The Monist -Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia

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1. Introduction

A critical appraisal of dominant literature on the status of human rights treaties under the Constitution of the Federal Democratic Republic of Ethiopia (the Constitution)[1] reveals a converging opinion regarding the normative position of *ratified* treaties in the country's pyramid of laws. There are two-tiered dimensions to the emerging consensus about the status of treaties. At one level, the supremacy clause of Art 9(1) of the Constitution, rendering any inconsistent 'law, customary practice or a decision of an organ of state or a public official' null and void, has led to the assertion that the Constitution is superior to all ratified treaties.[2]At another level, the declaration under Art 9(4) of the Constitution that duly ratified treaties are "integral parts of the law of the land" and the requirement of its Art 13 (2) that the Bill of Rights[3] of the Constitution must be interpreted in conformity with ratified treaties have been taken only as a partial answer to the question of the hierarchical position of ratified treaties.

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[1] Promulgated by virtue of Proclamation No. 1/1995, *A Proclamation to Pronounce the Coming into Effect of the Constitution of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta, 1st Year, No. 1, 21 August 1995.

[2] Chi Mgbako, et al, 'Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights' (2008) 15(1) *Fordham International Law Journal* 701, 713; Sisay Alemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia,' (2008) 23 *Journal of Ethiopian Law* 135, 147; Gebreamlak Gebregiorgis, 'The Incorporation and Status of International Human Rights under the FDRE Constitution' in Girmachew Alemu and Sisay Alemahu (ed), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects (Ethiopian Human Rights Law Series)* (2008) vol 2, 37; Getachew Assefa, 'The Protection of Fundamental Rights and Freedoms in Ethiopian Federalism' (Paper presented at the Proceedings of the First National Conference on Federalism, Conflict and Peace Building, Addis Ababa, 2005) 257; Ibrahim Idris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' (2000) 20 *Journal of Ethiopian Law* 113, 132-134;; Rakeb Messele, 'Enforcement of Human Rights in Ethiopia' (Action Professionals Association for the People (APAP), 2002) 15.

[3] This refers to Chapter Three of the Constitution, which enshrines the civil and political rights, economic, social and cultural rights and group (peoples') rights. The elaborate catalogue of the rights and freedoms guaranteed under the Constitution, running from Art 13-44, comprise almost a third of the overall constitutional provisions.

The fact that the House of Peoples' Representatives (HPR)[4] is entrusted with treaty ratifying powers[5] as well as powers to issue proclamations,[6] led to the conclusion that treaties and proclamations of the HPR share parity of status due to their identical formal source.[7] As a result, treaties would take the rank of proclamations and are subject to the temporal-sensitive rule of *lex posterior derogate lex priori* (latter law prevails over the former).[8] The doctrinal debate of monism and dualism has added some credence to the dilemma of normative hierarchy.[9]

This paper, departing from the emergent consensus of the dominant literature on the status of human rights treaties in Ethiopia, argues that the prevailing scholarship that has put the Constitution at the apex of any law (domestic or international) and treaties on equal footing with proclamations is a consequence of the mistaken approach which allows domestic law to determine the position of treaties at the national level. The contention here is that, unless the status of human rights treaties is analysed outside the four corners of domestic law, the analysis continues to be a self-fulfilling prophesy. Owing to the customary principles of good faith and *pacta sunt servanda*, domestic law cannot sit in judgment of its hierarchical interactions with international law. Any other approach would lead to a situation that licences the domestic legislature to establish a normative regime that not only denigrates but also violates international standards contained in ratified human rights treaties. This automatically implicates the country's international responsibility for violations of international law and rights and freedoms consecrated therein through legislative means.

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[4] The HPR is the federal parliament with a constitutional mandate of comprehensive 'power of legislation in all matters assigned by this Constitution to Federal jurisdiction.' See Art 55 (1) of the Constitution.

[5] In Ethiopia, treaties are concluded (signed) by the State's Executive branch which must subsequently submit it for ratification to the HPR. Under Art 55 (12) of the Constitution, the HPR 'shall ratify international agreements concluded by the Executive.' A more specific proclamation has assigned the power of negotiating and signing treaties to the Ministry of Foreign Affairs. Thus the Ministry shall, 'in consultation with the concerned organs, negotiate and sign treaties and agreements Ethiopia enters into with other states and international organizations … and effect all formalities of ratification of treaties and agreements.' See Art 25 (2), Proclamation No. 4/1995, *A Proclamation to Provide For the Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic Of Ethiopia*, Federal Negarit Gazeta, 1st Year, No.4, 23 August 1995.

[6] Art 55 (1) of the Constitution. Proclamations are primary laws that occupy a position second only to the Constitution in the domestic normative hierarchy.

[7] Getachew, cited above at note 2, p. 257; Ibrahim, Cited above at note 2, p.134; Sisay, cited above at note 2, 147; Gebreamlak, cited at note 2 above) 46.

[8] Getachew, cited at note 2 above, p. 257; Ibrahim, cited above at note 2, p. 134; Minasse Haile, 'Comparing Human Rights in Two Ethiopian Constitutions: The Emperor's and the "Republic's" - *Cucullus Non Facit Monachum*' (2005) 13 *Cardozo Journal of International and Comparative Law* 1, 28.

[9] See Ibrahim, cited above at note 2, p. 113; Rakeb, cited above at note n 2 p. 15 and 53; Gerbeamlak, cited at note 2 above, 55; Sisay, cited at note 2 above, 147.

