28] (There is considerable variation among States concerning which treaties qualify as 'important'.) Moreover, if legislation is needed to ensure that government officials have the requisite authority to implement a treaty, dualist States usually enact the necessary implementing legislation before the treaty enters into force internationally.[29]

For courts in dualist States, there is a crucial distinction between incorporated and unincorporated treaties. As a formal matter, courts in dualist States have no authority to apply treaties directly as law. If the legislature has enacted a statute to incorporate a particular treaty provision into national law, courts apply the statute as law;[30] and they frequently consult the underlying treaty to help construe the meaning of the statute.[31] Thus, in dualist States, courts apply treaties indirectly, not directly. However, one should not overstate the difference between direct and indirect application. Either way, judges who are receptive to the domestic judicial application of treaties can use their judicial power to protect the treaty-based rights of private parties and promote compliance with national treaty obligations.[32]

Dualist States employ a variety of methods for incorporating treaties into national law.[33] In the United Kingdom, for example: the text of a treaty may be attached to a statute stipulating that the attached treaty provisions 'shall have the force of law in the United Kingdom';[34] Parliament may pass an Act granting government officials 'all the powers necessary to carry out obligations under an existing or future treaties';[35] or Parliament may pass an Act authorizing the Crown to enact regulations to implement one or more treaties.[36]

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[27] See Copithorne (n 26) 91–4 (Canada); Lapidoth (n 26) 385–90 (Israel); Rothwell (n 26) 128–30 (Australia); Sinclair and others (n 26) 727 (United Kingdom); and Thakore (n 26) 352–5 (India).

[28] See Copithorne (n 26) 96, 98 (Canada); Lapidoth (n 26) 388–9, 393–4 (Israel); Sinclair and others (n 26) 737–9 (United Kingdom); and Thakore (n 26) 365–6 (India).

[29] See Copithorne (n 26) 96 (Canada); Lapidoth (n 26) 396–8 (Israel); Sinclair and others (n 26) 742 (United Kingdom); and Thakore (n 26) 359–60 (India).

[30] See eg A Aust, 'United Kingdom' in Sloss (n 17) 486; Okeke (n 26) 396 (Ghana); id., at 416-22 (Nigeria); Rothwell (n 26) 138–41 (Australia); G van Ert, 'Canada' in Sloss (n 17) 202–4.

[31] See eg Aust (n 30) 482–3 (United Kingdom); Jayawickrama (n 17) 264–6 (India); D Kretzmer, 'Israel' in Sloss (n 17) 290–2 (Israel); Rothwell (n 26) 138–41 (Australia); van Ert (n 30) 175–82 (Canada).

[32] See generally D Sloss, 'Treaty Enforcement in Domestic Courts: A Comparative Analysis' in Sloss (n 17) 8–43 (analysing the practice of national courts in eleven States).

[33] See eg Kretzmer (n 31) 283–5 (Israel); Rothwell (n 26) 159–60 (Australia); van Ert (n 30) 169–71 (Canada).

[34] Aust (n 13) 169.

[35] Ibid.

[36] Ibid 170.

Given the wide variety of techniques that dualist States utilize to incorporate treaties,[37] the question whether a particular treaty provision has been incorporated is often ambiguous.[38]

The Australian High Court developed a creative approach to addressing this type of ambiguous situation, which commentators have dubbed 'quasi-incorporation'.[39] The term refers to situations where 'government departments, and administrative decision makers are given [a statutory directive] to take into account the provisions of . . . international instruments to which Australia is a party'.[40] For example, in the *Project Blue Sky* case,[41] an Australian statute specifically directed the Australian Broadcasting Authority (ABA) 'to perform its functions in a manner consistent with "Australia's obligations under any . . . agreement between Australia and a foreign country"'.[42] The petitioners argued that the ABA had violated the statute by enacting regulations inconsistent with a bilateral free-trade agreement between Australia and New Zealand.[43] A three-judge panel of the Federal Court held that 'the ABA was not bound to take into account' the free-trade agreement because that agreement conflicted with a different statutory provision.[44] The High Court reversed, holding 'that the ABA was precluded from making a standard inconsistent with the' free-trade agreement, even though that agreement had not been directly incorporated into Australian domestic law.[45] Courts in other dualist States have adopted a similar approach.[46] In the United Kingdom, for example, petitioners in several cases have obtained judicial remedies by invoking statutes that required administrative decision-makers to exercise their authority in conformity with treaty obligations that had not been directly incorporated into domestic law.[47]

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[37] See eg Aust (n 30) 479–81 (United Kingdom) (discussing, among others, *Cheng v Conn, Inspector of Taxes* [1968] 1 All ER 779); Kretzmer (n 31) 283–5 (Israel); Rothwell (n 26) 158–60 (Australia) (discussing *Project Blue Sky Inc v Australian Broadcasting Auth* (1998) 153 ALR 490); van Ert (n 30) 169–71 (Canada) (discussing, among others, *Pan American World Airways v The Queen* [1981] 2 SCR 565; *Schavernoch v Foreign Claims Commission* [1982] 1 SCR 1092).

[38] See eg van Ert (n 30) 171.

[39] See Rothwell (n 26) 158–64.

[40] Ibid 159.

[41] *Project Blue Sky Inc v Australian Broadcasting Auth* (1998) 153 ALR 490.

[42] Rothwell (n 26) 141 (quoting Broadcasting Services Act 1992).

[43] Ibid 141–2.

[44] Ibid 143.

[45] Ibid 143–5.

[46] See, e.g., Okeke (n 26) 416-18 (discussing application of Warsaw Convention in Nigeria).

[47] See Aust (n 30) 490–1 (noting that 'there have been numerous successful challenges by way of judicial review to [administrative] decisions on claims to refugee status'); ibid 491–2 (discussing *Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409; [2002] All ER (D) 450

More surprisingly, courts in dualist States have developed a variety of strategies for judicial application of unincorporated treaties—even in the absence of any statutory directive for government officials to take account of treaty provisions.[48] In Australia, for example, the High Court held in *Minister of State for Immigration and Ethnic Affairs v Teoh*[49] that administrative decision-makers must exercise their statutory discretion in conformity with the Convention on the Rights of the Child, an unincorporated treaty, because treaty ratification meant that individuals had a 'legitimate expectation' that government officials would act in accordance with the treaty.[50] The Canadian Supreme Court has declined to follow the so-called legitimate expectations doctrine.[51] Even so, the Canadian Supreme Court has held that administrative decision-makers in Canada, like their Australian counterparts, must exercise their statutory discretion in conformity with the Convention on the Rights of the Child, an unincorporated treaty.[52] In Israel, 'it has now become standard practice for the Supreme Court to' apply Geneva Convention IV in cases involving the Occupied Territories, although the Convention has not been incorporated into domestic law.[53] The Court justifies this approach by citing the government's political commitment to 'respect the humanitarian provisions of the Convention'.[54] Similarly, the Indian Supreme Court routinely applies unincorporated treaties to support its interpretation of both statutory and constitutional provisions;[55] the Court has also applied treaties to support its progressive development of common law principles.[56]

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holding that the Director of Fisheries of South Georgia and the South Sandwich Islands 'had not properly carried out his statutory powers' because he failed to take account of relevant treaty provisions).

[48] See MP Van Alstine, 'The Role of Domestic Courts in Treaty Enforcement: Summary and Conclusions' in Sloss (n 17) 608–12.

[49] (1995) 128 ALR 353.

[50] Ibid; See also Rothwell (n 26) 146–8; Okeke (n 26) 408 (discussing application of legitimate expectations doctrine by Nigerian Supreme Court).

[51] See van Ert (n 30) 173 (discussing *Baker v Canada* [1999] 2 SCR 817).

[52] See ibid 194–7.

[53] See Kretzmer (n 31) 305–10 (discussing, among others, HCJ 3278/02, *Hamoked The Center for the Defense of the Individual v IDF Commander* 57 P.D. (1) 385 ('*Hamoked*')).

[54] Ibid 309–10 (discussing *Hamoked* (n 53); HCJ 7862/04, *Abu Dahar v IDF Commander* 59 P.D. (5) 368).

[55] See Jayawickrama (n 17) 247–64 (discussing, among others, *Jolly George Verhese v Bank of Cochin* [1980] 2 SCR 913; *Transmission Corporation of Andhra Pradesh v Ch Prabhakar* Supreme Court of India, Civil Appeal 6131 of 2002, 26 May 2004); see also Okeke (n 26) 409-13 (discussing a similar practice by the Supreme Court of Ghana).

[56] See Jayawickrama (n 17) 255–6 (discussing *MV Elisabeth v Harwan Investment and Trading Pvt Ltd* [1992] 1 SCR 1003).

This increasing judicial reliance on unincorporated treaties by courts in dualist States blurs the traditional distinction between monist and dualist States.[57] Nevertheless, judges in dualist States periodically invoke the dualist dogma that courts are powerless to apply treaties unless the legislature has expressly incorporated the treaty into domestic law.[58] Hence, there remains an uneasy tension between the formalities of strict dualist doctrine and the practical reality that courts in dualist States have developed a variety of strategies to facilitate judicial application of unincorporated and partially incorporated treaties.

B. Monist States

The key distinguishing feature of monist legal systems, as defined herein, is that at least some treaties are incorporated into the domestic legal order without the need for any legislative act, other than the act authorizing the executive to conclude the treaty. Under this definition, Albania,[59] Argentina,[60] Austria,[61] Belgium,[62] Chile,[63] China,[64] Colombia,[65] Egypt,[66] France,[67]

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[57] See MA Waters, 'Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 Colum L Rev 628.

[58] See eg B Saul, 'The Kafka-esque Case of Sheikh Manour Leghaei: The Denial of the International Human Right to a Fair Hearing in National Security Assessments and Migration Proceedings in Australia' (2010) 33 UNSW Law J 629.

[59] See G Zyberi and S Sali, 'The Engagement of Albanian Courts with International Law' in *Engagement* (n 1).

[60] See M Pinto and N Maisley, 'From Affirmative Avoidance to Overriding Alignment: The Engagement of Argentina's Supreme Court with International Law' in *Engagement* (n 1).

[61] See F Cede and G Hafner, 'Republic of Austria' in *NTLP* (n 21) 59–60, 67–8.

[62] See F Dopagne, 'Belgium' in *Engagement* (n 1).

[63] See F Orrego Vicuna and F Orrego Bauzá, 'Chile' in *NTLP* (n 21) 136–8.

