TREATY-MAKING POWER AND SUPREMACY OF TREATY IN ETHIOPIA

By

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" .International treaties. to which Ethiopia shall be party, shall be the supreme law of the Empire. "
Art. 122 Revised Constitution of Ethiopia.

Introduction

The word "treaty" is derived from "traiter" French for "to negotiate," and denotes those international agreements which are intended to have an "obligatory character."[1]

The generic term "treaty" is used in this study in its general sense, so as to cover "treaty", "protocol" "international agreement", "convention" and "obligation" (in the latter case in its narrow sense).[2] The difference in form of such instruments does not extend to their juridical effect, and the rules of international law are equally applicable to all contractual engagements between States or a State and International Organizations. Both the so-called law-making treaties and other treaties are treated in this study under this general term, as there is not much difference between them as pointed out by Oppenheim, who stated that:

"In principle, all treaties are law-making in as much as they lay down rules of conduct which the parties are bound to observe as law."[3]

In this study we are concerned with the following questions:

1. Is treaty-making the prerogative of the Emperor alone?
2. Could this power be delegated?
3. Can a treaty amend or modify the provisions of the Constitution or any other legislation in existence?
4. Are treaties concluded prior to, and after the promulgation of the Revised Constitution supreme law equally?

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1. Ernest Satow, *A Guide to Diplomatic Practice* (4th ed., 1962), § 553, p. 325.
2. See p. 420, *infra.*
3. L. Oppenheim, *International Law, (Treaties)* (8th ed., 1955), Vol. I, § 492, p. 879.

5. Is municipal action required to implement treaties?

6. How can conflicts of treaties with municipal law[4] be reconciled?

In order to answer these questions this article attempts to analyse two relevant provisions of the Revised Constitution, namely, (a) Art. 30, which is the source of treaty-making power; and (b) Art. 122, which is the supremacy clause, incorporating treaties into the municipal legal framework, and stipulating the enforcement of treaties as the supreme law of the Empire.

The analysis however, must necessarily be of a preliminary nature, not only because of the scantiness of material on the subject, but also because of the brevity of the legal experience under the Revised Constitution of Ethiopia.

The fact that the subject is complex, coupled with the lack of material such as decided cases on treaties in Ethiopia, and the non-availability of any preparatory work on the draft of the Constitution, or any official commentary on the Revised Constitution, makes the task of the writer a difficult one.

PART I.

TREATY - MAKING POWER

The technical term "treaty-making" usually includes the whole process of negotiating, initialing, signing, ratifying, exchanging of instrument of ratification, publishing the legislation of parliamentary approval, and authenticating the legality of the treaty so concluded by one nation with another nation or international organization.

This study, however, attempts to show only where the treaty-making power lies in Ethiopia according to the existing laws and the effect of the treaty. It does not go into the details of treaty-making process, which have been amply covered in the paper of Captain Shimelis Metaferia.[5]

It should be noted however, that there is a basic difference in treaty-making process in Ethiopia, since the promulgation of the Revised Constitution and in the period prior to it.

A. Prerogative of the Emperor to make-treaty.

Prior to November 4, 1955 (the date of promulgation of the Revised Constitution) the treaty-making power was vested in the Emperor alone without any limitation. This is shown by Art. 14 of the 1931 Constitution which states: "The Emperor has legally the right to negotiate and sign all kinds of treaties."

For practical purposes, however, the Emperor by Order No. 1 of 1943 delegated the Foreign Minister to negotiate treaties and agreements on His behalf.[6] This delegation was enforced, even after the promulgation of the Revised Constitution. It was amended however, by Order No. 46 of 1966, as will be demonstrated later.

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4. The term "municipal law" means national or domestic law of any country.
5. Shimelis Metaferia, *Treaty-Making Power in Ethiopia* (LL.B. Paper, unpublished, Faculty of Law, H.S.I.U., 1967).
6. Ministers (Definition of Powers) 1943, Art. 43 (f and g), Order No. 1. *Neg. Gaz.*, year 2, no. 5.

Since the promulgation of the Revised Constitution the whole power of foreign relations, of which treaty-making is one, is also conferred on the Emperor by Art. 30 of the 1955 Constitution.[7] However, the requirement of parliamentary approval of certain kinds of treaties is embodied in the same Article, as pointed out below.

B. Analysis of Art. 30.

(a) Discrepancy between the Amharic and English Version.

Art. 30 of the Revised Constitution outlines the prerogative of the Emperor in the field of foreign relations and treaty-making, and the limitations therein. The analysis of the Article under consideration reveals the following facts:

First of all, unlike the English version, the Amharic version of Art. 30 of the Revised Constitution is divided into two parts. The first one deals with foreign relations in general, and the second with treaty-making in particular. It should be noted however, that the words contained in the very first sentence, i.e. *supreme direction of the foreign relations of the Empire* implies the treaty-making power as well. (Emphasis added).

Secondly, the Amharic text of the same Article employs the words "He, alone" only in the second part. Hence, one may rightly conclude that the Emperor can delegate his power of treaty-making concerning setlement of disputes and measures of co-operation, (which includes all kinds of treaties), but not those concerning ratification of treaties. Thus as stipulated in the third sentence of the Article under review, the determination of the kind of treaties that do or do not require ratification, is the sole power of the Emperor. However, the Emperor's prerogative to decide which treaties need parliamentary approval is and should be governed by the general criteria laid down in the "however clause" of Art. 30.

While concuring generally with the analysis made and the conclusions presented by Captain Shimelis[8] concerning the treaties and agreements enumerated in the "however clause" of Art. 30, the writer would like to point out a discrepancy between the Amharic and English version, as to the treaties laying a burden on Ethiopian subjects personally. In the first place, the equivalent for the English word "personally" does not exist in the Amharic version at all. Secondly, for the English term "burden" an Amharic word "gudat" is employed. This single word has two connotations in the Amharic language: (a) physical injury and (b) damage or loss

7. Art. 30 of the Revised Constitution reads: The Emperor exercises the supreme direction of the foreign relations of the Empire. The Emperor accredits and receives Ambassadors, Ministers and Missions; He, alone, has the right to settle disputes with foreign Powers by adjudication and other peaceful means, and provides for and agrees to measures of co-operation with foreign Powers for the realization of the ends of security and common defence. He, alone, has the right to ratify, on behalf of Ethiopia, treaties and other international agreements, and to determine which treaties and interntational agreements shall be subject to ratification before becoming binding upon the Empire. However, all treaties of peace and all treaties and international agreements involving a modification of the territory of the Empire, or of sovereignty or jurisdiction over any part of such territory, or laying a burden on Ethiopian subjects personally, or modifying legislation in existence or requiring expenditures of state funds, or involving loans or monopolies, shall, before becoming binding upon the Empire and the inhabitants thereof, be laid before Parliament, and if both Houses of Parliament shall approve the same in accordance with the provisions of Articles 88-90 inclusive of the present Constitution, shall then be submitted to the Emperor for ratification.

8. See note 5, *supra*, pp. 132-134; 152-154; 158-160; 171-172; 175-178; 191-193; 196-198.

of property. Thus, the literal translation of the Amharic version for the English phrase which reads: "treaties laying a burden on Ethiopian subjects," would be "treaties bringing about damage or injury on Ethiopian subjects." Hence, according to the Amharic, which is the official version, any treaty which might bring about any damage or loss to a property belonging to an Ethiopian or a physical injury to an Ethiopian subject must be laid before Parliament for approval before ratification by the Emperor. Thus, a treaty which might be interpreted to give: (a) a privilege to a foreign Government to take a piece of land, belonging to an Ethiopian, by expropriation proceeding for the use of its Embassy rather than by a direct negotiation with the owner as to the price; and (b) an immunity to its diplomat residing in Ethiopia from paying an adequate compensation, if any of them inflict a physical injury on an Ethiopian might be cited as an example of the kind of treaty envisaged in the Amharic version of Art. 30. On the other hand, if the English version is considered to be more logical, a treaty calling for military assistance to a foreign power or payment of a special tax for the benefit of a foreign power may involve a burden on Ethiopian subjects as illustrated by Captain Shimelis.

(b) Delegation of Treaty-Making Power.

