

## UNIFICATION OF THE APPLICATION OF PRINCIPLES OF INTERNATIONAL LAW IN THE MUNICIPAL REALM: A CHALLENGE FOR CONTEMPORARY INTERNATIONAL LAW.\*

### I. Introduction

During the early years of the formation of international law<sup>1</sup>, international law was known as the law of nations and defined as such; the law was strictly between nations in making, application and the procedural capacity to litigate same. During this era, international law confined itself exclusively to the international realm; it had interaction neither with municipal law nor municipal subjects; consequently, a conflict between international law and municipal law was an unlikely event.

The last century witnessed several events which changed the complexion of the hitherto law of nations and caused it to break loss from its traditional frontiers. Such events as the 1<sup>st</sup> world war and the consequential emergence of the League of Nations in 1919; the atrocities of the 2<sup>nd</sup> world war and the succession of the League of Nations by the more encompassing United Nations Organization; the fall of colonialism and the consequential multiplicity of independent states; the increasing need for the protection of human rights and the environment by international law; the emergence of supranational organisations (such as the European Union) and the emergence of international economic law, have made the application of international law in the municipal realm and to municipal subjects a *sine qua non* for an efficacious international law regime. Buttrressing this point, John C. Yoo observed:

*Relationship and problems which were once domestic, such as economics and environment have become international in scope: events abroad ... affect domestic markets and institutions in a more profound manner than in the past. Efforts to regulate domestic problems need to address international affairs in order to be comprehensive and effective. Correspondingly, policy solutions have come to rely upon new types of international agreements that include multiple parties, that create independence international organisations, and that pierce the veil of the nation-state and seek to regulate individual private conduct. While perhaps necessary to meet international goals, these novel arrangements and institutions create difficulties because they intrude into what was once controlled by the domestic political and legal system.<sup>2</sup>*

It is now often the case, as observed by Abram and Antonio Chayes, that while “[s]uch treaties are formally among states, and the obligations are cast as state obligations ... [t]he real object of the treaty ... is not to affect state behaviour but to

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1 We adopt the classification provided by Malanczuk, who divided the development of international law into:

(a) pre-classical period (early origin from antiquity to 1648);

(b) the classical period (1648-1918); and

(c) the modern system (1918 to present). – PETER MALANCZUK, AKENHURST'S MODERN INTERNATIONAL LAW. P.9 (7th Revised ed. 1997)

2 John C. Yoo, “Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding” 99 Colum. L. Rev. 1956, 1968 (1999). (hereinafter, Yoo, Globalism)

regulate the activities of individuals and private entities”<sup>3</sup> The venture of international law into matters of municipal concern has created continuous tension between both systems of law. Notwithstanding the time-honoured principle of international law, that a state may not cite the existence of, or absence of national law to justify a failure to fulfill its international law obligation<sup>4</sup>, occasions are rife where States have failed to fulfill their international law obligations due to impediments created by municipal law. A defaulting State may well be liable on the international realm, but because municipal law is the product of the exercise of sovereign powers by States, it cannot be abrogated by international law except the State by the exercise of its sovereign powers bestows on international law the position of a superior law. This view is also shared by Antonio Cassese, when he said:

*Since international law cannot stand on its own feet without its ‘crutches’, that is, municipal law, and since national implementation of international [law] rules is of crucial importance, one would expect there to be some form of international regulation of the matter or at least a certain uniformity in the way which domestic legal systems implement international law. The reality is quite different, however. International law merely provides that states cannot invoke the legal procedures of their municipal system as a justification for not complying with international rules. There it stops, thus leaving each country freedom in the fulfillment of its international duties. A survey of national systems shows a complete lack of uniformity.... As a consequence each state decides on its own, how to make international law binding ...and what status and rank in the hierarchy of municipal sources of law assign to it<sup>5</sup>*

The aim of this work is to highlight the different approaches of States in the implementation of international law in their municipal realm; we shall rely on the practices of some States and relate same to the complexities created by the complete lack of uniformity. It shall be argued that for international law to fully realize its regulatory functions in the affairs of States, humans and the environment, there must be consistency and hence predictability in the approach of States. In order to have a holistic view of the theme, we shall commence this study by a brief excursion into the concept of sovereignty and the role it plays in the municipal normative order.