[64] See X Hanqin, H Zhiqiang, and Fan Kun, 'China' in *NTLP* (n 21) 163–4.

[65] See G Cavelier, 'Colombia' in *NTLP* (n 21) 205.

[66] See N Elaraby, M Gomaa, and L Mekhemar, 'Egypt' in *NTLP* (n 21) 238–9.

[67] See PM Eisemann and R Rivier, 'France' in *NTLP* (n 21) 265–7.

Germany,[68] Iran,[69] Japan,[70] Mexico,[71] the Netherlands,[72] Poland,[73] Russia,[74] South Africa,[75] Spain,[76] Switzerland,[77] Thailand,[78] and the United States[79] all have monist legal systems. In all twenty-one States, some form of legislative approval is required for at least some types of treaties before the executive is authorized to make a binding international commitment on behalf of the nation.[80] Despite these similarities, there are substantial differences among these States concerning the application of treaties within their national legal systems.

One significant area of variability concerns the types of treaties that require legislative approval before international entry into force of the treaty.[81] In Mexico and Colombia, all treaties require prior legislative approval.[82] Chile, the Netherlands, South Africa, and Switzerland establish a default rule that treaties ordinarily require legislative approval, but

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[68] See H Beemelmans and HD Treviranus, 'Federal Republic of Germany' in *NTLP* (n 21) 323–6.

[69] See FR Dizgovin, 'Enforcement of International Treaties by Domestic Courts of Iran: New Developments,' 58 VJIL 227 (2018).

[70] See T Kawakami, 'Japan' in *NTLP* (n 21) 424–5.

[71] See LM Díaz, 'Mexico' in *NTLP* (n 21) 451.

[72] See JG Brouwer, 'The Netherlands' in *NTLP* (n 21) 497–9.

[73] See L Garlicki, M Masternak-Kubiak, and K Wójtowicz, 'Poland' in Sloss (n 17) 378.

[74] See WE Butler, 'Russia' in *NTLP* (n 21) 554–6.

[75] See NJ Botha, 'South Africa' in *NTLP* (n 21) 600–2.

[76] See C Esposito, 'Spanish Foreign Relations Law and the Process for Making Treaties and Other International Agreements' in C Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, Oxford forthcoming 2019).

[77] See L Wildhaber, A Scheidegger, and MD Schinzel, 'Switzerland' in *NTLP* (n 21) 658–9; EM Belser and R Oleschak, 'Engagement of Swiss Courts with International Law' in *Engagement* (n 1).

[78] See S Sucharitkul, 'Thailand' in *NTLP* (n 21) 706.

[79] See RE Dalton, 'United States' in *NTLP* (n 21) 788–90.

[80] See Beemelmans and Treviranus (n 68) 323–6 (Germany); Botha (n 75) 590–2 (South Africa); Brouwer (n 72) 489–91 (the Netherlands); Butler (n 74) 544–7 (Russia); Cavelier (n 65) 199 (Colombia); Cede and Hafner (n 61) 64–5 (Austria); Dalton (n 79) 770–4 (United States); Díaz (n 71) 447–8 (Mexico); Dizgovin (n 69) 234-36 (Iran); Dopagne (n 62) TAN 1-5 (Belgium); Eisemann and Rivier (n 67) 258–60 (France); Elaraby and others (n 66) 231 (Egypt); Esposito (n 76) TAN 38 (Spain); Garlicki and others (n 73) 376–7 (Poland); Hanqin and others (n 64) 161–2 (China); Kawakami (n 70) 419–20 (Japan); Pinto and Maisley (n 60) TAN 18 (Argentina); Sucharitkul (n 78) 701–3 (Thailand); Zyberi and Sali (n 59) TAN 6-12 (Albania); Vicuna and Bauzá (n 63) 127–30 (Chile); and Wildhaber and others (n 77) 644–8 (Switzerland).

[81] For a tabular depiction of the variability in this area, see Hollis, 'Comparative Approach' (n 21) 33.

[82] See Cavelier (n 65) 199 (Colombia); Díaz (n 71) 447–8 (Mexico).

they recognize certain exceptions to that rule.[83] In other States, legislative approval is required only for designated categories of treaties.[84]

Another significant area of variability relates to publication requirements. In Albania, Belgium, Chile, Egypt, France, Iran, Japan, and Russia, a treaty that has entered into force internationally lacks domestic legal force until the executive branch publishes or promulgates the treaty domestically.[85] In other monist States, though, (at least some) treaties enter into force domestically at the same time they enter into force internationally, without the need for any additional steps.[86]

There is also significant variation among monist States concerning the hierarchical rank of treaties within the domestic legal order. In Austria, Egypt, Germany, and the United States, treaties are equivalent to statutes; they rank lower than the Constitution.[87] In South Africa, treaties rank lower than statutes.[88] In Albania, Belgium, China, France, Japan, Mexico, Poland, and Spain, (at least some) treaties rank higher than statutes but lower than the Constitution.[89] In Iran, treaties generally take precedence over statutes "unless a [particular] treaty has been ratified that establishes the superiority of domestic law over" that treaty.[90] In Argentina, treaties generally rank higher than statutes and lower than the Constitution, but some human rights treaties have constitutional rank.[91] In the Netherlands,

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[83] See Botha (n 75) 586–92 (South Africa); Brouwer (n 72) 489–91 (the Netherlands); Vicuna and Bauzá (n 63) 123–4 (Chile); and Wildhaber and others (n 77) 644–51 (Switzerland).

[84] See Hollis, 'Comparative Approach' (n 21) 32–7; see also Dizgovin (n 69) 234-35 (Iran); Esposito (n 76) TAN 38 (Spain); Zyberi and Sali (n 59) TAN 8-10 (Albania).

[85] See Butler (n 74) 552–4 (Russia); Dizgovin (n 69) 235-36 (Iran); Dopagne (n 62) TAN 2-3 (Belgium); Eisemann and Rivier (n 67) 265–7 (France); Elaraby and others (n 66) 238–9 (Egypt); Kawakami (n 70) 424–5 (Japan); Zyberi and Sali (n 59) TAN 11 (Albania); Vicuna and Bauzá (n 63) 136–8 (Chile).

[86] See Hollis, 'Comparative Approach' (n 21) 41–2.

[87] See Cede and Hafner (n 61) 59–60, 67–8 (Austria); Dalton (n 79) 789–90 (United States); Elaraby and others (n 66) 238–9 (Egypt); A Paulus, 'Germany' in Sloss (n 17) 214–18. In both Austria and Germany, treaties approved by the legislature have the rank of statutes, but treaties concluded without legislative approval have a lower rank. See Cede and Hafner (n 61) 67–8; Paulus, 214-18. In the United States, though, there is at least some authority for the proposition that treaties concluded without legislative approval have the same rank as treaties approved by the legislature. See *United States v Pink* 315 US 203 (1942); *United States v Belmont* 301 US 324 (1937).

[88] This follows directly from Art 231(4) of the South African Constitution, which states: '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.'

[89] See Díaz (n 71) 451–4 (Mexico); Dopagne (n 62) TAN 5-7 (Belgium); Eisemann and Rivier (n 67) 263–7 (France); Esposito (n 76) TAN 45 (Spain); Garlicki and others (n 73) 376–9 (Poland); Hanqin and others (n 64) 163–5 (China); Zyberi and Sali (n 59) TAN 5-7 (Albania); and T Webster, 'International Human Rights Law in Japan: The View at Thirty' (2010) 23 Colum J Asian L 241, 245.

[90] See Dizgovin (n 69) 238-9.

[91] See Pinto and Maisley (n 60) TAN 28-29.

some treaties rank higher than the Constitution.[92] In Chile, Russia, and Switzerland, the hierarchical rank of treaties is contested, but it is undisputed that at least some treaties rank higher than statutes,[93] and there is some authority for the proposition that some treaties have constitutional rank.[94]

In many monist States, even if a treaty has the formal status of law in the absence of implementing legislation, the legislature sometimes enacts legislation to help ensure that courts and executive officers give practical effect to the treaty within the national legal system. Thus, for example, the United States enacted implementing legislation for the New York Convention,[95] and South Africa enacted implementing legislation for the Warsaw Convention.[96] As Professor Nollkaemper observes: '[E]ven if the provisions of a treaty could in principle be applied directly, the Netherlands usually chooses to convert them into national legislation to harmonize Dutch law with the requirements of international law'.[97]

All monist States recognize the possibility, at least theoretically,[98] that domestic courts can apply (at least some) treaties directly as law.[99] Indeed, this is one of the crucial differences between monist and dualist systems: dualist States permit only indirect judicial application of treaties, whereas monist States permit direct judicial application in some cases. Despite this formal distinction, however, there are several reasons why judicial practice exhibits many similarities between monist and dualist States. First, as noted above, courts in

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[92] See Brouwer (n 72) 498–9.

[93] See Butler (n 74) 554–6 (Russia); Vicuna and Bauzá (n 63) 138–9 (Chile); and Wildhaber and others (n 77) 658–64 (Switzerland).

[94] See Butler (n 74) 556 (contending that '[t]he primacy of international treaties of the Russian Federation extends to Federal laws, including constitutional laws'); Vicuna and Bauzá (n 63) 139 (noting that, in one view, human rights treaties 'now have in Chile a ranking above that of ordinary statutes and at least equal to the Constitution'); and Wildhaber and others (n 77) 662 (Switzerland) ('Treaties in conflict with federal constitutional law have to be applied irrespective of their unconstitutionality').

[95] See Federal Arbitration Act 1970 ss 201–8 (implementing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38 ('NY Convention').

[96] See J Dugard, 'South Africa' in Sloss (n 17) 470; Convention for the Unification of Certain Rules Relating to International Carriage by Air (signed 12 October 1929, entered into force 13 February 1933) 137 LNTS 11 ('Warsaw Convention').

[97] A Nollkaemper, 'The Netherlands' in Sloss (n 17) 335.

[98] The South African Constitution expressly contemplates a category of self-executing treaties, but South African courts have not yet held that any particular treaty is self-executing. See Dugard (n 96) 453–5.