Since the promulgation of Order No. 46 of 1966, the Ministers of Foreign Affairs, Finance, and Planning and Development are empowered to negotiate and conclude international treaties, agreements, and arrangements; whereas the Ministers of National Defence and Foreign Affairs are required to ensure that obligations under treaties and agreements are carried out; and enforce all treaties, conventions and international obligations of the nation.[9]

In other words, the Minister of Foreign Affairs has been delegated, by Art. 28 (c) of Order No. 46 of 1966, to conclude certain types of agreements, except in so far as specific power has been delegated to another Ministry or Public Authority. The kind of agreements that other Ministries or Public Authorities are empowered to negotiate and conclude are agreements dealing with loans and credits by the Minister of Finance; economic and technical assistances formerly by the Minister of Planning and Development, presently by the concerned Minister together with the Head of the Planning Commission Office which is part of the Prime Minister's Office, (as provided in Order No. 63 of 1970).[10]

The other Ministers or Heads of Public Authorities, as executing agents, may conclude protocols or other agreements, which come under (or based on) an umbrella agreement signed by one of the above named Ministers or by an Ethiopian ambassador or minister abroad after having been given "full power" by the Emperor to sign such treaties or agreements. An example of such agreement would be a cultural relation agreement or an agreement dealing with an execution of a project, e.g. building a school by a joint fund, contributed by the two contracting parties.

(c) Findings as to the Provisions of Art. 30.

By virtue of Art. 30 of the Revised Constitution, treaty-making power is the prerogative of the Emperor, subject of course, to parliamentary approval for certain

9. Ministers (Definition of Powers) (Amendment No. 2), 1966, Arts. 25 (g and h); 28 (c and d); 29 (h) and 33 (h) Order No. 46 *Neg. Gaz.*, year 25, no. 23.

10. Planning Commission Order, 1970, Art. 5(3) Order No. 63 *Neg. Gaz.*, year 29, no. 19.

kinds of treaties and agreements, enumerated in the "however clause" of the same Article. But, by Order 46 of 1966, the Emperor has delegated the power of negotiating and concluding treaties and agreements to the Ministers of Foreign Affairs, Finance and Planning and Development (presently the Head of Planning Commission Office). The other Ministers or Heads of Public Authorities are entitled only to conclude cultural agreements and protocols dealing with the execution or carrying of certain programmes (projects), provided for in an umbrella agreement, signed by a duly authorized official of the Government.

However, notwithstanding the proviso of Art. 30, the power to ratify on behalf of Ethiopia, and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon Ethiopia is the sole prerogative of the Emperor. Because both the Amharic and English version of Art. 30, states that the Emperor *alone* has this right. This is not a power which can be delegated to any official.

(d) Reconcilation of Art. 1 and Art. 30.

As rightly pointed out by Captain Shimelis in his paper,[11] Art. 1 of the Revised Constitution on the face of it seems to forbid the making of a treaty which tries to alienate sovereignty rights and territories of the Empire of Ethiopia. On the other hand, Art. 30 opens the possibility of concluding treaty which involves a modification of the territory of the Empire or sovereignty rights over any part of such territory, provided parliamentary approval is obtained before ratification. These basic conflict of the two constitutional provisions must be reconciled somehow.

Since, no country by its own Constitution incapacitates itself from making treaties with other countries which are for its own good, the writer attempts to reconcile the two provisions by the well-established rule of interpretation of law that a specific provision prevails over a general one. Hence, Art. 1 being too general, and placed in the general part, should be interpreted in the light of Art. 30, which is a specific provision for treaty-making power in Ethiopia.

C. Requirement of Parliamentary Approval.

As stipulated in Article 30 of the Revised Constitution all treaties dealing with the following matters require the approval of Parliament, before becoming binding upon the Empire and inhabitants, i.e. before municipal execution and application:-

1. Treaties of peace;
2. Treaties and international agreements involving a modification of the territory of the Empire;
3. Treaties and international agreements involving a modification of sovereignty or jurisdiction over any part of such territory;
4. Treaties and international agreements laying a burden on Ethiopian subjects personally (or according to the Amharic version bringing about physical injury or damage to property);
5. Treaties and international agreements modifying legislation in existence;

11. See note 5 *supra*, pp. 120-122.

6. Treaties requiring expenditures of State funds;
7. Treaties and international agreements involving loans; and
8. Treaties and international agreements involving monopolies.

Treaties and international agreements of this nature should go through the law-making process as laid down in Articles 88-90 inclusive of the Revised Constitution, and be ratified by the Emperor[12] after the approval of the Parliament —Chamber of Deputies and the Senate— by a majority vote of both Chambers.

This requirement was not applicable to treaties and international agreements concluded prior to the promulgation of the Revised Constitution of Ethiopia. Art. 14 of the 1931 Constitution did not require the approval of Parliament, and consequently, any treaty or international agreement was binding upon Ethiopia without such approval. Thus, treaties and international agreements concluded before November 4, 1955 are still binding upon Ethiopia, even though their provisions may be subject to ratification with the approval of Parliament had they been concluded after the promulgation of the Revised Constitution.

The High Court of Ethiopia, on a constitutional issue raised as to the applicability of Art. 122 of the Revised Constitution has given a ruling to the effect that Art. 122 does not affect any legislation, order etc., that was in force at the time the Constitution was promulgated.[13] Thus, what Art. 122 of the Revised Constitution impliedly provides, i.e., that any international treaties conventions and obligations to which Ethiopia shall be party in the future, if inconsistent with the provisions of the Constitution, are null and void, does not affect any treaty or agreement that was in force at the time the Revised Constitution was promulgated.

The approval of a treaty by Parliament follows a similar step-by-step procedure described in "The Law Making Process in Ethiopia."[14] The only exception being, in case of treaties, that the text which is submitted to Parliament by the Executive branch of the Government has to be accepted as submitted or rejected into without any amendment, unlike proposals of laws which are subject to amendment. When approving a treaty or agreement the Parliament approves a draft Proclamation submitted along with it, which states that the treaty or agreement signed on a given date between the contracting parties is duly approved. The publication of the said Proclamation in the Negarit Gazeta without the text of the treaty or agreement is the practice except in the case of the O.A.U. Charter, when the full text of the treaty was published.

As Wright states : "Though requirements for legislative participation may sometimes delay execution of treaties requiring positive action, undoubtedly popular participation in the conduct of foreign affairs frequently renders a State more likely to fulfill ordinary obligations of customary international law and treaty."[15]

12. Ratification of a treaty is an act by which the provisions of a treaty are formally confirmed and approved by the Emperor after the approval of the Parliament, with expression of willingness to be bound by the provisions of the instruments of ratification upon deposit or exchange of the instrument, unless otherwise stated in the treaty itself.
13. H.E. Lij Araya Abebe v. The Imperial Board of Telecommunication of Ethiopia (High Court, 1956 (E.C.), *J. Eth. L.*, Vol. 2, (1965) p. 305.
14. Kenneth Robert Redden, *The Law-Making Process in Ethiopia* (1966) pp. 29-30.
15. Quincy Wright, *"International Law in Its Relation to Constitutional Law," American J. Int'l. L.* Vol. 17 (1923), No. 2, p. 236.

The promulgation of the Proclamation approving a treaty or agreement, which falls under the "however clause" of Art. 30 of the Revised Constitution, makes it executory and applicable in Ethiopia.

On this point Preuse writes: "As in the case of a law, a treaty was obligatory, by virtue of its regular conclusion, executory, by virtue of its promulgation, and applicable, by virtue of its publication."[16]

Therefore, the role of parliamentary approval is very significant, as it gives such effect to treaties. It should be noted however, that ratification of an ILO convention differs from the ordinary ratification of a treaty which has been negotiated and signed by plenipotentiaries.[17] Because, they are not self-executing or intended to be so.

Non-unanimity exists among the authorities whether the effect of ratification is retroactive, so as to make a treaty binding from the date when it was duly signed by the representatives.