## **II. Sovereignty and International Law**

The key to understanding the place of international law in national affairs is sovereignty. The term sovereignty has been as variously defined<sup>6</sup> as it has been criticized<sup>7</sup>. In the words of Lassa Oppenheim,

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3 Abram Chayes & Antonio Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* 14 (1995) cited in Yoo, *Globalism at 1958*

4 Section 27 Vienna Convention on the Law of Treaties 1969. Also the *Free Zones Case* (1932) PCIJ, Ser. A/B No. 46, p.167, the *Case of the Polish Nationals in Danzig* (1931), PCIJ, Ser. A/B No.44 p. 24

5 ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDE WORLD*, 15 (1986)

6 See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law* 84:4 AJIL 866 (1990) (affirming that sovereignty has many meanings depending on the context and the objective of those using the word)

7 LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES*, 9-10 (1995), cited in Benedict Kingsbury, “Sovereignty and Inequality”, (online) [http://www.ejil.org/journal/Vol.9/No4/art1.html#p10\\_45](http://www.ejil.org/journal/Vol.9/No4/art1.html#p10_45) (arguing that: “Sovereignty, strictly, is the locus of ultimate legitimate authority in a political society, once the Prince or “the Crown”, later parliament or the people. It is an internal concept and does not have, need not have, any implications for relations between one state and another.... For

*There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment when it was introduced into political science until the present day, has never had a meaning which was universally agreed upon.*<sup>8</sup>

Sovereignty connotes the power of the State over both its internal and external affairs. The doctrine of sovereignty could be likened to a double-edged sword: there are the “internal” and the “external” edges. The “internal” aspect of sovereignty entails the power of a sovereign to exercise final and absolute authority within a given (its) territory. The external aspect of sovereignty entails the independence and non-subjection of the sovereign State to any other external authority or power in the conduct of both its domestic and international affairs. It is this aspect of sovereignty that puts States at par – equality<sup>9</sup> – in their relationship with one another<sup>10</sup>. It is a cardinal requirement<sup>11</sup> for international legal personality of States. However, external sovereignty is a derivative of internal sovereignty; without internal sovereignty and effectiveness, there can be no external sovereignty. It is in this realisation, that Jean Bodin, described sovereignty as, “[t]he most high, absolute and perpetual power over the citizens and subjects in the commonwealth”<sup>12</sup>

Sovereignty being the bundle of the rights of the State to act within and without, it is the power of the State to affect people, properties and events within its territory as well as the capacity to enter into legal relations with other States. It is therefore, the attribute that the State must possess to be able to enter into international legal relations and transform them into national obligations. The existence of international law and its connection with national life is absolutely the product of sovereignty.

The misunderstanding that has crept into the relationship between municipal law and international law, owes largely to the erroneous view that globalization has obliterated the traditional absolute right of independent states to exercise supremacy in their internal affairs. The ultimate aim of this argument is to subjugate the national legal order to international legal order – globalization<sup>13</sup>. No doubt globalization seem, in some areas, to have blurred the clear-cut differences between municipal law and international law, it does not obliterate the differences. In effect, whatever incursion globalization has made into municipal realm is brought about by the strength of municipal law, through the exercise of sovereignty. It is for this reason perhaps, that Benedict Kingsbury rationalised the situation thus:

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international relations, surely for international law, it is a term largely unnecessary and better avoided.’)

8 LASSA OPPENHEIM, INTERNATIONAL LAW 66 (Sir Arnold D. McNair ed., 4th ed. 1928)

9 See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 287 (4th ed. 1990) (noting that the importance of sovereignty stems from its relationship to the “equality of states which represents the basic constitutional doctrine of the law of nations”). Sovereignty is the basis of Article 2(7) of the United Nations Charter; the essence of which is to give States equal rights to manage their internal affairs free from outside interference and to prevent powerful States from undue intervention in the affairs of weaker States.