[99] See WE Butler, 'Russia' in Sloss (n 17) 410–11; Cede and Hafner (n 61) 69 (Austria); Dalton (n 79) 788–90 (United States); Díaz (n 71) 454 (Mexico); Dizgovin (n 69) 254-58 (Iran); Dopagne (n 62) (Belgium); Eisemann and Rivier (n 67) 265–70 (France); Elaraby and others (n 66) 238-9 (Egypt); Esposito (n 76) TAN 45 (Spain); Garlicki and others (n 73) 400–4 (Poland); Hanqin and others (n 64) 163–5 (China); Nollkaemper (n 97) 341–8 (the Netherlands); Paulus (n 87) 209–12 (Germany); Pinto and Maisley (n 60) TAN 18-28 (Argentina); Zyberi and Sali (n 59) (Albania); Vicuna and Bauzá (n 63) 136–9 (Chile); Webster (n 89) 244–7 (Japan); and Wildhaber and others (n 77) 644–8 (Switzerland).

dualist States apply various strategies to facilitate judicial application of unincorporated and partially incorporated treaties.[100]

Second, courts in monist States often apply treaties indirectly as an aid to statutory or constitutional interpretation, rather than applying treaties directly as rules of decision to resolve disputed issues.[101] It is difficult to measure the relative frequency of direct versus indirect application, but there is some evidence that courts even in monist States rely more heavily on indirect than direct application.[102] Indeed, courts may prefer indirect application 'in cases where the direct application of international law would conflict with national law' because '[c]ourts usually prefer a conciliatory solution over the acknowledgment and resolution of a conflict of law'.[103] Insofar as courts in monist States prefer indirect rather than direct application, this further erodes the practical significance of the distinction between monist and dualist States.

Finally, in certain monist States, courts have articulated a distinction between 'self-executing' and 'non-self-executing' treaties.[104] When domestic courts decide that a treaty is 'non-self-executing', they sometimes behave as if the treaty has not been incorporated into domestic law even though the treaty, as a formal matter, has the status of law within the domestic legal system.[105] Thus, just as judicial practice in some dualist States blurs the monist-dualist divide by applying unincorporated treaties as if they were incorporated, judicial practice in some monist States blurs the monist-dualist divide by handling formally incorporated treaties as if they were unincorporated.

II. Horizontal, Transnational, and Vertical Treaty Provisions

To appreciate the role of domestic courts in treaty application, it is important to understand the nature of modern treaties. There is a widespread misconception that treaties focus exclusively, or almost exclusively, on regulating horizontal relations among States. This was never really true,[106] and it is certainly not true in the twenty-first century. States conclude treaties to regulate three different types of relationships: *horizontal* relations between and

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[100] See nn 40–57 and accompanying text.

[101] See eg Dugard (n 96) 457–63 (South Africa); Garlicki and others (n 73) 403–4 (Poland); Nollkaemper (n 97) 348–51 (the Netherlands); Paulus (n 87) 209–10 (Germany); and D Sloss, 'United States' in Sloss (n 17) 526–7.

[102] See eg Garlicki and others (n 73) 404 (stating that 'the most typical technique [in Poland] is that of coapplication of an international norm and a domestic norm').

[103] Nollkaemper (n 97) 349.

[104] See nn 192–208 and accompanying text.

[105] In the United States, for example, courts sometimes behave as if non-self-executing treaties are unincorporated, even though the Constitution states expressly that 'all treaties' are 'the supreme Law of the Land'. See Sloss, 'United States' (n 101) 509–14, 527–9, 534–9. See also Restatement (Fourth) of Foreign Relations: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity § 110 (2018).

[106] See eg D Sloss, 'When Do Treaties Create Individually Enforceable Rights?' (2006) 45 Colum J Trans'l L 20, 51–91 (analysing US Supreme Court's application of vertical and transnational treaty provisions between 1789 and 1838).

among States, *vertical* relations between States and private actors (including natural persons and corporations), and *transnational* relations between private actors who interact across national boundaries.[107] The role of domestic courts in applying treaties varies greatly depending on whether the treaty provision at issue is horizontal, vertical, or transnational.[108]

Domestic courts rarely apply treaties that regulate horizontal relationships among States. If one State believes that another State has violated a horizontal treaty obligation, the complainant might raise the issue in diplomatic negotiations, or perhaps file suit in an international tribunal, but it would be unusual for the complainant to file suit in a domestic court. Domestic courts typically dismiss cases in which private litigants file suit to resolve disputes that are properly characterized as horizontal disputes between States, because domestic courts generally lack the institutional competence to adjudicate such disputes. For example, a group of Serbian citizens sued the Dutch Government in a domestic court in the Netherlands, alleging that the government violated Article 2(4) of the UN Charter by supporting the NATO bombing of Yugoslavia in 1999. The Supreme Court of the Netherlands held that plaintiffs were not entitled to invoke Article 2(4) in a Dutch court.[109] Similarly, when a member of the Israeli Knesset filed a petition to challenge the legality of the government's targeted killing policy, the Israeli Supreme Court declared that 'the choice of means of warfare, which are used by the [State] in order to thwart murderous terrorist attacks, is not of the matters that this court would see fit to interfere with'.[110]

In contrast to horizontal treaties, domestic courts routinely apply transnational treaty provisions that regulate cross-border relationships between private actors. Such treaties include, for example, the 1958 New York Convention,[111] the 1980 Convention on the International Sale of Goods (CISG),[112] and the 1980 Hague Convention on Child Abduction.[113] Although States negotiated and ratified these treaties, they are designed primarily to regulate cross-border relationships among private actors, not horizontal relationships among States. The New York Convention provides rules for recognition and enforcement of arbitral awards arising from transnational commercial activities. The CISG

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[107] A separate category of treaties involves agreements between States and international organizations. Such treaties involve horizontal provisions (such as a nation's obligation to make financial contributions) and vertical provisions (such as immunities for employees of international organizations). Treaties between States and international organizations do not generally include transnational provisions.

[108] See generally D Sloss and MP Van Alstine, 'International Law in Domestic Courts' in W Sandholtz and C Whytock (eds), *Research Handbook on the Politics of International Law* (Edward Elgar, Cheltenham 2017) 79-115.

[109] See Nollkaemper (n 97) 347.

[110] OG Schwartz, 'The Engagement of Israel's Supreme Court with International Law' in *Engagement* (n 1) (quoting HCJ 5872/01 *Knesset Member Muhammad Bara'ke v. Prime Minister, Ariel* Sharon 56 (3) PD 1 (2002)).

[111] NY Convention (n 95).

[112] United Nations Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 1489 UNTS 3.

[113] Convention on the Civil Aspects of International Child Abduction (adopted 25 October 1980, entered into force 1 December 1983) 1343 UNTS 89.

provides rules for contracts involving transnational sale of goods. The Hague Convention applies to child custody disputes in which one parent transports a child across national boundaries. For these and other transnational treaties, domestic courts play a vital role in ensuring that private actors behave in accordance with internationally agreed rules regulating cross-border activities. According to one source, such transnational treaties 'have generated thousands of reported opinions' from domestic courts, including more than 10,000 domestic judicial opinions applying the CISG, at least 1750 applying the New York Convention, and almost 1000 applying the Hague Convention.[114] Domestic courts are arguably the primary enforcers of transnational treaty obligations because most international tribunals lack jurisdiction to adjudicate private disputes involving alleged infractions of transnational treaty provisions.[115] Moreover, such disputes rarely have sufficient political salience to become the subject of interstate diplomacy.

The preceding comments apply equally to monist and dualist States. Although there are significant formal distinctions between monist and dualist States (as discussed in Part I), there are few, if any, functional distinctions. In both monist and dualist States, domestic courts rarely apply horizontal treaty provisions, but they routinely apply transnational treaty provisions.

The most significant differences among States relate to the judicial application of vertical treaty provisions—provisions that regulate relations between States and private parties. Prominent examples of vertical treaty provisions include the Covenant on Civil and Political Rights (which protects the civil and political rights of citizens in relation to their own governments)[116] and the Refugee Protocol (which protects the rights of individuals who have fled persecution in their home countries to seek asylum in other countries).[117] Domestic courts in both monist and dualist States apply vertical treaty provisions more frequently than they apply horizontal treaty provisions because, in most mature legal systems, domestic courts have an institutional responsibility to protect the rights of private parties, and vertical treaties (unlike horizontal treaties) sometimes create rights for private parties.

Whereas both vertical and transnational treaty provisions implicate the rights of private parties—and therefore invite judicial application of treaties—vertical treaty provisions implicate the public functions of government in a way that is not true for transnational treaty provisions. For example, the Refugee Protocol regulates the public functions of government by creating legal (vertical) duties that the government owes to individuals who claim refugee status under the treaty. In contrast, the 1999 Montreal

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[114] Sloss and Van Alstine (n 108) 95.

[115] Arbitral panels established pursuant to bilateral investment treaties frequently adjudicate disputes between States and private corporations but—in contrast to international commercial arbitration—investment treaty arbitration typically involves vertical treaty provisions, not transnational treaty provisions. The International Court of Justice occasionally adjudicates disputes that originated as transnational, commercial disputes between private parties. See eg *Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v Switzerland)* ICJ Press Release 2009/36. However, these types of transnational, private disputes rarely give rise to ICJ jurisdiction.

[116] ICCPR (n 5).

[117] Protocol Relating to the Status of Refugees (n 7).

Convention[118] regulates the cross-border commercial activities of airlines, including State-owned airlines, but it does not create significant new duties for governments in the exercise of traditional public functions.

This distinction between vertical and transnational treaty provisions helps explain the distinction between nationalist and transnationalist approaches to the judicial application of treaties. 'Transnationalist' decisions manifest a belief that the judiciary has an independent responsibility to ensure that domestic government officials act in accordance with international treaty obligations. 'Nationalist' decisions manifest a belief that courts should not scrutinize too closely government conduct that is arguably inconsistent with international treaty obligations. In countries where courts adopt a more 'transnationalist' approach—such as Albania,[119] Argentina,[120] the Netherlands, [121] and South Africa[122]—domestic courts apply both vertical and transnational treaty provisions with equal vigour. However, in States where courts adopt a more 'nationalist' approach—such as the United States[123] and Israel[124]—domestic courts are hesitant to apply vertical treaty provisions, even though they routinely apply transnational provisions.[125]

The contrast between nationalist and transnationalist approaches manifests different judicial attitudes about the relative weight assigned to two competing factors: the judicial responsibility to protect the rights of private parties and the judicial responsibility to refrain from interfering with public governmental functions.[126] Transnationalist judges assign greater weight (implicitly, if not explicitly) to the judicial responsibility to protect the rights of private parties, including rights vis-à-vis government actors, protected by vertical treaty provisions. Nationalist judges assign greater weight (again implicitly, if not explicitly) to the judicial responsibility to defer to the political branches' judgment about how best to interpret and apply vertical treaty provisions. It bears emphasis that the distinction between nationalist

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[118] Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309.