Mr. Jones writes, that the international law doctrine which states that the ratification of treaties gives the retroactive effect has been accepted by well-known writers on international law. The doctrine he discusses in his paper reads:

"A treaty is binding on the contracting parties, unless otherwise provided, from the date of its signature, the exchange of ratifications having, in such case, a retroactive effect, confirming the treaty from that date."[18]

On the other hand Oppenheim states:

"The fact that ratification imports the binding force to a treaty seems to indicate that ratification has normally no retroactive effect."[19]

The present writer submits that due to practical necessity the latter view should be maintained in Ethiopia. In other words, a treaty to which Ethiopia is a party, unless the treaty otherwise provides, should become binding from the date of its ratification rather than the date of signature.

D. Validity of a Treaty.

In order to have full obligatory force and give rise to international obligation a treaty must possess intrinsic or inherent validity, in addition to its formal and temporal validity, as asserted by the international jurists.[20] The term 'formal validity' and 'temporal validity' denote the regularity of conclusion and continuing existence and non-termination of a treaty respectively.[21]

Thus, in order that a treaty be legally binding, as Schuman puts it, certain conditions are essential: (1) The parties must be legally competent; i.e. they must

16. Lawrence Preuse, "*Relation of International Law to Internal Law in the French Constitutional System*," *American J. Int'l. L. Vol.* 44 (1950), p. 650.
17. J. L. Brierly, *The Law of Nations* (1963) p. 154.
18. Mervny Jones, "*The Retroactive Effect of the Ratification of Treaties*" *American J. Int'l. L.* Vol. 29 (1935) p. 51.
19. Oppenheim, cited above at note 3, § 518, p. 917.
20. United Nations, *Yearbook of the International Law Commission* (1958) Vol. II, p. 23.
21. Ibid.

be free under the terms of their Constitution and earlier treaties to contract the engagement. (2) The plenipotentiaries must have been fully accredited and must have acted within the scope of their authority. (3) There must be freedom of consent, with no sign of fraud, or coercion applied against the person negotiating. (4) Treaties must conform to international law, and must not infringe the right of a third State.[22]

Apparently, there are two main schools of thought concerning the international validity of treaties, and competence of the treaty-making power. The theories advocated by the two schools of thought are given below, as cited by Professor Briggs from the original source:

According to the Harvard Research, a summary of the opinions of a distinguished group of international lawyers[23] shows that there is a large body of doctrine to the effect that the international validity of treaties is a matter which is determined by international law, that while a State may by constitutional provisions limit and regulate the exercise of the treaty-making power, such provisions have no international significance, and that treaties made by the organs designated by the Constitution to exercise the treaty-making power are binding as international engagements even though the treaty-making organ or organs exceed their constitutional competence.

An equally distinguished group of writers,[24] maintain that the international validity of treaties and the competence of the treaty-making authorities are determined in part at least, by the constitutional law of the States which enter into them and that international law recognizes that this must be taken into account; . .that it is both the right and duty of a State when negotiating with another State to verify by incquiring the facts relative to the competence of the treaty-making organs of the latter State.. and therefore a treaty which is unconstitional or *ultra vires* for want of competence on the part of the treaty-making authorities or in excess of competence, is null and void and consequently not binding on the State whose Constitution has been violated.[25]

According to the same source, the Harvard Research, after examining the doctrine, the practice and jurisprudence of different States concludes: "It seems clear from this summary of the doctrine, the practice, and the jurisprudence, the preponderance of authority is in favour of the view: (1) that the competence of the treaty-making organs of a State is determined by the law of that State; and (2) that treaties made on its behalf by organs which are not competent under that law to conclude them are not binding internationally upon such State."[26]

The writer of this study, however, disagrees with the conclusion reached by the Harvard Research, and following the thinking of the first school of though, submits that a treaty made on behalf of a State by organs which are not competent under the law i.e. who exceeded their constitutional competence to conclude it, is not enforceable nationally in the State whose Constitution has been violated, although it

22. Frederik L. Schuman, *International Politics*, (6th ed., 1958), p. 126.
23. The names of the authorities omitted.
24. The names of the writers omitted.
25. Herbert W. Briggs, *The Law of Nations* (2nd ed. 1952), p. 846.
26. Id. 847.

may in some cases be binding internationally for reasons of the stability and security of the process of making international treaties and agreements.

To this effect, the comment to section 126 of the Restatement of Foreign Law reads in part:

"The practicalities of international relations, therefore, militate against acceptance of the view that would declare an international agreement not binding upon a State if made in excess of the Constitutional or domestic authority of the official acting on its behalf."[27]

Consequently, a treaty concluded on behalf of Ethiopia by organs designated by the Constitution to exercise the treaty-making power shall not be executed by courts nationally, if found to be in excess of the powers vested on them. But it may be binding upon Ethiopia internationally unless the other party to the treaty is in fact aware that the agent of Ethiopia is exceeding his authority. That is to say, such treaty can not be enforced by the municipal courts of Ethiopia; but international bodies may hold that such treaty is binding upon Ethiopia in accordance with the rules and practices of international law, if a dispute arises.

As quoted by Professor Bishop, the celebrated authority on International law, from Hackworth's Digest of International Law: "The treaty still subsists as an international obligation although it may not be enforceable by the courts or administrative authorities."[28]

Thus, legislation enacted either by the Parliament or the Executive branch does not relieve internationally the Government of Ethiopia of the obligations established by a treaty, while such treaty is not enforceable nationally for the following reasons.

A treaty cannot be valid in a country if it infringes its Constitution, because the power to make a treaty is derived from the Constitution. Hence, a treaty cannot legally provide the opposite of what the Constitution provides.

E. Need of Municipal Action to Implement Certain Treaties.

It might be advisable to point out at the outset the distinction between a self-executing treaty, and a non-self-executing treaty. As rightly stated by Byrd: a self-executing treaty provides, or in case of silence is later legally held to provide, that its provisions shall or may be implemented without the need of any additional authoritative instrument or legislation; whereas the provisions of a non-self-executing treaty may not be implemented until further authority has been provided by legislative or other action.[29]

The kind of treaties enumerated in the "however clause" of Art. 30 of the Revised Constitution should be backed by legislative action, i.e. Proclamation of approval, so that their execution may be enforced by Ethiopian Courts, if so required.

As to the treaties ratified by the Emperor without the approval of the Parliament, pursuant to the third sentence of Art. 30 of the Revised Constitution, it

27. The American Law Institute, *Restatement of the Law, The Foreign Relations Law*, (1962), 126, p. 462.
28. William W. Bishop Jr., *International Law, Cases and Materials*, (2nd ed. 1962), p. 145.
29. Elbert M. Byrd, Jr., *Treaties and Executive Agreements in the United States* (1960) p. 202.

would be expedient to issue "Executive Notice" so that the Courts may take a judicial notice of the treaty if any dispute arises.

One might cite Articles 55 and 56 of the Charter of the United Nations to which Ethiopia is one of the first signatory States, as an example of non-executing provisions. Those provisions of the Charter do not create rights and duties for individuals,[30] until implemented by legislation.[31] On the other hand, some constitutional provisions require that certain acts should not be taken unless provided by international agreement. For instance, Art. 50 of the Revised Constitution stipulates that: "No other person shall be extradited except as provided by international agreement."

The self-executing treaties, however, do not require any legislation to make them operative and effective.

PART II.

SUPREMACY AND EFFECT OF TREATIES.

Provided it possesses esential validity, a treaty to which Ethiopia is a party and which has been concluded in conformity with the Revised Constitution must be enforced in Ethiopia as supreme law by virtue of Art. 122.

Treaties concluded prior to the promulgation of the Revised Constitution are enforced because Order No. 6 of 1952 makes all international treaties, conventions and obligations then in force, part of the supreme law of the Empire.[32] The scope of this Order was extended later by the Public Rights Proclamation No. 139 of 1953, which stipulates: in addition to existing treaties, international conventions and obligations in force in 1952; all treaties, international conventions and obligations and executive agreements[33] henceforth concluded and/or ratified shall be the supreme law of the Empire, and shall be self-executory.[34] However, the supremacy of treaties concluded and/or ratified prior to the promulgation of the Revised Constitution is not of the same standing with the supremacy of treaties concluded since then, as shall be explained later.