10 STEPHEN D. KRASNER, SOVEREIGNTY, ORGANIZED HYPOCRISY (1999), quoted in John H. Jackson, “Sovereignty-Modern: A New Approach to an Outdated Concept” 97AJIL 782, 786 (2003). (Krasner identified four essentials of sovereignty viz: domestic sovereignty, interdependence sovereignty, international legal sovereignty and Westphalia Sovereignty).

11 See MICHAEL ROSS FOWLER & JULIE MARIE BUNCK, LAW POWER AND THE SOVEREIGN STATE 11 (1995) (to them, sovereignty of states is of cardinal importance to international relations).

12 JEAN BODIN, THE SIX BOOKS OF A COMMONWEALTH 84 (Kenneth D. MacRae ed., Richard Knolles trans., 1962)

13 See John H. Jackson, “Sovereignty-Modern: A New Approach to an Outdated Concept” 97AJIL 782 (2003)

*Globalization and democratization are placing state sovereignty under strain, as international rules and institutions appear to become more intrusive, transnational civil society more active, and unitary state control less pronounced. State sovereignty as a normative concept is increasingly challenged, especially by a functional view in which the state loses its normative priority and competes with supranational, private, and local actors in the optimal allocation of regulatory authority. But discarding sovereignty in favour of a functional approach will intensify inequality, weakening restraints on coercive intervention, diminishing critical roles of the state as a locus of identity and an autonomous zone of politics, and redividing the world into zones. The traditional normative concept of sovereignty is strained and flawed, but in the absence of better means to manage inequality it remains preferable to any of the alternatives on offer<sup>14</sup>.*

Globalisation is the magic wand that holds together, the world's growing economic system<sup>15</sup>. It is the interconnection between the economic, the political, cultural scientific, technological and ideological fields of the world.<sup>16</sup> There is a gradual but steady change in the locus of law-making in the international legal systems orchestrated by the interaction between legal systems and social change. Thus globalization has impacted international law transforming it from static to a dynamic and pragmatic system leading to the recognition of the evolving status of the individual and other non-state actors at the international plane. Whilst it may be correct to assert that the frontiers of State-hold is gradually collapsing culminating in the diminishing frontiers of State sovereignty with the deepening of capitalism and democracy the world over, the liberalization of trans-boundary trade and humanitarian intervention as a basis for intervening in gross abuse of human rights, we must also admit that these are only made possible by the mechanism of municipal law.

No rule of international law takes domestic effect on its own force; the State must either have consented to the efficacy of that particular rule within its municipality<sup>17</sup> or have delegated, through an enabling treaty, part of its sovereign right in certain areas to an international organisation<sup>18</sup>. The treaty of Rome and the European communities Act (UK) 1972, both of which provide the footage for the European Union Parliament to make rules which are domestically effective in the United Kingdom, are obvious examples. It must for all purposes be remembered, as in the case of the EU and WTO, that the vertical effects of international law are brought about by the submission of the State (through the exercise of sovereign will) to international law and the adjustment of

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14 Supra note 7 at p. 10

15 The worlds economy has become co interconnected that internal crises – be it political, economic, military or terrorism – may have impact even upon the most remote geographically connected States and create concern for the international community as a whole.

16 V. Golland-Debbas, "Law Making in a Globalised World" being a paper presented at the Euromediterranean Course of International Law Castellon, Spain 2005.

17 This position is expressly recognized in some international instruments. Hence it is sometimes provided as did article 1 of the African Charter on Human and Peoples Right 1982 (took effect on March 17, 1983) that State Parties should endeavour to adopt the needed legislative instruments to bring its provisions to bear in their municipal realm.