[119] See Zyberi and Sali (n 59) TAN 1 (stating that Albanian courts 'follow a strategy of alignment and even hyper-alignment').

[120] See Pinto and Maisley (n 60) TAN 29-30 ('The constitutional reform of 1994 paved the way for the Court's new era of 'overriding alignment' with respect to international law').

[121] See Nollkaemper (n 97) 326–69.

[122] See Dugard (n 96) 448–75; see also H Woolaver, 'The Engagement with International Law by South African Domestic Courts' in *Engagement* (n 1).

[123] See Sloss, 'United States' (n 101) 504–54.

[124] See Kretzmer (n 31) 273–325.

[125] For more detailed analysis, see Sloss, 'Treaty Enforcement' (n 34) 1–60; see also Van Alstine (n 48) 555–613.

[126] See PB Stephan, 'Treaties in the Supreme Court, 1946–2000' in DL Sloss, MD Ramsey, and WS Dodge (eds), *International Law in the US Supreme Court: Continuity and Change* (CUP, Cambridge 2011) 338 ('*Intl Law in the US Supreme Court*').

and transnationalist approaches is best conceptualized as a spectrum with multiple shades of grey, not a sharp line separating black and white.

One might think that courts in monist States are more transnationalist and courts in dualist States are more nationalist. In fact, though, there is not any significant correlation along these lines. Courts in dualist States sometimes adopt a transnationalist approach and courts in monist States sometimes adopt a nationalist approach.[127] Hence, the monist-dualist dichotomy cannot explain variations among States in judicial decision-making in cases involving vertical treaty provisions. Rather, the extent to which domestic courts apply vertical treaty provisions is best explained by examining whether courts in a particular country are more inclined to adopt a nationalist or transnationalist approach.

III. Nationalist and Transnationalist Approaches

The contrast between nationalist and transnationalist techniques is most visible when litigants ask courts to apply vertical treaty provisions. The tension between nationalist and transnationalist approaches generally does not arise in cases involving horizontal treaty provisions because courts rarely apply horizontal treaty provisions. Similarly, the tension between nationalist and transnationalist approaches rarely arises in cases involving transnational treaty provisions: courts in both monist and dualist States routinely apply transnational treaty provisions without hesitation.

The fact that the tension between nationalist and transnationalist approaches pertains primarily to vertical treaty provisions raises an additional point. Since vertical treaty provisions regulate relations between States and private parties, litigated cases typically pit a private party against a government actor. In some cases, the government invokes a vertical treaty provision to support the exercise of governmental power to regulate private conduct.[128] More commonly, though, a private party invokes a vertical treaty provision as a constraint on government action.[129] Despite the spread of democratization since the end of the Cold War, many States still lack a truly independent judiciary.[130] In such States, transnationalism is not a viable option because judges lack the institutional authority to issue and enforce judgments

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[127] No State is purely nationalist and no State is purely transnationalist. However, courts in some States have more nationalist tendencies and courts in other States have more transnationalist tendencies. See Sloss, 'Treaty Enforcement' (n 34).

[128] For example, when the Security Council approved the transfer of Charles Taylor to the Netherlands to stand trial before the Special Court for Sierra Leone, the government of the Netherlands relied on the Security Council resolution, and therefore ultimately the UN Charter 'to provide the proper legal basis in domestic law for the arrest and detention of Charles Taylor'. Nollkaemper (n 97) 329–30.

[129] See eg Paulus (n 87) 234–5 (discussing decisions of German courts applying Art 36 of the Vienna Convention on Consular Relations).

[130] The Varieties of Democracy (V-DEM) database is the best source for estimating the number of countries with independent judiciaries. See V-DEM Data Set, Version 8, available at https://www.v-dem.net/en/data/data-version-8/. The variables v2juhcind-ord and v2juncind-ord, respectively, rank high courts and lower courts on judicial independence on a scale from 0 to 4. States with a ranking of 3 or 4 can be said to have independent judiciaries. In 2017, about 48% of States scored 3 or 4 for their highest courts and about 54% of States scored 3 or 4 for their lower courts. Thus, approximately half the States in the world have independent judiciaries.

constraining government conduct. In States that do have an independent judiciary, though, courts must still decide whether to apply treaties—much as they would apply constitutional, statutory, or common law—as a tool to constrain government action. Transnationalist judges apply treaties in precisely this way, whereas nationalist judges employ various avoidance and contestation techniques to refrain from applying treaties as a constraint on government action. This is the core feature of the distinction between nationalist and transnationalist approaches.

The following analysis of nationalist and transnationalist techniques is divided into four sections: statutory interpretation, treaty interpretation, constitutional interpretation, and self-execution. The first three sections address issues that are common to both monist and dualist States. The final section addresses issues that are unique to monist States.[131]

A. Statutory interpretation

Courts in both monist and dualist States frequently apply an interpretive presumption that statutes should be construed in conformity with the nation's international legal obligations, including obligations derived from both treaties and customary international law. This interpretive presumption is sometimes called a 'presumption of conformity' or a 'presumption of compatibility'.[132] In the United States, the presumption is referred to as the 'Charming Betsy canon'.[133] Labels aside, the presumption of conformity is probably the most widely used transnationalist tool. Courts in Australia,[134] Belgium,[135] Canada,[136] Germany,[137]

[131] For a comparable analysis of issues unique to dualist States, see nn 40–57 and accompanying text.

[132] See eg van Ert (n 30) 188–97 (discussing application of the presumption of conformity by Canadian courts in the context of, among others, *R v Hape* [2007] SCC 26); Kretzmer (n 31) 287–92 (discussing application of the presumption of compatibility by Israeli courts in the context of, among others, Cr. A. 5/51, *Steinberg v Attorney General* 5 P.D. 1061).

[133] The canon takes its name from an 1804 decision by Chief Justice Marshall. See *Murray v Schooner Charming Betsy* 6 US (2 Cranch) 64, 118 (1804).

[134] See Rothwell (n 26) 152–6 (discussing, among others, *Mabo v Queensland (No 2)* (1992) 175 CLR 1).

[135] See Dopagne (n 62) TAN 9-14 (discussing several cases from the Court of Cassation).

[136] See van Ert (n 30) 188–97 (discussing, among others, *R v Hape* [2007] SCC 26).

[137] See Paulus (n 87) 209 ('German courts are also bound to interpret domestic law, as far as possible, in a way that avoids the breach of international legal obligations', citing BVerfGE 74, 358, 370).

India,[138] Iran,[139] Israel,[140] the Netherlands,[141] Poland,[142] South Africa,[143] Switzerland,[144] the United Kingdom,[145] and the United States,[146] among other countries, have applied the presumption in cases involving vertical treaty provisions to help ensure that government conduct conforms to the nation's international treaty obligations.

One recurring issue concerns the threshold conditions necessary to trigger application of the presumption. There is broad agreement that courts may apply the presumption in cases where the statute is facially ambiguous. The South African Constitutional Court, unlike many other national courts, has taken the position that 'no ambiguity in the legislative text is required in order for the obligation of consistent interpretation to be activated'.[147] Similarly, the Supreme Court of Canada has held that 'it is reasonable to make reference to an international agreement at the very outset of the inquiry to determine if there is any ambiguity, even latent, in the domestic legislation'.[148] Justice Kirby advocated a similar approach in Australia, arguing that courts should refer to international treaties 'not only when there exists statutory ambiguity, but also where the construction of a statute would result in an interpretation contrary to international human rights standards'.[149] However, the majority of the Australian High Court has rejected this approach, refusing 'to endorse a wider role for

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[138] See Jayawickrama (n 17) 247–51 (discussing, among others, *Jolly George Verghese* [1980] 2 SCR 913).

[139] See Dizgovin (n 69) 246 (Iranian courts 'use human rights treaties . . . as interpretive guides alongside constitutional and statutory provisions, as well as *Sharia* law, to underscore or support a particular interpretation').

[140] See Kretzmer (n 31) 287–92 (discussing, among others, HCJ 2599/00, *Yated—Friendly Society of Downs Syndrome Children's Parents v Ministry of Education* 56 P.D. (5) 834).

[141] See Nollkaemper (n 97) 348–51 (discussing, among others, Supreme Court, 27 May 2005, LJN AS7054).

[142] See Garlicki and others (n 73) 404 (noting that 'coapplication of an international norm and a domestic norm' is the most common technique for the judicial application of treaties in Poland).

[143] See Dugard (n 96) 457 (noting that the South African Constitution requires courts, when interpreting legislation, to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law', citing *S v Basson* 2005 (1) SALR 171 (CC)).

[144] See Belser and Oleschak (n 77) TAN 19-21 (since at least 1968, the Federal Supreme Court's "practice of consistent interpretation has . . . been confirmed on numerous occasions and allowed solving almost all issues of prima facie conflict between international and national norms.").

[145] See Aust (n 30) 482–3 (discussing, among others, *Garland v British Rail Engineering* [1983] 2 AC 751).

[146] See Sloss, 'United States' (n 101) 526–7 (discussing, among others, *Murray* (n 121)).

[147] Woolaver (n 122) TAN 17 (discussing *Glenister v President of the Republic of South Africa and Others*, CCT 48/10 [2011] para. 202).

[148] *National Corn Growers Association v Canada* [1990] 2 SCR 1324, 1372–3.

[149] See Rothwell (n 26) 153–4.

treaties in statutory interpretation other than where the legislature has clearly envisaged such a role or where there exists a clear ambiguity on the face of the statute'.[150]

Judicial application of the presumption is clearly transnationalist, especially in cases where the statute is not facially ambiguous. In contrast, judges with a more nationalist orientation sometimes avoid application of the presumption by declaring that a statute is unambiguous in cases where litigants argue that the statute could reasonably be interpreted in conformity with international treaty obligations.[151] It is likely that courts throughout the world decide numerous statutory interpretation cases where the presumption is not applied, even though it is potentially applicable, because litigants fail to raise a possible treaty argument, or courts decline to address the argument explicitly.[152] It is difficult to perform a systematic analysis of judicial application of the presumption even in a single country because it is hard to identify cases in which courts do not mention potentially applicable treaty arguments.

B. Treaty interpretation

Domestic courts in both monist and dualist States are frequently asked to interpret treaties. In dualist States, this situation commonly arises when the legislature enacts a statute that is expressly intended to implement a treaty.[153] In monist States, courts sometimes interpret treaties when a litigant asks the court to apply a treaty directly, and sometimes when the treaty is applied indirectly. Regardless of the context in which treaty interpretation issues arise, courts have a choice whether to adopt a nationalist or transnationalist approach to treaty interpretation.