A. Analysis of Art. 122.

The English text of Art. 122 of the Revised Constitution reads:

"The present Revised Constitution, together with *those international treaties, conventions and obligations to which Ethiopia shall be a party, shall be the supreme*

30. Brierly, cited above at note 17, p. 117.
31. Treaty implementing legislation is legislation enacted to enforce or otherwise effectuate a non-self-executing treaty.
32. Federal Incorporation and Inclusion of the Territory of Eritrea within the Empire of Ethiopia Order, 1952, Art. 8, Order No. 6, *Neg. Gaz.*, year 12, no. 1.
33. It should be noted that, unlike the English version of Art. 1 of the Proclamation No. 139 of 1953, the enumeration in Art. 122 of the Revised Constitution, of the types of treaties and international agreements that are given the status of supreme law of the Empire does not include "executive agreements".
34. Public Rights Proclamation, 1953, Art. 1. Proclamation No. 139, *Neg. Gaz.* year 13, no. 3.

law of the Empire, and all future legislation, decrees, orders, judgments, decisions, and acts inconsistent therewith, shall be null and void." (Emphasis added).

Note, first, that the Amharic version of the same Article differs from the English version. The literal translation of the Amharic version is:-

"This Revised Constitution, together with those international treaties, world conventions and obligations to which Ethiopia shall be party (with connotation of futurity) shall be the supreme law of the Imperial Government. All legislations, decrees, judgments, decisions to be made in the future, if inconsistent with this Constitution, shall be null and void."

Besides the difference in construction of the sentence, (i.e. one complex sentence in the English version in contrast to two short sentences in the Amharic version); the main differences are: (1) that "Imperial Government" and "world conventions" are used in the Amharic version instead of "the Empire" and "international conventions" respectively; (2) that the legal term "orders" and "acts" do not exist in the Amharic version at all and (3) the technical term "therewith" is used in the English version to mean the Constitution and treaties, while in the Amharic the language used is "inconsistent with this Constitution." The latter variances in the two texts makes a considerable difference as will be demonstrated later.

B. Definition of The Technical Terms Used in Art. 122.

(i) The word "international", in the first place, qualifies the terms treaty, convention and obligation that had been concluded by Ethiopia with other State, or States or International Orgnization; and secondly, it denotes that such treaties operate within the sphere of international law.

(ii) A "treaty" is a written agreement (compact) between two or more States or International Organizations, signed by their duly authorized representatives, creating a relation and obligation between themselves, and ratified by the supreme organ(s) in accordance with the constitutional requirements of the contracting parties.

It should be noted here, that a concession contract is not an international treaty by definition,[35] because it is a contract between a State and an individual investor or a firm, and not an agreement concluded between a State and another State or International Organization. Consequently, except in a very few special cases, a concession contract is governed by the public law of the contracting State rather than by international law in general, and the law of treaties in particular.

(iii) The term "convention" is usually used to describe a multipartite instrument, or a bilateral arrangement of a technical nature, or a contract which determines the relation between States in some special field. To this effect Myers writes:

"Convention has become the standard name of instruments produced by multilateral bodies, which in particular instance study specific phases of a general subject."[36] Thus, this term covers(1) multilateral law-making treaties; (2) treaties con-

35. N. March Hunnings, *International Law in a Nutshell* (1959) p. 46.

36. Denys P. Myers, "*The Names and Scope of Treaties*," *American J. Int'l L.* Vol. 51 (1957) p. 587.

cluded under the auspices of the League of Nations or the United Nations; and (3) the Labour and Red Cross Conventions, negotiated by the International Labour Organization (ILO) and the International Red Cross Organizations respectively.

(iv) The term "obligation" may have two interpretations. In the broader sense, it denotes the international obligations that Ethiopia is required to respect under international law,[37] like sending troops to Korea and Congo, pursuant to the Resolution of the Security Council of U.N., and abiding by the general rules of international law.[38] In the narrower sense, it denotes merely the contractual engagements or treaty obligations of Ethiopia, i.e. paying its national debts in due time.[39]

It is not clear whether the term "obligation" is used in Art. 122 of the Revised Constitution in its wider or narrower sense. But the present writer, however, reads it in a narrower sense. Incidentally, the term "obligation" is not mentioned in Art. 30 of the Constitution, which requires ratification of all international treaties and agreements.[40]

This study does not attempt to treat "international obligation" in its broader interpretation, since that is a major topic by itself which requires further and thorough study of the applicability in Ethiopia of customary international law rules recognized in other civilized States. Thus, the term "obligation" is treated in this study in its narrow sense only.

(v) The term "supreme law" denotes that the Revised Constitution and treaties concluded in accordance with Art. 122 are superior to all laws in the hierarchy of laws in Ethiopia, under which if found to be inconsistent, all other laws shall be declared null and void by Ethiopian courts.[41]

Taken together, those technical terms clearly stipulate that international treaties, agreements, conventions or obligations to which Ethiopia is a party, and made pursuant to the Revised Constitution are (along with the Revised Constitution) superior to ordinary laws in the hierarchy of laws in Ethiopia.[42]

C. Finding as to the Supremacy of Treaty.

Treaties are declared by the Revised Constitution to be the supreme law of the Empire, when concluded in accordance with the provisions of the Revised Constitution of 1955.

Moreover, according to the English version of the supremacy clause of Ethiopia, all future legislation (proclamations), decrees, orders, judgments, decisions and acts[43] inconsistent with the Constitution and international treaties, are null and void,

37. Charles G. Fenwick, *International Law* (4th ed. 1965), p. 110.
38. Maritime Proclamation, 1953, Art. 101. Proclamation, No. 137, *Neg. Gaz.*, year 13, No, 1.
39. See note 9 *supra*, Art. 25 (h), Order No. 46, *Neg. Gaz.*, year 25, No. 23.
40. The term "international agreement" is not used in Art. 122, as in Art. 30 and 50 of the Revised Constitution.
41. R.C. Means, "*The Constitutional Right to Judicial Review of Administrative Proceedings: Threshold Question*," *J. Eth. L.*, Vol. 3, (1966) p. 181.
42. G. Kreczunowicz, "*Hierarchy of Laws in Ethiopia*," *J. Eth. L.*, Vol. 1. (1964), p. 111.
43. The word "act" is used in Art. 122 of the Constitution to denote Governmental action imposing duty or obligation on individuals.

specifically in the case of the former, and inferentially in the case of the latter. That is to say, any legislation enacted by the legislative or the executive branch; or any decision or act by the administrative body or the judiciary, made contrary to the supreme law, shall be declared null and void under the public law, as unconstitutional. If declared unconstitutional, it is unenforceable by the Ethiopian courts.

On the other hand, since the Amharic version of Art. 122 does not employ the term "order" and "acts" in the enumeration of future legislation and governmental acts to be declared null and void, if found to be inconsistent with the supreme law, any future "orders" or governmental "acts" may not be subject to such declaration according to the Amharic version. Even though, strictly speaking, the Amharic version prevails over the English version in case of contradiction, due to the fact that Amharic is the official language of Ethiopia by virtue of Art. 125 of the Revised Constitution, the later conclusion could not be maintained as logical. There is no rational basis for holding "orders" and "acts" valid when contradicting the supreme law, whereas proclamations, decrees, judgments and decisions are to be declared null and void, if found to be inconsistent with the supreme law of the Empire.

Since the variance between the English and the Amharic version of the Article under review seems to be an over sight in translation from the English text into the Amharic; and the logical reading of the Article requires that the omitted technical terms be read into the Amharic version as well, the writer suggests that the Amharic version should be considered to mean what the English version stipulates.

Moreover, as pointed out earlier there is a difference between the English and the Amharic version of Art. 122 of the Revised Constitution arising from the fact that "inconsistent therewith" is used in the English version, while "inconsistent with this Constitution" in the Amharic version.

The term "therewith" in the English version seems to mean the Constitution and treaties. On the other hand, the Amharic excludes treaties, as the language used is "inconsistent with this Constitution."

This is a discrepancy created by a bad translation of the complex and involved Article under consideration. The fact that both the Constitution and international treaties are made the supreme law of the Empire, as stipulated both in the Amharic and the English version of Art. 122 of the Revised Constitution justifies a conclusion that the difference arises from bad translation of the legal terminology "therewith" from English into Amharic, rather than a legislative intent to make a distinction between the Constitution and international treaties, in respect to their taking precedence over all legislation, and limiting subsequent national legislation. Otherwise, there is no justification in placing treaties as part of the supreme law, if future legislation, decress, orders, judgments, decisions and acts inconsistent therewith shall not be declared null and void.