18 See Application of the Obligation to Arbitrate under section 21 of the United Nations Headquarters Agreement of 26 June 1947, 1988 ICJ REP. 12 (here, the court accepted that, implied in a State's membership of international organisation, is a clear limitation on its sovereignty). This is not disputed, provided we do not loss sight of the fact that membership of international organisations are voluntary; it is therefore, that initial voluntary surrender of the State to the rules of an international organisation, that underpins her sovereignty.

municipal law accordingly. Support for this otherwise notorious view could be garnered from the view of the Supreme Court of the Czech Republic, when it was called upon to apply EU Directive in the municipal realm of Czech Republic. Refusing the invitation, the court reasoned:

*“... the validity of the agreement made between the parties on August 31, 1993 must be decided according to the then valid law, as both lower courts did. In contrast, laws and directives valid in the countries of the European Community are not applicable, as the Czech Republic was not (and still is not) a member of the community, and that is why the Czech Republic is not bound by these laws...”*<sup>19</sup>

This does not in my opinion derogate from the absolute sovereignty a State has to control its internal affairs given that a State can denounce a treaty and abrogate its effect in her municipality. Besides, like ever before, international law feeds on the favourable exercise of sovereign powers by States. The strength international law has recorded in certain areas and the weaknesses in others are reflections of how much States are willing to direct their sovereign power in support or denunciation of the particular rule. The inability of the International Criminal Court to effectively come into being exemplifies the inherent power of the sovereign State to determine, as ever before, when and to what external authority it would submit its country or citizens.<sup>20</sup> Certainly,

*... the theory of sovereignty provides the means by which people can express, and be deemed to have expressed consent to the application of international legal norms and to international institutional competences. Consent, whether express or tacit, plays a crucial role in legitimating international legal rules and institutional activities ....*<sup>21</sup>

The confusion we grapple with in our contemporary world is brought about by those, whose believe that the concept of sovereignty is an outdated concept which has been irredeemably washed away by globalization<sup>22</sup>. But this confusion can be averted if we admit the fact that municipal law rather than international law forms the basis of the interaction between municipal law and international law; hence globalization could not have been without the support of municipal law. Support for this view could be garnered from the decision of the Supreme Court of the United States in *Foster v. Neilson*,<sup>23</sup> where the court declared:

*A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into*

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19 Decision of the Czech Supreme Court of December 12, 2000, 25 Cdo 314/99. Cited in Zdenik Kubn, the Application of European Law in the New Member States: Several (Early) Predictions” 6:3 German LAW Journal (March 2005). Available online at [www.germanlawjournal.com/article.php?id=577](http://www.germanlawjournal.com/article.php?id=577)

20 The Rome Statute of the ICC came into force in July 2002 and about 105 countries have ratified it while 41 countries have signed but yet to ratify. The government of Sudan has refused to surrender the Janjaweed Militia suspects to the ICC prosecutor; United States and Israel initially signed the Rome Statute but subsequently withdrew their signatures; China, Russia, Iran, North Korea, India, Yeman, Iraq have refused to submit to the jurisdiction of the ICC.

21 Supra note 7 at 25

22 No doubt, the Westphalia or classical idea of sovereignty (which held sway between the 16th century and early 20th century) has changed through interdependence and communication, but the basic assumption of the time – territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognised States and States consent as the basis of international legal obligations – still persists.

23 27 U.S. (2 Pet.) 253 (1829)

*execution by the sovereign power of the respective parties to the instrument*<sup>24</sup>

Accordingly any inquiry concerning the form and shape of international law in the municipal sphere must look up to municipal law for guidance.

### **III. Municipal Implementation of Treaties**

In exercise of its sovereign powers each State regulates the mode and manner in which international law is applied within its municipality; and as stated earlier, there is no straightjacket or uniform approach - each State must be treated on the basis of its municipal law provision<sup>25</sup>. The lack of uniformity notwithstanding, it is possible to identify three ways by which states implement international law within their municipality. They are as follows:

- (a) When international law is self-executing;
- (b) When international law is non-self-executing;
- (c) The American model.