Courts applying a transnationalist approach interpret treaties in accordance with the shared understanding of the parties. In accordance with this approach, transnationalist judges cite the Vienna Convention on the Law of Treaties,[154] decisions of foreign courts[155] and

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[150] Ibid 156.

[151] See eg *Breard v Greene* 523 US 371, 375–6 (1998) (construing a federal statute to be inconsistent with US obligations under the Vienna Convention on Consular Relations).

[152] See ILA Study Group Report (n **Error! Bookmark not defined.**) [40] (discussing 'evasive avoidance').

[153] See eg Aust (n 30) 482–3 (United Kingdom) (discussing, among others, *Sidhu v British Airways* [1997] 1 All ER 193); Jayawickrama (n 17) 264–5 (India) (discussing *Dadu alias Tulsidas v State of Maharashtra* Supreme Court of India, Writ Petition (Criminal) 169 of 1999, 12 October 2000); van Ert (n 30) 177 (Canada) (discussing *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982).

[154] See eg Aust (n 30) 483 (United Kingdom) (discussing, among others, *R v Lambert Justices, ex p Yusufu* [1985] Times Law Reports 114); Garlicki and others (n 73) 387–9 (Poland) (discussing, among others, Decision of 9 March 2004, I CK 410/03 (not published Lex 182080)); Nollkaemper (n 97) 360–2 (Netherlands) (discussing, among others, Supreme Court, *State Secretary for Finance v X* 21 February 2003, 36 NYIL 2005, 475); Rothwell (n 26) 151–2 (Australia) (discussing, among others, *Morrison v Peacock* [2002] HCA 44); van Ert (n 30) 175–82 (Canada) (discussing, among others, *Pushpanathan v Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982).

[155] See eg Dugard (n 96) 470 (South Africa) (discussing, among others, *Potgieter v British Airways* 2005 (3) SALR 133 (C)); Kretzmer (n 31) 291–2 (Israel) (discussing, among others, F.H. 36/84, *Teichner v Air France* 41 P.D. (1) 589); Nollkaemper (n 97) 364–5 (Netherlands) (discussing, among others, *Administrative Law*

international tribunals,[156] as well as views adopted by nonjudicial international bodies[157] to support their interpretations of particular treaty provisions. For example, the Argentinean Supreme Court has said that judges represent 'the national sovereignty, and thus, [are] bound to safeguard the good faith that should guide the conduct of the State in the international sphere, faithfully complying with the obligations emanated from treaties and other sources of international law'.[158] Similarly, in a case involving interpretation of the New York Convention, an Iranian court said: '[R]egard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'.[159]

In contrast, courts applying a nationalist approach emphasize that treaty interpretation is primarily an executive function, not a judicial function. Accordingly, courts applying a nationalist approach tend to defer to the executive branch on treaty interpretation issues.[160] Deference to the executive branch often yields judicial opinions that give greater weight to unilateral national policy interests, and less weight to the shared, multilateral understanding that guides transnationalist interpretations.

Available information, which is admittedly limited, indicates that the nationalist approach to treaty interpretation is a minority approach. The United States may be the only State where courts have adopted an explicit interpretive presumption favouring deference to the executive branch on treaty interpretation issues.[161] In Israel, the Supreme Court has never

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Division of the Council of State, M.E.D. v State Secretary for Justice 6 November 1995, 28 NYIL 1997, 353); van Ert (n 30) 185–6 (Canada) (discussing, among others, *Connaught Laboratories Ltd v British Airways* (2002) 61 OR (3d) 2004 (Ont. SCJ)).

[156] See eg Dugard (n 96) 466–70 (South Africa) (discussing, among others, *Ferreria v Levin* NO 1996 (1) SALR 984 (CC)); Garlicki and others (n 73) 389–98 (Poland) (discussing, among others, Judgment of 29 January 2003, V.S.A. 1494/02 (ONSA 2004 nr 2, item 57)); Nollkaemper (n 97) 363–4 (Netherlands) (discussing, among others, *H v Public Prosecutor* Court of Appeal of The Hague, ILDC 636 (NL 2007)); Paulus (n 87) 223–35 (Germany) (discussing, among others, BVerfGE 111, 307 (2004)); van Ert (n 30) 183–4 (Canada) (discussing, among others, *Mugesera v Canada (Minister of Citizenship and Immigration)* [2005] 2 SCR 91).

[157] See eg Dugard (n 96) 466–70 (South Africa) (discussing, among others, *Government of the Republic of South Africa v Grootboom* 2001 (I) SALR 46 (CC); *Minister of Health v Treatment Action Campaign* (No 2) 2002 (5) SALR 721 (CC)); Jayawickrama (n 17) 257 (India) (discussing *Visaka v State of Rajasthan* [1997] 3 LRC 361); Kretzmer (n 31) 298–301 (Israel) (discussing, among others, HCJ 7029/95 *New General Labor Federation v National Labor Court* 51 P.D. (2) 63, 157); van Ert (n 30) 184–5 (Canada) (discussing, among others, *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76).

[158] Pinto and Maisley (n 60) TAN 31-32 (quoting *Acosta, Claudia*, 321: 3555 (1998) para. 15.

[159] Dizgovin (n 69) 252 (quoting Case No. 9409970227201292).

[160] See eg Sloss, 'United States' (n 101) 524–5 (discussing, among others, *El Al Israel Airlines, Ltd v Tsui Yuan Tseng* 525 US 155, 168 (1999)); Kretzmer (n 31) 292–5 (Israel) (discussing, among others, HCJ 785/87, *Afu v IDF Commander* 42(2) P.D. 4 (English tr [1990] 29 ILM 139)).

[161] See eg *Medellin v Texas* 552 US 491, 513 (2008) ('It is, moreover, well settled that the United States' interpretation of a treaty "is entitled to great weight" '). In other States, courts give conclusive weight to executive views on specific treaty-related issues that are constitutionally committed to executive decision-making. See eg Aust (n 30) 484 (United Kingdom); Dugard (n 96) 471–2 (South Africa); van Ert (n 30) 186–8 (Canada). However, to the best of my knowledge, the United States is the only country where the nation's

adopted an express interpretive presumption of this type, but 'in cases relating to the [Occupied Territories], for a long time, the Supreme Court in fact adopted the interpretation of [Geneva Convention IV] favored by the authorities'.[162] In contrast, Polish commentators assert: 'For a court to treat executive branch views [on treaty interpretation issues] as dispositive would be incompatible with the principle of independence of the judicial branch, as understood under the Polish Constitution.'[163] The Polish view appears to be the dominant one. In most countries with independent judiciaries—including both monist and dualist States—domestic courts claim an independent responsibility to construe treaties in accordance with the shared expectations of the parties, without giving undue weight to the unilateral views of their own governments.[164]

A distinct interpretive issue concerns treaty-based protection for the rights of private parties. Transnationalist judges recognize that many treaties are designed to protect the rights of private parties. Accordingly, they interpret treaties in a manner that accords significant protection to treaty-based private rights.[165] In contrast, nationalist judges sometimes apply a presumption that treaties ordinarily regulate horizontal relations between States, not vertical relations between States and private parties.[166] Application of this presumption can lead nationalist courts to construe vertical treaty provisions as if they were horizontal provisions, thereby denying protection for treaty-based private rights. This strategy provides nationalist

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highest court has expressly adopted an interpretive canon favouring deference to the executive branch across the full spectrum of treaty interpretation questions.

[162] Kretzmer (n 31) 292 (discussing, among others, HCJ 785/87 *Afu v IDF Commander* 42(2) P.D. 4).

[163] Garlicki and others (n 73) 399 (discussing, among others, *K Galstyan V. S.A.* 726/99). Unfortunately, judicial independence has recently come under attack in Poland. See J Strupczewski, 'Top EU court voices doubts on Polish courts' independence' *Reuters* (25 July 2018) at <https://www.reuters.com/article/us-eu-poland-judiciary/top-eu-court-voices-doubts-on-polish-courts-independence-idUSKBN1KF1BB>. Data from the V-DEM database shows a decline in judicial independence in Poland between 2015 and 2017. See note 130.

[164] See eg Aust (n 30) 482–3 (United Kingdom); Dugard (n 96) 471–2 (South Africa) (discussing, among others, *Kolbarschenko v King* NO 2001 (4) SALR 336 (C)); Jayawickrama (n 17) 267–70 (India); Nollkaemper (n 97) 362–3 (Netherlands) (discussing, among others, Central Appeals Tribunal 21 July 2006, LJN No AY 5560); Paulus (n 87) 221–3 (Germany) (discussing, among others, Görgülü BVerfGE 111, 307, Engl Tr BVerfG, 2 BvR 1481/04 of 14 October 2004); van Ert (n 30) 186–8 (Canada) (discussing *Pushpanathan v Canada* [1998] 1 SCR 982; *Château-Gai Wines Ltd v Attorney General of Canada* [1970] Ex CR 366).

[165] See eg Aust (n 30) 484–7 (United Kingdom); Dugard (n 96) 472–4 (South Africa); Jayawickrama (n 17) 266–72 (India) (discussing *Basu v State of West Bengal* [1997] 2 LRC 1; *Visaka v State of Rajasthan* [1997] 3 LRC 361); Nollkaemper (n 97) 345–8 (Netherlands) (discussing, among others, *Central Appeals Court for the Public Service and for Social Security Matters X Y and Z v B. O.Z. Regional Compulsory Insurance Fund* 29 May 1996, 30 NYIL 1998, 241); Paulus (n 87) 211 (Germany) ('[W]hen individual citizens claimed rights against the state on the basis of international law, it was quite natural that the state that had given its word to other states could be regarded also bound toward its own citizens'); Rothwell (n 26) 136 (Australia) ('[O]ne clear trend is that the courts have become more open to hearing matters based on the existence not only of a treaty right recognized under Australian law but also of a right that exists entirely under international law by way of a treaty to which Australia is a party'); van Ert (n 30) 202–7 (Canada).