The technical term "therewith" should therefore include both kinds of supreme law — the Revised Constitution and international treaties — in the sense it is used in the English version of the Article under review. The logical reading of the Article as well as the doctrine of the supremacy clause leads to such conclusion.

As far as a treaty is concerned, the words, 'shall be null and void' in Art. 122 of the Constitution, means that the treaty will be of no force or effect insofar as the municipal or domestic aspects of the treaty are concerned. The international

obligation of the treaty are not affected by this language for the external force and effect of such treaties are governed by international law due to the contentions advanced earlier. In other words, a treaty would not lose its international validity because in substance it violated the Constitution, and thereby lacked domestic validity. In the words of Kuhn, international, not municipal standards of law should determine a treaty's scope and the limitation of its use.[44]

In short, the supremacy of a treaty means essentially two things: its provisions takes precedence over all legislation, except the Revised Constitution; and further, treaty provisions not only invalidate previous national law, but also limit subsequent national legislation. (See Pages 415–417).

Incidentally, the Constitution of Ethiopia, unlike its counterpart the Constitution of United States of America, does not consider as part of the supreme law, treaties made prior to the promulgation of the Revised Constitution, i.e. November 4th, 1955.

This contention is based on the usage of the first "shall" employed in Art. 122 of the Revised Constitution.

The world "shall" is employed in Art. 122 of the Revised Constitution with the connotation of futurity, and should be read to mean that only treaties concluded or adhered to by Ethiopia subsequent to November 4, 1955 are to be considered as part of the supreme law of the Empire. The word "shall" is not used here in the imperative sense as it is usually used in legal drafting. In other words, the context does not include treaties concluded prior to November 4, 1955 for the following reasons:-

a) In order to avoid ambiguity, the Revised Constitution consistently used the word "is" instead of "shall", whenever it was desired to give effect in the future to past happenings. For instance Articles 123, 124, 125 and 126 of the Constitution used the word "is" in the imperative sense rather than the usual word "shall", which was used in other Articles of the Constitution. Under such circumstance one may contend that those Articles embrace past happenings. If Art. 122 was intended to give the same status to treaties concluded prior to, and subsequent to November 4, 1955 the verb "is" should have been used instead of "shall", as in the case of subsequent Articles cited above.

b) The Amharic version of the same Article uses the word "shall" with the connotation of futurity. Since Amharic is the official language of the Empire by virtue of Art. 125 of the Revised Constitution, the reading of the Amharic version should be given more weight. Consequently, the first "shall be" in the English version of the Article under consideration has been employed not in the imperative sense but with connotation of futurity. The second "shall be" is used, however, in the imperative sense of the word.

c) It is a well-established rule of law, that new legislation should not have a retroactive effect, unless specifically provided therein. Accordingly, Art. 122 of the Revised Constitution should not be read to imply that treaties concluded prior to the promulgation of the Revised Constitution are to be considered as part of the supreme law retroactively.

44. Arther K. Kuhn, "*The Treaty-Making Power and the Reserved Sovereignty of the State*," *Columbia Law Review*, Vol. 7 (1907). p. 185.

d) Last but not least, an inquiry as to the legislative intent made by the writer of this study, does not support the view that Art. 122 of the Revised Constitution was intended to give the status of supreme law, to treaties concluded prior to the enactment of the present Constitution.

Therefore, Art. 122 of the Revised Constitution does not give equal status to treaties concluded prior to the promulgation of the present Constitution. In other words, the pre-Revised Constitution treaties. are not now the supreme law of the land (Empire).

Neverthless, the fact of not putting treaties concluded prior to the promulgation of the Revised Constitution on an equal level with treaties negotiated after the promulgation of the Revised Constitution does not mean that Ethiopia will not respect her obligations under these treaties. On the contrary, provided they possess essential validity, irrespective of the fact that they are not placed on an equal footing with the Constitution, Ethiopia has to respect them and they are operative and binding until such time as she substitutes them with treaties negotiated on better terms. The *Tesemma Wolde Yohaness Vs. Van Bethvson and Jack Hensel's case*,[45] may be cited as an example, of the fact that Ethiopia respects her treaty obligation, inspite of the fact that this is inconsistent with her law in force.

The holding of the Awraja Court in the cited case, substantiates the contentions advanced elsewhere in this study, *inter alia:*

(i) that provided it possessed essential validity, irrespective of the fact that it is not made part of the supreme law, a treaty concluded prior to the promulgation of the Revised Constitution should be respected until formally terminated or replaced by another treaty;

(ii) that a treaty prevails over a primary law, as the treaty in point superseded the Administration of Justice Proclamation of 1942, which gave jurisdiction to the Awraja Courts to hear such cases; and

(iii) that Courts have to interpret and enforce treaties made prior to the promulgation of the Revised Constitution, due to Art. 8 of Order No. 6 of 1952 and Art. 1 of Proclamation No. 139 of 1953.

D. The Relationship Between Municipal Law And Treaties.

International law including treaty is usually received into the national law in two ways:

a) by prescribing in the national law, the penalties for the offences agreed upon by the civilized States as international crime, e.g. as provided in Articles 281-295 inclusive, of the Penal Code of Ethiopia of 1957; and

b) by incorporating treaties into the national legal framework in general terms, as provided in Art. 122 of the Revised Constitution.

Thus, Art. 122 of the Revised Constitution integrates or incorporates treaties concluded since November 4, 1955 into the internal legal system of Ethiopia.

45. Tesemma Wolde Yohaness Vs. V. J. Van Bethvson and Jack Hensel (Addis Ababa Awraja Court, Civil Case No. 3309 of 1956 E.C.)

Treaties concluded prior to the promulgation of the Revised Constitution are incorporated into the legal system by Order No. 6 of 1952 and Proclamation No. 139 of 1953.

Otherwise, in case of any dispute arising out of such treaties, the Ethiopian courts may not have a legal basis to enforce those treaties. To this effect, Kaplan and Katzenbach write:

"National courts ...apply international law only because the latter has been received into, or incorporated within, the national law."[46]

PART III

CONFLICTS OF TREATIES.

A. Conflicts Between Two Treaties.

One of the authorities in internnational law, Kelsen concluded his writing on conflicts between treaties by saying: "If the conflicting treaties are concluded by the same contracting parties, according to general international law the rule *lex posterior derogant priori* applies. The latter treaty abrogates the earlier treaty. It is, however, possible that a treaty establishes the contrary principle: *lex prior derogant posteriori*, that is to say, that a latter treaty (concluded by the same parties) shall be null and void if incompatible with the first treaty."[47]

The writer of this study submits that, in case of conflicts between two treaties concluded by Ethiopia with the same contracting party the treaty latter in point of time shall abrogate the provious treaty.

But, in case of conflict between two treaties, each with a different other State, the result will be different.

As to priority of conflicting treaty obligations Briggs writes:

"Although many writers assert that a latter treaty is null and void if in conflict with a prior treaty between one of the parties and a third State, the Harvard Research in Art. 22 (c) merely stipulated that the earlier treaty takes priority".[48]

The writer of the present study suggests that the second treaty, although inconsistent with the first, should not be held to be invalid, but the earlier treaty be given priority in execution, while making reparation for the damage caused by the non-performance of the latter treaty. The rational for an earlier treaty receiving priority over a latter treaty in terms of execution is to find a way out of such dilemma, and to satisfy the old legal maxim: *Pacta Sunt Servanda*, i.e. agreements must be observed. To this end, Prof. Wehberg states: Without the recognition of the principle of and adherence to treaties there can be no intercourse between nations or any international law.[49]

46. M. A. Kaplan and DeB. Katzenbach, *The Political Foundation of International Law*, (1961), p. 268.
47. Hans Kelsen, *The Law of the United Nations.* (1964) p. 112.
48. Briggs, cited above at note 25, p. 908.
49. Hans Wehberg, "*Pacta Sunt Servanda*," *American J. Int'l L.* Vol. 53 (1959 supp.) p. 786.

B. Conflicts between Treaties and Municipal Law.

The conflicts between treaties and municipal law can arise in Ethiopia in various ways: (a) conflict of treaty with prior primary law (Proclamation or Decree); (b) conflict of latter primary law with prior treaty; and (c) conflict between treaty and constitutional provisions.