#### **i. When International Law is Self-Executing**

International law is said to be self executing in the municipal realm where no local legislation is required for implementation<sup>26</sup>. In *Trans World Airlines Inc. v. Franklin Mint Corp*<sup>27</sup>, the United States Supreme Court defined a self executing treaty as one for which, “no domestic legislation is required to give the force of law in the United States [the domestic realm].” Article 55 of the Constitution of France, 1958; Article 28 of the Greece Constitution, 1975; Article 93 and 94 of the Netherlands Constitution 1983 and Article 8 of the Portuguese Constitution of 1976 permit municipal implementation of treaties without prior legislation. In all of these countries, international law is self-executing; the general rule in these countries is that, a treaty assumes the force of municipal law the moment it is entered into.

It suffices to briefly state, at this point, that the role of the European community in transforming its member states into a monist haven demonstrates the most uniform example of the self-execution of international law in the municipal realm. Way back 1974, the erudite Lord Denning in *H.P. Bulmer Ltd v. Bollinger S.A*<sup>28</sup>, likened the Europeans Community Law to an “incoming tide flowing up the estuaries and up the rivers [of the British Common Law]”. A few years later in *Shield v. E Coomes (Holdings Ltd)*<sup>29</sup>, the great Jurists (Lord Denning) was amazed at how, “[t]he flowing tides of community laws is coming fast. It has not stopped at the high water marks; it has broken

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24 Ibid, at 314

25 This is why the postulations of the monist and dualist schools of thought are hardly helpful in contemporary international law – the monists hold the view that there is one system of law of which international law is an element and to that extent that municipal law must conform to international law for pain of nullity; the crust of this view is that international law is self-executing in the municipal realm of states. The dualists on the other hand holds the view that international law and municipal law constitute a dual system of law regulating separate entities and that each exists in its own realm. See Louis Henkin, “Treaties in a Constitutional Democracy” 10 MICH.J. INT’L L 406, 415. If one takes either view as the standard, one will invariably fall into the error of either relegating municipal law (monists) or excluding the direct application of international law in the municipal realm (dualist). It is not the doctrines that define the relationship between municipal and international law but the municipal laws of states that determine whether states operate the dualist or monist model or a hybrid of both.

26 See Jordan Paust, “Self Executing Treaties” 82 AJIL 760, 1988.

27 466 U.S 243, 252 (1984)

28 (1974) 2 ALL E.R 1226, 1231

29 (1979) 1 ALL E.R 456,462

the dykes and the banks. It has submerged the surrounding land so much so that we have to learn to be amphibious if we wish to keep our heads above water”.

EU Directives are directly applicable in all the countries which have acceded to the treaty establishing the community. But care must be taken not to confuse EU Directives for general international law. In principle, except in such EU countries where international law is generally self-executing, there could be two different approaches to the implementation of international law. That is, while EU Directives will, by virtue of the countries' membership of the community, be self-executing, international law, generally, will require municipal implementation. The United Kingdom aptly buttresses this point. While by virtue of her accession to the treaty establishing the European Community and Europeans Community Act 1972 (as amended) EU Directives are directly applicable in the United Kingdom, but as to general international law, the applicable principle is still as stated by the Privy Council in *Higgs & Anor. v. Minister of National Security & Ors*<sup>30</sup> that:

*In the law of England and the Bahamas, the right to enter into treaties was one of the surviving prerogative powers of the crown. Treaties formed no part of domestic law unless enacted by the legislature. Domestic courts had no jurisdiction to construe or apply a treaty, nor could incorporated treaties change the law of the land. They had no effect upon citizens' rights and duties in common law or statute law....*

## ii. When International Law is Non-Self-Executing

International law is non-self executing when it cannot, upon being entered into by the contracting States, possess the force of law in the municipal realm of the state parties without prior legislative action<sup>31</sup>. This approach can be noticed in Article 29-6 of the 1937 Constitution of Ireland; section 95 of the Finish Constitution of 1999; Article 167(2) and (3) of the Belgium Constitution of 1970, Articles 94 and 95 of the Constitution of Spain, articles 149-151 of the Constitution of Burkina Faso 1991, articles 43-45 of the constitution of the republic of Cameroon 1972 and Section 12 of the Constitution of the Federal Republic of Nigeria 1999.