[166] See Sloss, 'United States' (n 101) 525–6 (discussing, among others, *Gandara v Bennett* 528 F.3d 823, 828 (11th Cir 2008)).

judges a convenient rationale for declining to apply treaty-based (vertical) constraints on governmental conduct.[167]

The United States is the only State whose courts have adopted an explicit interpretive presumption that treaties do not create rights for private parties.[168] Courts in other States approach the matter as a straightforward interpretive question, without adopting a presumption for or against private rights.[169] If the treaty text, on its face, indicates that the parties intended to confer rights on private parties, domestic courts will typically enforce those rights, subject to constraints on judicial enforcement of unincorporated treaties in dualist States.[170]

C. Constitutional interpretation

Courts in both monist and dualist States apply treaties to help elucidate the meaning of constitutional provisions. Argentina, South Africa, and India are leading examples of States where courts routinely invoke treaties and other provisions of international law in the context of constitutional interpretation.[171] Argentina amended its constitution in 1994. The revised constitution grants constitutional rank to certain human rights treaties.[172] Article 75 provides that treaties with constitutional rank 'do not repeal any section of the First Part of the Constitution and are to be understood as completing the rights and guarantees recognized herein'.[173] Accordingly, the Supreme Court held that it was bound to interpret other provisions of the Constitution in harmony with the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[174]

The South African Constitution states explicitly: 'When interpreting the Bill of Rights, a court, tribunal or forum . . . must consider international law; and may consider

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[167] See ibid 539–40.

[168] See Restatement (Fourth), supra note xx, § 111 cmt. b & Reporters' Note 1.

[169] See eg Aust (n 30) at 484 (United Kingdom) ('There is no presumption that a treaty does not create a right for a private party'); Dugard (n 96) 472 (South Africa) (stating that an incorporated treaty 'creates rights and duties for the individual in the same way that an ordinary statute creates rights and duties'); Nollkaemper (n 97) 347 (Netherlands) ('Dutch law recognizes the fact that states may agree by treaty to grant certain rights to individuals, which they are then entitled to enforce before national courts').

[170] See nn 31-33 and accompanying text.

[171] See Jayawickrama (n 17) 245–7, 266–72 (India) (discussing, among others, *Visaka v State of Rajasthan* [1997] 3 LRC 361); Pinto and Maisley (n 60) TAN 64-83 (Argentina) (discussing, among others, *Derecho, René*, 334:1504 (2011)); Woolaver (n 122) TAN 24-46 (South Africa) (discussing, among others, *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011]).

[172] Pinto and Maisley (n 60) TAN 28.

[173] Ibid (quoting art 75).

[174] Ibid. TAN 35 (discussing *Monges, Analia*, 319:3148 (1996)).

foreign law'.[175] In light of this constitutional mandate, the South African Constitutional Court has adopted the view 'that the spirit, purport and objects of the bill of rights . . . are inextricably linked to international law and the values and approaches of the international community'.[176] Similarly, the Indian Constitution stipulates: 'The State shall endeavour to . . . foster respect for international law and treaty obligations in the dealings of organized peoples with one another'.[177] Accordingly, Indian jurisprudence reflects a view 'that any international convention not inconsistent with the fundamental rights provisions in the Constitution and in harmony with its spirit must be read into those provisions to enlarge the meaning and content thereof'.[178]

Courts in Belgium,[179] Canada,[180] Germany,[181] Ghana,[182] Israel,[183] Nigeria,[184] and Switzerland[185] also apply treaties to help interpret domestic constitutional provisions, but they do so less regularly than the highest courts in Argentina, India, and South Africa. The judicial practice of using international law in constitutional interpretation has provoked sharp controversy in both Australia and the United States. In Australia, Justice Kirby was a strong advocate for judicial application of international law in constitutional interpretation, but he never persuaded a majority of the High Court to follow his recommended approach.[186] The US Supreme Court occasionally cites treaties to support its interpretation of a contested constitutional provision; in many such cases the majority's reliance on international law provoked a strong critical response from dissenting Justices.[187] Although the US Supreme Court rarely cites human rights treaties in its constitutional decisions, there is evidence that

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[175] S Afr Const (n 88) s 39(1).

[176] Dugard (n 96) 462 (quoting N Botha, 'The Role of International Law in the Development of South African Common Law' (2001) S Af Ybk Intl L 253, 259).

[177] India Const s 51.

[178] Jayawickrama (n 17) 246 (discussing, among others, *Visaka v State of Rajasthan* [1997] 3 LRC 361).

[179] See Dopagne (n 62) TAN 15-16 (discussing Constitutional Court, 15 Sept. 2004, No. 147/2004).

[180] See van Ert (n 30) 197–201 (discussing, among others, *R v Hape* [2007] SCC 26).

[181] See Paulus (n 87) 230–3 (discussing, among others, BVerfGE 111, 307 (2004)).

[182] See Okeke (n 26) 409-11 (discussing, among others, *New Patriotic Party v Inspector General of Police*, (1993-1994) 2 G.L.R. 459).

[183] See Kretzmer (n 31) 298–301 (discussing, among others, HCJ 112/77 *Foguel v Broadcasting Authority* 31 P.D. (3) 657).

[184] See Okeke (n 26) 420-22 (discussing, among others, *Agbakoba v Dir of State Sec Serv* [1994] 6 NWLR 475).

[185] See Belser and Oleschak (n 77) TAN 30 (discussing BGE 125 II 417 (1991)).

[186] See Rothwell (n 26) 156–8 (discussing, among others, *Al-Kateb v Godwin* [2004] HCA 37).

[187] See eg *Graham v Florida* 130 S Ct 2011 (2010); *Roper v Simmons* 543 US 551 (2005); *Lawrence v Texas* 539 US 558 (2003).

international human rights norms exerted influence over the development of US constitutional law in the decades after World War II.[188]

Recent judicial practice in the United Kingdom merits separate discussion. Since Britain does not have a written, constitutional Bill of Rights, British courts rely on other sources of law to protect the fundamental rights that, in most other countries, are protected by a written Constitution. The Human Rights Act, enacted in 1998, 'effectively incorporated the [European Convention on Human Rights] into English law'.[189] Since passage of the Act, British courts routinely apply the European Convention to protect individual rights that, in many other countries, would be regarded as constitutional rights.[190] As of this writing, it is unclear how Brexit may affect enforcement of treaty rights in British courts.

D. Self-execution in monist States

Judicial doctrine in monist States distinguishes between treaties that are directly applicable as law and treaties that are not directly applicable. Many States use the terms 'self-executing' and 'non-self-executing' to distinguish between these two classes of treaty provisions.[191] When a court holds that a treaty is self-executing, it typically acts in a transnationalist mode to facilitate the domestic application of treaty-based international norms. When a court holds that a treaty is not self-executing, it generally acts in a nationalist mode to shield the domestic legal system from the influence of treaty-based legal norms.[192] Judicial doctrine invariably grants judges some discretion to determine which treaties are self-executing. Transnationalist judges exercise their discretion in a manner that pushes more treaties into the self-executing category. Nationalist judges exercise their discretion in a manner that pushes more treaties into the non-self-executing category.

South Africa's Constitution includes an explicit textual distinction between self-executing and non-self-executing treaty provisions.[193] Although the Constitution refers explicitly to 'self-executing' treaties, it does not define the term 'self-executing', nor does it identify criteria for distinguishing between self-executing and non-self-executing treaties. The South African courts have not yet issued a definitive ruling to clarify the meaning of the self-execution clause in the South African Constitution.[194] Ultimately, the resolution of that question may have little practical significance because the South African Constitutional Court

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[188] See D Sloss and W Sandholtz, 'Universal Human Rights and Constitutional Change' William & Mary B Rts J (forthcoming 2019).

[189] Aust (n 30) 487.

[190] See ibid 487–91 (discussing, among others, *A(FC) and others v Secretary of State* [2004] UKHL 56).

[191] See eg Dugard (n 96) 453–5 (South Africa); Garlicki and others (n 73) 400–3 (Poland); Wildhaber and others (n 77) 659 (Switzerland).

[192] See Sloss, 'United States' (n 101) 527–9 (discussing, among others, *Intl Café SAL v Hard Rock Café Intl (USA), Inc* 252 F.3d 1274 (11th Cir 2001)).

[193] See S Afr Const (n 88), s 231(4).

[194] See Woolaver (n 122) pt III.C.

is one of the most transnationalist courts in the world: it regularly applies treaties and customary international law to help construe both statutory and constitutional provisions.[195]

Domestic courts in Germany, Switzerland, and the Netherlands are also fairly transnationalist, insofar as they take a comparatively broad view of which treaties are self-executing. In all three countries, courts generally hold that treaty provisions designed to benefit private parties are invocable by private parties and directly applicable by the courts, subject to one caveat.[196] To be directly applicable, 'a treaty provision has to be sufficiently clear to function as "objective law" in the domestic legal order'.[197] Courts in all three countries have stated or assumed that most substantive provisions of the European Convention on Human Rights and other human rights treaties are self-executing.[198] However, the Federal Supreme Court in Switzerland has held that most provisions in the International Covenant on Economic, Social and Cultural Rights are not self-executing.[199]

The self-execution jurisprudence in Germany, Poland, and the Netherlands is characteristic of most European Union countries because judicial decision-making in those countries is heavily influenced by the European Court of Justice (ECJ), now known as the Court of Justice of the European Union (CJEU). Earlier ECJ case law 'establishes that European law requires the direct effect of community law in the domestic legal order. Moreover, the ECJ demands supremacy of European over domestic law'.[200] Thus, once a legal instrument 'has been adopted by a competent EU body, it . . . becomes automatically incorporated into the system of law binding on the national level [in Poland] and must be enforced by all national authorities, in particular by the national courts'.[201] For States who are members of the European Union, this is a 'consequence of EU membership', and member States have 'no alternative but to follow the established rules'.[202]

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[195] See ibid TAN 15-46.

[196] See Nollkaemper (n 97) 341–8 (the Netherlands) (discussing, among others, Central Appeals Tribunal, *Management Board of Employee Insurance Benefits Agency v X* 14 March 2003, 36 NYIL 2006, 466); Paulus (n 87) 209–12 (Germany); Belser and Oleschak (n 77) TAN 14-18 (Switzerland).

[197] Nollkaemper (n 97) 333 (the Netherlands). See also Belser and Oleschak (n 77) Switzerland TAN 14 ('International norms are only considered to be in the realm of courts when they are sufficiently precise to be applied by courts without further clarification by parliament or government').

[198] See Belser and Oleschak (n 77) TAN 30-32 (Switzerland) (discussing BGE 125 II 417 (1991) and BGE 139 I 16 (2012)); Nollkaemper (n 97) 342 (the Netherlands); Paulus (n 87) 232 (Germany) (discussing BVerfGE 111, 307 (2004); English tr BVerfG, 2 BvR 1481/04 of 14 October 2004).