(i) Conflict of Treaty with Prior Primary Law.

When a primary law, i.e., Proclamation or Decree enacted pre-Revised Constitution, and a treaty concluded prior to November 4, 1955 are wholly inconsistent with each other, and the two cannot be reconciled, the latter must prevail by virtue of Art. 8 of Order 6 of 1952, and Art. 1 of Proclamation No. 139 of 1953. Similarly, when a prior law, enacted since the promulgation of the Revised Constitution and a treaty concluded afterwards are wholly inconsistent with each other, the treaty shall be considered to have amended the prior legislation, and as the supreme law it should prevail by virtue of Art. 122. It is to avoid such conflicts that Art. 30 of the Revised Constitution makes it imperative that all treaties and international agreements modifying legislation in existence be ratified by the Emperor after the approval of the Parliament, before becoming binding upon the Empire and inhabitants thereof.

(ii) Conflicts of Treaty with latter Primary Law.

Unlike in the U.S.A.,[50] no primary law, even if later in point of time, may be enforced in Ethiopia contrary to treaty rights or obligations, and no treaty may be abrogated or modified by latter primary law.

As to contradiction between a treaty and latter primary law, authorities on constitutional law state that: "even if a treaty may be modified by a latter law, such law ought never to be construed to violate the law of nations (which of course includes treaties) if any other possible construction is possible."[51]

The final provisions of Proclamation No. 137 of 1953, lays down a general rule which is in line with this opinion. The provision in point reads in part:

".. This Article is not to be construed as being inconsistent with the continuance of existing obligations under international treaty or convention to which We are a party."[52]

In addition, treaties being part of the supreme law may not be superseded by any subsequent legislation. That is to say, since treaties are part of the supreme law of the Empire, all future legislation, decrees, orders, judgments, decisions and acts inconsistent with duly ratified treaty shall be null and void, as laid down in Art. 122 of the Revised Constitution.

(iii) Conflicts of Treaties with the Provisions of the Constitution.

Provided it is concluded in accordance with the Revised Constitution a treaty is placed on equal level and made of like obligation with the Constitution of

50. In the case of the Cherokee Tobaco (Boundinot v. United States) the Supreme Court spoke as follows: "A treaty may supersede a prior Act of Congress (Foster and Elen V. Nelson) and an Act of Congress may supersede a prior treaty (Taylor V. Morten ...)"

51. Roland J. Stanger, *Cases and Materials on Public International Law*, (1966-1967) unpublished, Library, Faculty of Law Haile Selassie I University. p. 123.

52. See note 38 *supra*.

Ethiopia. Since both are declared to be supreme law, no superior efficacy is given to one over the other in the language of Art. 122 of the Revised Constitution. But if the two are incompatible, the Revised Constitution will prevail over the treaty, even if the treaty was concluded after November 4, 1955, because, a treaty to be binding upon Ethiopia municipally must be consistent with the Constitution in the first place, and meet the requirements of Art. 30 of the Revised Constitution. As Byrd puts it: " . .a treaty is to be measured by the Constitution, and if in violation of it, must fall."[53] Therefore, a treaty entered into in conformity with the Constitution so far as procedure goes, but which, in substance, violates some other provision of the Constitution shall be declared null and void by the Courts of Ethiopia.

Because, an action to be taken under the power to make international treaty is checked by other provisions of the Constitution, and any violation of such limitations makes the treaty null and void. Thus the power to make treaty, grounded in the Constitution must be determined not only by the constitutional language granting it but also by the restrictions placed upon it by other constitutional limitations. The samet is pointed out in the Restatement of the Foreign Relations Law.[54] Illustrations:-

If State A, in reciprocity of an offer, is willing to conclude a treaty with Ethiopia, under which the nationals of that State who are residents of the Empire are prohibited to bring suit, against the Government of Ethiopia or instrumentality thereof, for the wrongful act resulting in substantial damage, would Ethiopia constitutionally enter into such treaty? The answer is obviously no. Because, such treaty curtails one of the rights guaranteed in Chapter III of the Revised Constitution of Ethiopia, notably the right of redress under Art. 62 (b) of the Constitution.

The conclusion of a treaty which prohibits the nationals of the other contracting State, who are residents of Ethiopia, from exercising their right of redress under Art. 62 (b) of the Constitution is unjustifiable, as it does not fall under any of the criteria laid down in Art. 65 of the Revised Constitution. Art. 65 of the Constitution stipulates that: (1) respect for the rights and freedoms of others; (2) the requirements of public order, and (3) the general welfare, alone justify any limitation upon the rights guaranteed in the Bill of Rights of Ethiopia i.e. rights enumerated in Chapter III of the Revised Constitution.

Such treaty is unjustifiable under Art. 65 of the Revised Constitution, due to the fact that it does not meet any of the criteria laid down therein.

Hence, such a treaty could not be constitutionally concluded by Ethiopia even with the approval of the Parliament. The power of Ethiopian Government to deal with a matter by international treaty is, therefore, limited by the restrictions placed upon it by other constitutional limitation.

In the case of the pre-Revised Constitution treaties, the fact that they were not entered into procedurally as now required by Art. 30 of the Revised Constitution does not affect their validity now. Since one can't get out of treaty obligation just by changing its own Constitution, they still remain binding internationally. Due to

53. Byrd, cited above at note 29, p. 84.

54. The American Law Institute, cited above at note 27, p. 437.

the fact that they have been incorporated into municipal law of Ethiopia by Order No. 6 of 1952 and Proclamation No. 139 of 1953, they are binding domestically too. Consequently, a treaty concluded either under Art. 14 of the 1931 Constitution of Ethiopia, or according to the treaty making practice prior to 1931, even if found to be incompatible with the provisions of the present Constitution shall be enforced unless terminated or until such time that it is replaced by a treaty renegotiated with the other contracting party. Because Art. 122 of the Revised Constitution does not affect any treaty that was in force at the time the Revised Constitution was promulgated. The pre-Revised Constitution treaties, even if they deny some substantive rights now guaranteed by the Revised Constitution shall not be declared null and void under the same Article.

Such a result places the Government in a dilemma. Because, the Government had to choose between two evils. It had to choose between (a) breaching the provisions of the treaty while maintaining the substantive rights now guaranteed by the Constitution; and (b) maintaining the treaties even if incompatible with the provisions of the Revised Constitution while denying the people some of the substantive rights guaranteed by the Revised Constitution. This is a difficult choice as the consequence of both is so great.

However, this is not at all, a problem without any solution. The Government may overcome such a problem by re-negotiating the terms of the treaty with the other contracting party, or parties, so that its provisions shall conform with the provisions of the Revised Constitution.

C. Conflicts of Treaties with the Charter of the United Nations Orgnization

As rightly pointed out by Lord McNair, many of the provisions of the Charter of the United Nations, a treaty purporting to create legal rights and duties possessing a constitutional or semi-legislative character, with the result that member States cannot contract out of them or derogate from them by treaties made between them, and that any treaty whereby they attempt to produce this effect would be void.[55] The provisions in point are paragraphs 3 and 4 of Article 2 of the United Nations' Charter, which creates rights and duties (a) as between members of the U.N.O. and (b) as between the United Nations and its members.[56]

Besides, Article 103 of the Charter provides:

"In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

As to retrospective and prospective operation of this provision Lord McNair writes:

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55. Lord McNair, *The Law of Treaties* (1961), p. 217.

56. Article 2 of the Charter reads in part:-

"3. All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

"4. All members shall refrain in their international relations from the threat or use of force against the territorial intergrity or political independence of any State, or in any other manner inconsistent with the purpose of the United Nations."

(i) So far as concerns existing agreements between members, it merely declares the existing rule of law to the effect that such agreements can be validly modified by a latter agreement, in this case the Charter; so far as future agreements are concerned, they thereby agree with all the members and with the United Nations that they can not contract valid obligations which conflict with those contained in the Charter.