In the above countries, treaties cannot have the force of law without implementation by municipal law; the implication of this is that for every treaty intended to have the force of municipal law, the country must adopt either of the following legislative processes –

- (a) enact a legislation giving force and life to the application of a treaty;
- (b) incorporate the provisions of a treaty into domestic policy and enact same as municipal law.

Until this is done, no municipal court can take cognizance of the treaty.

## iii. The American Model

The American model is a hybrid of the first two; it is so because a treaty may either be self-executing or non-self-executing in the municipal realm of the United States. Article VI of the United States Constitution simply declares that Treaties and Statutes shall be the “Supreme Law of the Land”. The constitution did not prescribe the manner by which treaties become effective in the realm; this lacuna leaves the pleasure of determining when a treaty becomes a law of the land to the language of the treaty and the vagaries of interpretation, which in turn has led to two very strong divergent views by judges<sup>32</sup> and other jurists<sup>33</sup> alike on what the true intendment of article VI. On the face of

30 The Times of December 23, 1999, cited with approval by the Supreme Court of Nigeria in *Abacha v. Fawehinmi* [2000] 6 N.W.L.R (pt. 660) 228, 288-289, 357

31 Carlos Manuel Vazquez. “The Four Doctrines of Self Executing Treaties”, 89 AJIL 695 at 695;

32 The inconsistent approach of the courts in this regards lends credence to this view. On the application of article VI, two lines of cases are evident. The first line of cases are those which upholds the self-

article VI an Act of Congress and applicable treaty are of equal status in the United States law and in the case of inconsistency, the latter in time prevails.<sup>34</sup> Accordingly, a treaty could supersede a prior Act of Congress and vice versa<sup>35</sup>. In *Murray v. Schooner Charming Betsy*<sup>36</sup> Marshall C.J., declared “An Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”

This pattern of reasoning was followed by the Supreme Court in *Foster v. Neilson*,<sup>37</sup> where it was held:

*...our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the Legislature, whenever it operates of itself without the aid of any legislative provision*<sup>38</sup>.

Although the above stated rule is highly trumpeted, it has been stated, and rightly too, that in practice, except in isolated cases<sup>39</sup>, the last in time rule operates in one direction; later statutes are often superior to treaties.<sup>40</sup>

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executing view; examples of these are *In re Tiburcio Parrott, C.C.*, 1 F. 481 (1880) (striking down the California constitutional ban on the rights of Chinese workers as a violation of the Burlingame Treaty); *In re Ah Chong*, 6 Sawyer 451 (1880) (holding that state law prohibiting aliens from fishing in public waters void due to contravention with Burlingame treaty); *Olympic Airways v. Husain*, 124 S. CT. 1221 (2004) (here, the court held that the Warsaw Convention 1929 was binding law in the United States, the claim based thereon was allowed) The second line of cases – the opposite view – is exemplified by *Foster & Elam v. Neilson*, 27 U.S 253 (1829) (declaring that the language of the Spanish grant over a piece of land could not be enforced until congress confirms same by legislation); *the United States v. Postal*, 589 F. 2d 862, 877 (5th Cir. 1979) (here the Fifth Circuit refused to apply the Law of the Sea Convention 1958 against the conviction of Postal, who was arrested on the high sea on a vessel flying the flag of Grand Cayman Island but yet Postal was tried and convicted in the United States); *United States v. Alvarez-Machin* 54 U.S. 655 (1992) (affirming the adduction of a suspect residing in Mexico in contravention of a 1978 extradition treaty with Mexico).