[199] See Belser and Oleschak (n 77) TAN 14-18 (Switzerland) (discussing BGE 120 I a 1 c.5 (1994).

[200] Paulus (n 87) 210 (citing *Internationale Handelsgesellschaft*, Case 11/70, [1970] ECR 1125).

[201] Garlicki and others (n 73) 385.

[202] Ibid. In light of the current threat to judicial independence in Poland, it remains to be seen whether Polish courts will continue to follow the established EU rules. *See supra* note 163.

In contrast to European jurisprudence, self-execution doctrine in the United States is analytically incoherent.[203] Courts and commentators agree that non-self-executing treaties are not directly applicable by domestic courts, but they do not agree why this is so. Some sources suggest that non-self-executing treaties are not incorporated into domestic law. A distinct view holds that non-self-executing treaties are part of domestic law, but they are a special type of law that courts are precluded from applying directly.[204] Under the latter approach, there is further disagreement as to why courts are precluded from applying non-self-executing treaties.[205] In practice, courts often hold that treaties are non-self-executing when an individual invokes a vertical treaty provision as a constraint on government action, but they almost never hold that transnational treaty provisions are non-self-executing.[206] Thus, the net effect of judicial doctrine is that US courts tend to adopt a transnationalist approach in cases involving transnational treaty provisions, but they tend to adopt a nationalist approach in cases involving vertical treaty provisions.[207] In contrast, courts in Germany, the Netherlands, Switzerland, and South Africa adopt a fairly consistent transnationalist approach for both vertical and transnational treaty provisions.

IV. Domestic Courts and Treaty Compliance

The final part of this chapter addresses the respective roles of the judicial, executive, and legislative branches in promoting compliance with treaty obligations.[208] My central claim is that these roles vary greatly depending on whether the treaty provision at issue is horizontal, vertical, or transnational. In brief, executive officials have primary responsibility for ensuring compliance with horizontal treaty obligations; the judiciary's role is marginal. With respect to transnational treaty provisions, though, the positions are reversed. The judiciary plays a central role in promoting compliance with transnational treaty provisions and the executive is marginalized. The picture for vertical treaty provisions is more complex.

A. Horizontal treaty provisions

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[203] See DL Sloss, 'Taming Madison's Monster: How to Fix Self-Execution Doctrine' (2015) BYU L Rev 1691.

[204] See ibid 1695-1702.

[205] See ibid. In some cases, courts hold that a treaty provision is not self-executing because it is too vague or ambiguous for judicial enforcement. See CM Vazquez, 'The Four Doctrines of Self-Executing Treaties' (1995) 89 AJIL 695, 713–15. This version of the doctrine is similar to the non-self-execution doctrine applied in many European countries. See nn 196-197and accompanying text. In other cases, courts hold that a treaty provision is not self-executing—even though it is sufficiently unambiguous to permit judicial enforcement—because the political branches have manifested a desire to preclude or limit judicial enforcement. See Sloss (n 203) 1703-14. This version of the doctrine has no apparent analogue in other countries.

[206] See Sloss, 'United States' (n 101) 534–6.

[207] See ibid 529–39.

[208] Given space constraints, the present analysis does not address the role of sub-national governments. However, it is noteworthy that sub-national governments in some States exert significant influence over matters related to treaty compliance. See eg Beemelmans and Treviranus (n 68) 328–9 (Germany); Wildhaber and others (n 77) 635–7 (Switzerland).

As discussed above, domestic courts rarely apply horizontal treaty provisions.[209] Consequently, domestic courts bear little responsibility for promoting compliance with horizontal treaty provisions. This proposition is generally true for both monist and dualist States, regardless of whether courts adopt a nationalist or transnationalist approach.

With respect to horizontal treaties, the relationship between the legislative and executive branches depends on the specific treaty provision at issue and the constitutional structure of a given State. For example, the North Atlantic Treaty obligates parties to assist other member States if there is 'an armed attack against one or more of them in Europe or North America'.[210] The duty to provide mutual assistance in the event of an armed attack is a paradigmatic horizontal treaty obligation. If a NATO State was the target of an armed attack, the executive branches in other NATO States would have primary responsibility for providing assistance under the treaty. In some States, depending on constitutional separation of powers considerations, the executive might have to obtain legislative approval before committing troops and weapons to the defense of an ally. Regardless, there is no State in which the judiciary would be responsible for implementing the nation's treaty obligation to help defend against an armed attack.

B. Transnational treaty provisions

Conventional wisdom holds that the executive branch has primary responsibility in most countries for implementing international treaty obligations. This is certainly not true for transnational treaty provisions. Consider, for example, the 1929 Warsaw Convention, which regulates international air carriage.[211] In the United States, Congress never enacted legislation to implement the Convention, but courts routinely apply it as a self-executing treaty.[212] In many dualist States,[213] and even in some monist States,[214] the legislature has enacted legislation to promote effective implementation of the Convention. In all States—whether the treaty is considered self-executing or is implemented by legislation—the judiciary bears primary responsibility for resolving disputes between private parties that are governed by the Convention.[215] In the United States, the executive branch occasionally submits amicus briefs to present its views about the proper interpretation of contested treaty provisions, but that is the extent of executive branch participation in treaty implementation.

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[209] See nn 108-110 and accompanying text.

[210] North Atlantic Treaty (adopted 4 April 1949, entered into force 24 August 1949) 34 UNTS 243, Art 5.

[211] Warsaw Convention (n 96). The Warsaw Convention is the predecessor of the 1999 Montreal Convention (n 118).

[212] See eg *Olympic Airways v Husain* 540 US 644 (2004); *El Al Airlines v Tsui Yuan Tseng* 525 US 155 (1999).

[213] See eg Kretzmer (n 31) 284 (Israel); Rothwell (n 26) 138 (Australia); van Ert (n 30) 186 (Canada).

[214] See Dugard (n 96) 470 (South Africa); Nollkaemper (n 97) 355 (the Netherlands).

[215] See eg Dugard (n 96) 470 (South Africa); Kretzmer (n 31) 290–1 (Israel); Nollkaemper (n 97) 355 (the Netherlands); Rothwell (n 26) 138 (Australia); van Ert (n 30) 186 (Canada).

Domestic courts play a crucial role in promoting compliance with transnational treaty provisions. A simple example helps illustrate this point. The New York Convention obligates States to recognize and enforce foreign arbitral awards.[216] Assume that a French company and a Japanese company submit a commercial dispute to an arbitral panel in accordance with UNCITRAL arbitration rules.[217] The panel orders the Japanese company to pay damages to the French company, but the Japanese company refuses to pay. That refusal, by itself, does not constitute a violation of Japanese treaty obligations because the company's refusal to pay is not attributable to the Japanese Government.[218] Now assume that the French company files suit in a Japanese court to enforce the arbitral award. If the Japanese court rules against the French company, and that ruling cannot be justified under the New York Convention,[219] the judicial decision would constitute a violation of Japanese treaty obligations because that judicial decision is attributable to the Japanese Government under principles of State responsibility.[220] Conversely, if the Japanese court orders the Japanese company to pay—and especially if the court attaches company assets to secure payment—the court is effectively acting as an agent of the international legal system to ensure Japanese compliance with national treaty obligations. Either way, the domestic court is the primary decision-maker whose decision determines whether the nation complies with its treaty obligations. This is characteristic of transnational treaty provisions: in most cases involving transnational provisions, domestic courts serve as the primary interface between the domestic and international legal systems, and their decisions effectively determine whether the nation complies with its treaty obligations.

The preceding observations about domestic judicial application of transnational treaty provisions apply equally to both monist and dualist States, with one caveat. In dualist States, the legislature typically incorporates a treaty before courts will apply it to resolve private disputes. Once the treaty is incorporated, though, judicial application is quite similar in both monist and dualist States. Moreover, the distinction between nationalist and transnationalist approaches has scant effect on judicial application of transnational treaty provisions. The global record of compliance with transnational treaty provisions is quite good because national courts in most States apply transnational treaty provisions routinely—either directly or indirectly—to help resolve private disputes arising from cross-border activities.

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[216] See New York Convention (n 95) Art III ('Each Contracting State shall recognize arbitral awards as binding and enforce them . . . under the conditions laid down in the following articles').

[217] UNCITRAL is the UN Commission on International Trade Law. For information, see UNCITRAL <http://www.uncitral.org/uncitral/en/about_us.html>.

[218] See J Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, Cambridge 2002) 91–3.

[219] Article V of the New York Convention identifies several circumstances in which '[r]ecognition and enforcement of the [foreign arbitral] award may be refused'. See New York Convention (n 95) Art V. Under the treaty, States are obligated to enforce foreign arbitral awards unless there is a valid reason for non-enforcement as specified in Art V.

[220] See Crawford (n 218) 61 (reprinting Art 4 of the Articles on Responsibility of States for Internationally Wrongful Acts: 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions').

C. Vertical treaty provisions

The relationship among the legislative, executive, and judicial branches in implementing vertical treaty provisions is a complex subject that defies simple generalizations. Patterns vary by nation and by individual treaty.

States sometimes achieve compliance with vertical treaty obligations through a process of "silent incorporation," even if no government official or agency makes a conscious decision to implement that obligation. For example, when the United States ratified the International Covenant on Civil and Political Rights (ICCPR), the executive branch assured the Senate that no implementing legislation was necessary because the United States could fulfil its treaty obligations by applying pre-existing laws.[221] Thus, when a court issues an injunction to enjoin enforcement of a State law that violates federal laws prohibiting race-based discrimination, one could say that the court is promoting compliance with US treaty obligations under Articles 2 and 26 of the ICCPR,[222] even if the court never considers a treaty-based argument. Similarly, commentators have noted that Canadian courts implement Canada's obligations under the ICCPR, at least partially, by applying the Canadian Charter of Rights and Freedoms and other provisions of domestic law.[223] Silent 'incorporation of international law into domestic constitutional and statutory provisions is undoubtedly one of the more effective techniques for' achieving compliance with vertical treaty provisions.[224]

Leaving aside cases where States achieve compliance almost unwittingly, we turn next to situations where some government actor makes a conscious decision to apply or interpret a particular treaty in a particular way. Here, it is helpful to discuss the 1951 Refugee Convention[225] and the 1967 Refugee Protocol[226] to illustrate the interplay among the legislative, executive, and judicial branches in the domestic application of vertical treaty provisions.

In dualist States, the legislature must first decide whether to enact legislation to incorporate a treaty into domestic law. Professor Aust said: 'It is invariable British practice

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[221] See D Sloss, 'The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties' (1999) 24 YJIL 129, 183–8.