(ii) So far as concerns agreements between members and non-members the position is not quite so clear. Our submission is that as regards existing treaties members are precluded by the Charter from performing a treaty which conflicts with the Charter, for instance, one which involves the unlawful use of force, and further, they are probably under a duty to use all lawful means to liberate themselves from obligations which conflict with the Charter; while as regards future treaties no member can create any valid obligation inconsistent with the Charter; moreover, a co-contracting non-member is aware of the fact, because the Charter must be regarded as what an English lawyer would call a 'notorious' instrument; and a non-member state must be deemed to know whether a State with which it is about to contract is a member or not. This view does not imply that the United Nations by their Charter have power to make rules binding upon a non-member; it means that members by acceptance of the Charter, a constitutive instrument, have accepted a limitation of their treaty-making capacity.[57]

Accordingly, by virtue of Article 103 of the United Nations' Charter in case of conflicts between Ethiopia's obligations under the Charter and under other international treaties the former shall prevail over the latter. This conclusion is substantiated by the general principle advocated by Kelsen on conflicts between obligation under the Charter and obligations established by treaties concluded between U.N. members, viz.; "For according to general international law, such treaty, if concluded before the Charter has come into force, is abrogated by the Charter; and if concluded after the Charter has come into force, the treaty inconsistent with the Charter is null and void under other provisions of the Charter. For such a treaty is an attempt to amend or abolish the Charter or parts of it in the relation of the members, parties to this treaty."[58]

In short, a treaty concluded prior to the Charter is abrogated by the Charter. And a treaty concluded subsequent to the Charter of U.N. is null and void by virtue of the Charter, if found to be inconsistent with the provisions of the said Charter.

It should be noted also that the Charter of the U.N. in Article 102 stipulates that all international treaties must be registered with the Secretariat of U.N., in order to avoid such conflict, and for purpose of constructive notice to other States. At its 65th meeting the General Assembly of the U.N. adopted Regulations to give effect to Art. 102 of the Charter. Effect of non-registration of treaties is that it may not be invoked before any organ of the United Nations (including the International Court of Justice) and not to take away the validity of the treaty.[59]

57. McNair, cited above at note 55, pp. 216-218.
58. Kelsen, cited above at note 47, p. 113.
59. Brierly, cited above at note 17, p. 324.

D. Conflicts of Treaties with the Charter of O.A.U.

The Charter of the Organization of African Unity (O.A.U.) signed on 25th of May 1963, is a multilateral treaty by definition.

The Charter signed and ratified by the signatory States in accordance with their respective constitutional processes, as required by Article XXIV of the Charter, is binding on all the signatory States. As far as Ethiopia is concerned, since the Charter, an international treaty, has been duly ratified,[60] it is part of the supreme law of the Empire, in the language of Article 122 of the Revised Constitution.

Therefore, in case of conflict between the provisions of the Charter of O.A.U. and primary legislation of Ethiopia, the provisions of the O.A.U. Charter control as it is treaty proclaimed to be part of the supreme law of Ethiopia. But in case of conflict between any resolution passed either by the Assembly of Heads of State and Government or the Council of Ministers of O.A.U. and any legislation, the municipal law shall prevail, due to the fact that a resolution is just an understanding on a point of principle to be followed in common by member States, and not a binding treaty. Only a treaty duly negotiated and ratified in accordance with its constitutional processes binds Ethiopia, as laid down in Article 30 of the Revised Constitution of 1955.

E. Solution of Treaty Conflicts.

Kelesn suggests the following solution of treaty conflicts:

"In order to solve the conflict between two inconsistent treaties concluded partly by the same parties in a more adequate way than that provided for by general international law, it has been suggested that the State which has concluded two inconsistent treaties should be bound to perform only the first concluded treaty and to make reparation for the damage caused by the illegal nonperformance of the subsequently concluded treaty. Both treaties remain valid, but a priority of execution is established with respect to the previously concluded one."[61]

Accordingly, in case of incompatibility of treaties with one another, Ethiopia may employ such solution to resolve conflict between its two inconsistent treaties.

F. Reconcilation of Municipal Law with Treaties.

According to international law, and practice, parties who enter into a treaty engagement are expected *ipso facto* to bring their municipal law into conformity with their international treaties.

Since treaty are part of the supreme law of the Empire, for Ethiopia the obligation to bring her municipal law into conformity with treaties to which she is a party and to maintain it, is not only a matter of international necessity, but it is a constitutional requirement too. Because it is a well-established rule of constitutional law that all primary and subordinate laws should be consistent with the supreme law, i.e. the Constitution and treaties in the case of Ethiopia. In fact by virtue

60. Charter of the Organization of African Unity Approval Proclamation, 1963, Proclamation No. 202 *Neg. Gaz.*, year 22, no. 16.

61. Kelsen, cited above at note 47, p. 117.

of Art. 122 of the Revised Constitution, the provisions of municipal laws enacted after the promulgation of the Revised Constitution cannot prevail over those of the treaties to which Ethiopia had become a party after November 4, 1955; provided they possess essential validity.

However, this should not be construed to mean that Ethiopia has to change the provisions of her Constitution so that they conform with treaties to which she is a party. Even though treaties concluded after November 4, 1955 are placed on equal level with the Constitution they are, however, required to conform with the provisions of the Revised Constitution, in order to have essential and formal validity, as well as municipal effect.

Thus Ethiopia may not invoke a provision of her municipal law to justify non-performance, provided that the conclusion of the treaty satisfies the requirements of her Constitution.

On the same point, the Permanent Court of International Justice at The Hague[62] in its advisory opinion on the treatment of Polish Nationals in Danzing said:

"A State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[63]

The Harvard Research also in Article 23 states:

"Unless otherwise provided in the treaty itself a State cannot justify its failure to perform its obligations under a treaty because of any provisions or omission in its municipal law, or because of any special features of its governmental organization or its constitutional system."[64]

The Russian lawyers go further and suggest that:-

"...both the rules of International Law and those of domestic origin should have the same binding force for all organs and nationals of the countries concerned. But by concluding an international agreement a governing authority undertakes, if necessary, to bring its domestic legislation into line with the international commitments it has assumed."[65]

Hunnings also spells out the main principles of municipal law in international law as follows:

"(a) A State may not plead that the violation of treaty or its non-fulfilment of international obligations is due to its Constitution or to the acts or omissions of either of the three branches or other organs of its government.

(b) A State may not pass legislation which endangers the treaty rights of other States.

(c) A State which has contracted international obligations is bound to give effect to them in its municipal legislation.

62. Ethiopia ratified the Statute of the Permanent Court of International Justice (Now the International Court) in July, 1926.

63. McNair, cited above at note 55, pp. 100-101.

64. Id., pp. 78-79.

65. Academy of Sciences of the U.S.S.R. Institute of Law, *International Law*, p. 15.

(d) The evasive form of a measure under municipal law is irrelevant if in fact it amounts to a violation or nonfulfilment of an international obligation."[66]

In simple terms all this means: deficiency in municipal law does not afford a defence to an action for breach of treaty obligation; and a State party to a treaty cannot excuse itself for non-performance, by pleading that its municipal law or organization prevented it from performing the obligation under treaty or did not enable it to do so.

Therefore, Ethiopia has to make its primary and subordinate laws to conform with treaties she is party to, if any of them conflicts with its treaty engagements.

Moreover, since the provision of the Constitution accords an equal status to the Constitution and treaties, the Ethiopian Courts should apply and interpret treaties of all kind which may come before them. As Kaplan and Katzenbach rightly stated, in United States (as in Ethiopia) the Constitution specifically describes treaties as "supreme law" and inferentially assigns courts the task of their interpretation.[67]

Thus, all branches of the Government of Ethiopia — legislative, executive and judicial — should give effect to treaties to which Ethiopia is a party. Treaties concluded prior to the promulgation of the Revised Constitution and which are inconsistent with the provisions of the Revised Constitution should be re-negotiated, so that they conform with the provisions of the Revised Constitution.

CONCLUSION

Prior to November 4, 1955 (the date of promulgation of the Revised Constitution), the treaty-making power was conferred by Art. 14 of 1931 Constitution on the Emperor, without any limitation. After the promulgation of 1955 Constitution, even though the treaty-making power is vested on the Emperor by Art. 30, it is somewhat limited, as parliamentary approval for certain kinds of treaties, enumerated in the "however clause" of the same Article, is made imperative.