33 The weight of academic views tilts towards self-execution. While scholars like Professor Carlos Vazquez and Jordan J. Paust argue that the provision makes treaties self-executing, Professor John Yoo belongs to the opposite camp. See Carlos Vazquez, treaty based rights and remedies of individuals, 99 Colum. L.Rev 1082, 1084 (1992) (arguing that the text and history of the constitution demonstrate that courts may directly enforce treaty provisions in properly brought suits by individuals); Jordan J. Paust, self executing treaties, 82 Am. J. Int'l Law 760,760 (1988) (arguing that non –self- execution is a judicial invention at odds with the constitution and the views of the framers). For the contrary view, see Yoo, Globalism, at 1961(arguing that the original understanding does not compel a reading of the supremacy clause that immediately makes treaties law within the united states, but instead allows the branches of government to delay execution of a treaty until congress as a whole can determine how treaty obligations are to be implemented). Also see the vehement critique of Yoo, Globalism by Martin S. Flaherty, “History Right?: History Scholarship, Original Understanding, and Treaties as “Supreme Law of the Land” 99 Colum. L.Rev 2095 (1992) (Flaherty challenged Yoo,s discussion on grounds of historical accuracy).

34 The Restatement (Third) of the Foreign Relations of the United States, δδ. 115 (1987)

35 *The United States v. The Schooner Exchange Peggy*, 1 Cranch 103, 110

36 6 U.S (2 Cranch) 64, 118 (1804)

37 *Supra* note 27

38 *Ibid*, at 314

39 Such as *Cook v. United States* 288 U.S 102 (1933), where the Supreme Court held that a 1924 Statute with Great Britain superseded a 1922 Tariff Statute and *U.S v. Ray*, 423 F. 2d 16, 21 (5th cir. 1970), which held that prior Outer Continental Shelf Lands Act is superseded by the Geneva convention on the continental shelf.

40 *Breard v. Greene*, 523 U.S at 374, where the U.S Supreme Court refused to issue a stay of execution of a death penalty imposed on a Paraguay national by a virginal court in violation of the Vienna Convention on Consular Relations on the ground that the treaty rights under the Vienna Convention were subject to the later in time Anti-Terrorism and Effective Death Penalty Act 1996 against the directive of the ICJ that the U.S should take measures to stay the execution. For a full discussion of



To execute a treaty in the United States, the court draws a distinction, on the basis of the wording of the treaty, between a self-executing treaty and a non-self-executing treaty. In the Restatement (Third) of the Foreign Relations Law of the United States §§ 111 (4) (1987)<sup>41</sup>, it was stated that treaties are “self-executing” so long as they are not, “non self-executing” and that treaties are non self-executing:

- (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation;
- (b) if the senate in giving consent to the treaty, or congress by resolution requires implementing legislation; or
- (c) if implementing legislation is constitutionally required.

Under the American model therefore, the courts must of necessity examine each treaty on its merit and determine whether it is a self-executing treaty or not. This situation gives courts of the land the jurisdiction to examine the language of each treaty on the merit with a view to its applicability<sup>42</sup>. In *U.S. v. the Schooner Peggy*<sup>43</sup>, Chief Justice Marshall of the U.S. Supreme Court held that when a treaty affects the rights of parties litigating in court, the treaty is much to be regarded as an Act of Congress.

The implementation of international law in the U.S, seem beset by the subjective disposition of the judge and the circumstances under which international law is sought to be implemented. Hence it has been strongly asserted that “It would mean that the United States regards international law commitments as having the force of law only as it wishes to honor them<sup>44</sup>”

One cannot therefore, assert with mathematical precision, with respect to any particular treaty, that the treaty will or will not be self-executing in the United States, until a court of competent jurisdiction in the forum certifies the treaty self-implementing or otherwise.

#### IV. Consequences

The lack of uniformity in the approaches of states creates consequences, not only for the actualisation of the drive of contemporary international law, but also for the parties inter se. it creates imbalances in the application of international law in the municipal realm of contracting parties. If for instance, Nigeria, the United States and France enter into a treaty which requires municipal implementation, that treaty shall immediately come into effect in France; in Nigeria, it shall not be effective unless it is implemented by the legislature; in the United States, it may or may not take effect depending on whether the treaty is seen to be self-executing or non-self-executing. If it is self-executing, it shall take effect without municipal implementation and vice versa if not self-executing<sup>45</sup>.