[222] See ICCPR (n 6) Art 2(1) (guaranteeing protection of rights 'without distinction of any kind, such as race, colour . . . or other status'); ibid Art 26 (guaranteeing 'all persons equal and effective protection against discrimination on any ground such as race, colour . . . or other status').

[223] See G van Ert, *Using International Law in Canadian Courts* (2nd edn Kluwer Law International, The Hague 2008) 332–51.

[224] Sloss & Van Alstine (n 108) 104-05.

[225] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

[226] Refugee Protocol (n 8).

never to ratify a treaty until any [necessary implementing] legislation has first been made.'[227] Like Britain, other dualist States generally refrain from ratifying treaties with vertical obligations unless or until they have enacted the implementing legislation necessary to ensure compliance with those obligations.[228] Accordingly, Australia, Canada, and the United Kingdom have all adopted legislation to implement the Refugee Convention and Protocol.[229] Even in monist States, legislatures often enact implementing legislation to promote effective domestic implementation of vertical treaty provisions. Although South Africa's Constitution provides expressly for self-executing treaties,[230] the South African legislature enacted legislation in 1998 to implement the nation's treaty obligations under the Refugee Convention and Protocol.[231] Similarly, in the United States, even though the Constitution specifies that ratified treaties are the 'supreme Law of the Land',[232] Congress enacted legislation in 1980 to implement US obligations under the Refugee Protocol.[233] Thus, in both monist and dualist States, legislative decisions about whether and how to implement vertical treaty provisions can have a significant impact on the nation's compliance with its treaty obligations.

Once a vertical treaty provision enters into force domestically, the executive branch assumes primary responsibility for treaty implementation. In most States, if an individual seeks admission to the country as a refugee, an executive officer will make the initial determination whether the individual qualifies for refugee status. That determination might promote or hinder treaty compliance, depending on three factors: first, whether the treaty has been fully or partially incorporated into domestic law (either by legislation or self-execution); second, in so far as the treaty is unincorporated or partially incorporated, whether the executive decision-maker construes relevant domestic laws in conformity with the nation's treaty obligations; and finally, in so far as the decision-maker consults or applies the treaty, whether that decision-maker interprets the treaty in accordance with internationally agreed principles of treaty interpretation.

If a treaty has been fully incorporated into domestic law—either by self-execution or by legislative incorporation—the decision-maker will presumably apply the treaty as a rule of law to reach his/her decision. In the Netherlands, for example, the 2000 Aliens Act authorizes

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[227] Aust (n 30) 486.

[228] See eg Hollis, 'Comparative Approach' (n 21) 32–4 (concluding that 'the case studies presented support a practice by which States join treaties only after they have established the domestic legal means to comply with the treaty's obligations'); van Ert (n 30) 204 ('The usual Canadian practice is not to allow treaties requiring domestic implementation to enter into force for Canada until the federal government has ensured the treaty's implementation').

[229] See Aust (n 30) 490–1 (United Kingdom); Rothwell (n 26) 138–40 (Australia); van Ert (n 30) 175 (Canada).

[230] See S Afr Const (n 90) s 231(4).

[231] See Dugard (n 96) 473–4.

[232] US Const Art VI cl 2.

[233] The Refugee Act of 1980, PL No 96-212, 94 Stat 102 (17 March 1980). The United States is not party to the 1951 Refugee Convention, but US ratification of the 1967 Protocol effectively means that the United States is bound by key provisions of the Convention.

executive officers to grant residence permits for 'Convention refugees', without defining the term. Hence, the statute effectively directs administrative (and judicial) decision-makers to apply the treaty definition of refugees.[234] The statute therefore promotes treaty compliance by directing decision-makers to apply the treaty definition as a rule of domestic law. In contrast, when a treaty remains wholly or partially unincorporated, decision-makers must apply domestic rules in place of—or in tandem with—the international rule; this raises a greater risk of non-compliance. In Australia, for example, the 1951 Convention has been only partially incorporated into domestic law.[235] Consequently, Australian decision-makers have been hesitant to rely too heavily on the Convention in construing domestic statutes,[236] producing a less-than-perfect record of treaty compliance.

If a vertical treaty provision remains wholly or partially unincorporated, executive decision-makers might still construe relevant domestic statutes in harmony with the nation's international treaty obligations. For example, Canada's Immigration and Refugee Protection Act directs executive officers to construe the Act 'in a manner that . . . complies with international human rights instruments to which Canada is a signatory'.[237] The statutory reference to 'human rights instruments' presumably includes the Refugee Convention and Protocol.[238] Similarly, in other States, executive officers may have a constitutional or statutory duty to perform their governmental functions in a manner that is consistent with the nation's treaty obligations—including, perhaps, obligations contained in unincorporated or partially incorporated treaties.[239] Alternatively, executive officials might simply decide as a policy matter to exercise their statutory responsibilities in a way that promotes compliance with treaty obligations. In any case, if executive officials have a conscious goal of exercising their powers and duties consistently with international treaty obligations, treaty compliance is enhanced. Conversely, if executive officials are heedless of treaty obligations, their actions are less likely to promote treaty compliance.

Executive officials are often required to interpret treaties. An official charged with deciding whether to grant an applicant refugee status would need to interpret the treaty if the treaty itself provides the governing rule of domestic law (via self-execution or full incorporation), or if some law or policy directs the official to take account of the treaty when construing the relevant domestic statute. In construing the treaty, the official might be guided to some extent by unilateral national policy interests. However, he or she might also be

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[234] See Nollkaemper (n 97) 336–7.

[235] See Rothwell (n 26) 138–40.

[236] See ibid 153–6.

[237] van Ert (n 223) 155.

[238] Canada is party to both the 1951 Refugee Convention and the 1967 Refugee Protocol. See United Nations Treaty Collection <http://treaties.un.org/Home.aspx?lang=en>.

[239] In the United States, the President and subordinate executive officers have a constitutional duty to 'take Care that the Laws be faithfully executed'. US Const Art II s 3. Most commentators agree that the Take Care Clause creates a legal duty for executive officers to implement treaties. See ET Swaine, 'Taking Care of Treaties' (2008) 108 Colum L Rev 331.

guided by internationally agreed principles of treaty interpretation.[240] If executive decision-makers give great weight to internationally agreed principles, their decisions are more likely to promote treaty compliance. Conversely, if decision-makers give more weight to unilateral policy interests, there is a greater risk that their decisions will obstruct treaty compliance.

If the legislative and executive branches both viewed treaty compliance as a paramount objective, the courts would rarely be asked to decide cases involving alleged treaty violations. However, legislatures sometimes fail to implement treaties that require legislative implementation, and executive officers sometimes fail to honour such treaties. When that happens, courts may be asked to decide whether governmental conduct is consistent with the nation's treaty obligations. Ultimately, the impact of judicial decision-making depends heavily on whether domestic courts pursue a nationalist or transnationalist course. In States where courts tend to adopt a transnationalist approach, domestic courts can play a key role in promoting treaty compliance. India, the Netherlands, and South Africa are leading examples of States where domestic courts actively promote compliance with vertical treaty obligations.[241] However, in States where courts tend to apply a nationalist approach, domestic courts effectively cede authority to the legislative and executive branches to make key decisions affecting compliance with vertical treaty provisions. Israel and the United States exemplify this nationalist approach, although judicial decision-making in Israel is moving in a more transnationalist direction.[242]

Finally, it is important to note that legislative action or inaction can nudge courts in a more nationalist or transnationalist direction. In the United Kingdom, for example, Parliament's decision to enact the Human Rights Act 1998 undoubtedly moved judicial decision-making in British courts in a more transnationalist direction;[243] in contrast, Brexit is likely to nudge courts in the opposite direction. In the United States, the Senate's consistent practice of attaching non-self-executing declarations to human rights treaties has clearly pushed judicial decision-making in a more nationalist direction.[244] These examples illustrate the complexity of the relationship among legislative, executive, and judicial branches in shaping governmental decisions that affect compliance with vertical treaty obligations.

Conclusion

[240] For more on the VCLT rules on treaty interpretation, see Chapter 19.

[241] See Dugard (n 96) (South Africa); Jayawickrama (n 17) (India); Nollkaemper (n 97) (the Netherlands).

[242] See Kretzmer (n 31) (Israel); Sloss 'United States' (n 101) .

[243] See Aust (n 30) 483–4, 487–90.

[244] See eg MS Flaherty, 'Global Power in an Age of Rights: Historical Commentary, 1946–2000' in *Intl Law in the US Supreme Court* (n 126).

International law and international relations scholars have written extensively about theories of national compliance with international legal obligations, including treaty obligations.[245] However, only recently have scholars begun to appreciate the role of domestic courts as key institutional actors whose decisions can promote or impede treaty compliance.[246] The preceding discussion suggests that more detailed study of domestic courts is warranted. Granted, domestic judicial decisions have little impact on national compliance with horizontal treaty obligations. However, domestic courts play a central role in ensuring compliance with transnational treaty obligations. Moreover, domestic courts have the potential to play a very significant role in promoting compliance with vertical treaty obligations. Whether that potential is realized depends, to a great extent, on whether domestic courts adopt a nationalist or transnationalist approach to the judicial application of vertical treaty provisions.

Recommended Reading

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CA Bradley (ed.), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, Oxford forthcoming 2019).

X Hanqin and J Qian, 'International Treaties in the Chinese Domestic Legal System' (2009) 8 Chinese J Intl L 299

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[245] See eg JL Goldsmith and EA Posner, *The Limits of International Law* (OUP, Oxford 2005); AT Guzmán, *How International Law Works* (OUP, Oxford 2008); R Goodman and D Jinks, *Socializing States: Promoting Human Rights Through International Law* (OUP, Oxford 2013).

[246] See, e.g., Engagement (n 1); Sloss (n 18); C Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (OUP, Oxford forthcoming 2019); HP Aust and G Nolte, *The Interpretation of International Law by Domestic Courts* (OUP, Oxford 2016). A leading example of earlier work on the topic is HH Koh, 'Why Do Nations Obey International Law?' (1997) 106 Yale L J 2599.

DB Hollis, MR Blakeslee, and LB Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff, Leiden 2005)

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CM Vazquez, 'Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties' (2008) 122 Harv L Rev 599

S Weill, *The Role of National Courts in Applying International Humanitarian Law* (OUP, Oxford 2014)

J Wouters, A Nollkaemper, and E de Wet, *The Europeanization of International Law* (TMC Asser Press, The Hague 2008)