Up to the promulgation of Order 46 of 1966, the Foreign Minister was delegated by Art. 43 (f and g) of Order No. 1 of 1943, to negotiate treaties and agreements on behalf of the Empeor. Since then, however, the Ministers of Foreign Affairs, Finance and formerly the Minister of Planning and Development (presently the Head of the Planning Commission Office) are delegated by Order No. 46 of 1966 and Order No. 63 of 1970, to negotiate and conclude treaties. While the treaty-making power delegated to the Minister of Foreign Affairs is a general one, the power delegated to the Ministers of Finance and the Head of Planning Commission Office are limited to agreement dealing with loans and credits in the case of the former, economic aid and technical assistance in the case of the latter. The other Ministers and Heads of Public Authorities conclude protocols or agreements dealing with cultural relations and execution of joint projects (financed from a fund contributed by the contracting parties) provided for in a prior umbrella agreement signed by a duly authorized official of the Government.

66. Hunnings, cited above at note 35, p. 8.

67. Kaplan and Katzenbach, cited above at note 46, p. 269.

The prerogative to ratify treaties and to determine which treaties and international agreements shall be subject to ratification before becoming binding upon Ethiopia, is reserved to the Emperor alone, by Art. 30 of the Revised Constitution. However, this prerogative is subject to the proviso of the same Article, and cannot be delegated.

As to reconciling of Arts. 1 and 30 of the Revised Constitution, the writer submits that Art. 1 being too general and placed in the general part of the Constitution, should be interpreted in the light of Art. 30 of the same Constitution, which is specific provision for treaty-making power in Ethiopia. Moreover, according to the Amharic version, which is the official one (by virtue of Art. 125 of the Revised Constitution) treaties which might bring about any damage or loss of property or physical injury on Ethiopian subjects must be laid before Parliament for approval before ratification.

It is submitted also, on the basis of the foregoing examination of Art. 122 of the Revised Constitution, that treaties to which Ethiopia is a party, and concluded in accordance with the Revised Constitution of 1955, must be enforced in Ethiopia as the supreme law of the Empire. Because, by the express words of the Constitution such treaties are proclaimed as the supreme law of the Empire along with the Revised Constitution. In other words, treaties concluded in accordance with the Revised Constitution are placed on equal level, and made of like obligation with the Constitution by virtue of Art. 122 of the Constitution, which integrates or incorporates treaties directly into internal legal system of Ethiopia.

As part of the supreme law of the Empire, treaties, therefore supersede all ordinary laws of Ethiopia, in case of conflicts. In case of conflict between a treaty and the provisions of the Revised Constitution, however, the provisions of the Constitution shall prevail over the treaty, ever if the treaty is later in point of time. Because, a treaty to be binding on Ethiopia and the inhabitants thereof, must be consistent with the Constitution, and possess intrinsic or inherent validity, in addition to its formal and temporal validity.

Granted that a treaty is formal and validly concluded, it becomes a supreme law in the hierarchy of laws in Ethiopia, if executed after the promulgation of the Revised Constitution. Thus, all primary laws, shall be declared null and void, if found to be inconsistent with a treaty. In other words, any legislation enacted by the legislative, or the executive branch, or any decision or act made by the administrative body or the judiciary, contrary to the supreme law, i.e. the Constitution and international treaties shall be null and void, as provided in the supremacy clause, i.e. Art. 122 of the Revised Constitution of Ethiopia. But a treaty which provides the opposite of what the Constitution provides should not stand. Here the words, "shall be null and void" mean that a treaty which violates the provision of the Revised Constitution, or any future legislation, decrees, order, judgments, decisions and acts that are inconsistent with the treaties made pursuant to the Revised Constitution, will be of no force or effect insofar as the municipal or domestic aspects of the treaty are concerned. The international obligation of the treaty are not, however, affected by this language for the external force and effect of such treaties are governed by international law.

In case of conflicts between Ethiopia's obligation under the U.N. Charter and the other international treaties, the provisions of the Charter prevail. Because, the Charter is law-making treaty and Ethiopia by signing and ratifying it has obligated herself not to contract out of it or derogate from it. In case of conflicts between

Ethiopia's obligation under O.A.U. Charter and other international treaties, however, the one earlier in point of time takes priority.

As to treaties concluded prior to the promulgation of the Revised Constitution, the writer of this study ventures to propose that, such treaties should be enforced provided they possess essential validity as they have been incorporated into the municipal law by Art. 8 of Order No. 6 of 1952, and by Art. 1 of Proclamation No. 139 of 1953.

The supremacy that the pre-Revised Constitution treaties acquire under the just cited legislations and the supremacy that the treaties made pursuant to the Revised Constitution derive from Art. 122 of the Revised Constitution differs both in status and effect.

The latter class of treaties are made supreme law by the supreme law of the Empire itself, while the former are made supreme law just by a primary law. Thus, the status of supremacy to be acquired by the two is not the same. Naturally, the supremacy derived by the Constitution is higher, due to the fact that treaties are given more or less the same standing and effect as the Revised Constitution, unlike the supremacy acquired by the Order, supplemented by Proclamation. Secondly, the Constitution, besides being the supreme law of the Empire in the true sense of the word, is later in point of time, hence, what is provided in the Constitution should have more weight, and consequently modifies the effect of the provisions of the Order and the prior Proclamation.

As the analysis made earlier shows, Art. 122 of the Revised Constitution does not make any reference to the status of the treaties concluded prior to the enactment of the Revised Constitution. In the absence of such reference and the non-retroactivity of Art. 122 of the Constitution in its application, the logical conclusion would be that the supremacy of the treaties concluded prior to the promulgation of the Revised Constitution has been supreseded by the supremacy of the treaties made in accordance with the provisions of the Revised Constitution. In other words, by the enactment of the Revised Constitution, with a supremacy clause not embracing the treaties made prior to it, the role and effect of Art. 8 of Order No. 6 of 1952 and Art. 1 of Proclamation No. 139 of 1953, is reduced merely to incorporating the pre-Revised Constitution treaties into the municipal law of Ethiopia.

Its function of making treaties the supreme law of the Empire has been taken over by Art. 122 of the Revised Constitution; as the result only the treaties made under the authorities of the Revised Constitution, become the supreme law of the Empire together with the Revised Constitution which considers as part of the supreme law of the Empire treaties, conventions, and obligations to which Ethiopia shall be party in the future.

The words "shall be party" here refer to treaties, conventions and obligations concluded after the promulgations of the Revised Constitution, i.e. November 4th 1955. The word "shall" is employed in the context which indicates futurity and not in imperative sense of gramatical interpretation of the word. Thus, treaties are declared to be the supreme law of the Empire when concluded in accordance with the provisions of the Revised Constitution of 1955. The Revised Constitution being the organic law and the principal supreme law in the hierachy of laws in Ethiopia, and later in point of time, supersedes also what was provided in Art. 8 of the Federal Incorporation and Inclusion of the Territory of Eritrea within the Empire of Ethiopia Order (Order No. 6 of 1952) and Art. 1 of the Public Rights Proclamation, (Proclamation No. 139 of 1953).

Moreover, treaties concluded in accordance with the Revised Constitution automatically acquire municipal effect by virtue of Art. 122 of the Revised Constitution. Treaties concluded prior to the enactment of the Revised Constitution acquire municipal effect due to Art. 8 of Order No. 6 of 1952 and Art. 1 of Proclamation No. 139 of 1953. Since treaties concluded prior to the promulgation of the Revised Constitution derived their municipal effect from primary legislation and not from the organic law —the Constitution— a problem may arise in their implementation. For instance, if a governmental act is taken now to implement an obligation under a treaty concluded prior to the promulgation of the Revised Constitution, and such implementation is inconsistent with the provisions of the Revised Constitution, the act may be declared null and void under the latter part of Art. 122 of the Constitution.

To avoid such consequence, if any treaty concluded prior to the promulgation of the Revised Constitution is inconsistent with the present Constitution, Ethiopia should re-negotiate with the other contracting party, so that it may conform with the provisions of the Revised Constitution.

Since treaties are proclaimed to be part of the supreme law of the Empire by the Revised Constitution, Ethiopia is constitutionally required also to bring its municipal law into conformity with treaties to which she is party to and to maintain so, in order to avoid any conflict or inconsistency between its treaty obligations and the provisions of the present Constitution.