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the case, see Curtis A. Bradley, “Breard, Our Dualist Constitution and the International Conception” 51 Stan. L. Rev. 529, 530-31 (1999)

41 Also see Stephen P. Vladeck, “Non Self-Executing Treaty and the Suspensions Clause after *St. Cyr*”. 113 Yale L.J 2008 (2007)

42 Indeed a treaty, by its term, may stipulate that implementing legislation will be required before the treaty has the force of domestic law. See *Foster v. Neilson*, 27 U.S (2 Pet.) 253 (1829)

43 *supra*

44 Peter Western, “The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin”, 101 Harv. L. Rev. 511, 513

45 For example, the United States became a party to the Vienna Convention on Consular Relations over forty years ago, but has refused to implement article 36 of the Convention; article 36 protects the rights of the citizens to consult with a Consular Officer, if arrested in a foreign country. While the United States had failed to implement the article, the State Department complains when other countries fail to apply article 36 to U.S citizens. See *U.S. v. Lombera-Carmoringa* 206 F.3d 882 (9th Cir 2000)

The legitimate expectations of officials in France, and of the citizens of Nigeria and the US (if the treaty creates private rights) that the treaty will be applied in Nigeria and the U.S, will hang on the indeterminacy of international law in the realms of the duo (Nigeria and US). This situation frustrates our hypothetical treaty as much as it creates implications for the parties under international law given that Nigeria and the U.S cannot rely on the deficiencies in their municipal laws to justify their inability to bring the treaty to bear in their respective municipal realm.

The situation is bound to be more complex, where the treaty involves a larger number of States. In that case, each member state would require assurances of the implementation of the treaty by every other before applying the treaty. One of the reasons advanced by the U.S court for refusing to apply the law of the sea convention in *United States v. Postal*<sup>46</sup> was that the enforcement of the multilateral treaty in other countries was unclear. This view leaves a bad cue for other states to take to the detriment of the convention.

## **V. Conclusion**

The situation envisaged above creates a serious challenge for contemporary international law in that the globalization of the world and of almost everything that is of interest to mankind – everything that is crucial to survival in our inter-dependent world – underscores the importance of international law and the need to unify the laws of all the countries of the world to create a common ground for the application of international law in the municipal realm, as against the prevailing anarchical situation.

Perhaps, it would be much easier to argue in favour of the monists approach with the ultimate aim of creating a unitary system where international law will be self-implementing and superior to national laws at the municipal realm. This may well do away with the prevailing chaotic approaches of states in the implementation of international law in the municipal realm, but this will lead to yet another problem – how can weaker States be protected from external control by States which wield powerful influence on the international realm. In theory, States may be equal on the international realm, yet the practical imbalances are very palpable. The United Nations Organisation is formed on the basis of equality yet the big five permanent members of the Security Council wield their veto to have their way and to protect their interest, sometimes, to the detriment of weaker states. This totally rules out the unitary approach, at least from the point of view of States which require strict internal control for national development and economic growth.

Such imbalances coupled with the increasing ethnicity and peculiarities of States, the diversity of interest, which sometimes reflect in treaties, the task of attaining a unification of the application of international law in multi-cultural and heterogeneous world like ours, not only in politics but also in legal systems, is an onerous one.

To our minds, the solution lies in legal pluralism whilst ensuring that some international mechanisms are in place to ensure compliance at the municipal sphere with international obligations. One way to achieve this is for each treaty to mandate all State parties to adjust its municipal law with a view to creating the legal cum political space for its implementation as a prerequisite coming into force. Alternatively, there could be inserted a reservation that would have the effect of making the treaty effective only as between the States in which municipal realm the treaty has become effected. This device will not only preserve the sanctity of the treaty but also the sovereignty of the Contracting states.

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46    Supra note 32 at 878