The starting point of the present enquiry is, therefore, to cut domestic law to size (without abandoning it) in the determination of its status visa-a-vis international standards, and to transcend domestic legal and institutional hurdles and analyse the place of international human rights treaties from the international law standpoint. This approach, arguably supported by the text of the Constitution and Ethiopian legislative and judicial practices, makes it evident that international human rights treaties ratified by Ethiopia are superior to proclamations and share equality of status with the Constitution. It would thus become impossible for latter laws to prevail over ratified treaties which are presumably consistent with the letters and the spirit of the Constitution's Bill of Rights.

The next section briefly discusses the waning role of the monist-dualist debate as a theoretical explanation of the interactions between national and international legal norms as well as the increasing triumph of monism at least in the area of human rights treaties. Section 3 presents a rebuttal of the dominant opinion that latter proclamations override inconsistent and previously ratified treaties in Ethiopia. It argues that the state's duty to implement ratified treaties domestically, the attendant obligations of good faith and *pacta sunt servanda,* the duty to provide domestic remedies to violations of (treaty-based) human rights as well as domestic Ethiopian legislative and judicial practice accord ratified treaties a position superior to that of proclamations. Section 4 gauges the hierarchical position of ratified treaties vis-à-vis the Constitution and contends that ratified treaties share parity of status with the Constitutional Bill of Rights. The final section draws the threads together and concludes the study.

2. The Monist-Dualist Clash

Just as the international debate regarding the monist-dualist distinction has come to lose its currency,[10] much of the scholarship on the status of human rights treaties in Ethiopia has increasingly tended to analyse the domestic status of human rights treaties in the framework of those doctrines.[11] The relationship between international law and municipal law triggers the issue of the relative validity of rules of international law on the domestic plane compared to their municipal counterparts. This in turn raises a crucial issue of whether, and, if so, the degree to which domestic courts and other institutions may give way to rules of international law where they are not necessarily consistent with domestic law. It has been rightly commented: '[n]othing is more essential to a proper grasp of the subject of international law than a clear understanding of its relation to state law.'[12]

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[10] Martin Schenin, 'International Human Rights in National Law' in Raija Hanki, and Markku Suksi (ed), *An Introduction to the International Protection of Human Rights* (2002) 417, 418; Ian Brownlie, *Principles of Public International Law* (2008) 31-35.

[11] Ibrahim, cited above at note 2, p 113; Rakeb, cited above at note 2, p.15; Mgbako, cited above at note 2, 713-714.

[12] J G Starke, *Starke's International Law* (11th ed, 1994) 63.

The monist doctrine does not recognise the distinction between the domestic and the international, and, does not allow room for contradiction between the two sets of rules. Because domestic law and international law are part of the same system of norms[13], in the unlikely event of conflict between the two sets of rules, legal interpretation and application must give precedence to international law.[14] This theory argues that 'the basic norms of the national legal order are determined by the norms of international law,…[i]t is the basic norm of the international legal order which is the ultimate reason of validity of the national legal order, too.'[15] The validity and authority of domestic law is thus primarily due to its conformity with the international law, lack of which renders it null and void whereby it is superseded by the international law rules which, as a consequence, would directly apply domestically.

The dualist doctrine represents a contrasting approach and starts from the assumption that the national and international legal systems regulate entirely different and parallel subject matters and have no room for conflict.[16] It holds that international law is a horizontal regime for the regulation of inter-state relations while municipal law is a vertical regime governing the relationship between the state and its inhabitants.[17] In D'Amato's words, "[t]he objects of domestic law are people; the objects of international law are states."[18] Domestic law prevails in matters of domestic nature and domestic jurisdictions apply domestic law: "Domestic law and international law are each sovereign in their own spheres."[19] Thus, 'neither legal order has the power to create or alter rules of the other.'[20] Domestic jurisdictions may apply international law but solely as an exercise of the authority of domestic law which adopted or transformed the rules of international law.[21]

As D'Amato noted, dualism is a sibling of strict state sovereignty according to which 'international law and national law are two separate, independent legal orders, each

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[13] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (1995) 205.
[14] Brownlie, cited above at note 10, p. 32-33.
[15] Ibid.
[16] Id, p. 31.
[17] Higgins, cited above at note 13, p. 205.
[18] Anthony D'Amato, 'Is International Law Coercive?' *Northwestern University School of Law Public Law and Legal Theory Series No. 08-25* (2008) p.6.
[19] Ibid.
[20] Brownlie, cited above at note 10, p. 31-32.
[21] Id, p. 32.

valid in its own sphere. National law governs the internal or domestic affairs of a state while international law governs foreign affairs.'[22] He thus asserted:

> If dualism were a correct theory of international law, internal affairs would be fixed for all time as purely internal. Anything within a state's domestic jurisdiction would have to remain within a state's domestic jurisdiction, forever impervious to international regulation. For under the dualist theory, both international law and domestic law would be powerless to transform domestic subject-matter into international subject-matter; neither of these legal regimes has any "jurisdiction" over the other.[23]

The dualist doctrine is a theoretical construct that was developed a century ago for a period prior to the emergence of a fully-blown international human rights regime.[24] It was suited to the epoch where the state enjoyed an exclusive sovereignty in its territory and the role of international law was truly restricted to the governance of inter-state relations. What a state does to individuals and groups within its territory was an exclusive internal concern as the principle of sovereignty precluded interference by the rest of the international community in a state's internal affairs. As Henkin observed, '[h]uman rights were generally not the stuff of international politics until after World War II.'[25] According to D'Amato, '[p]rior to 1945 a government would not be deemed to have violated international law by the mass murder of its own citizens in its own territory.'[26]

This scenario is no longer the same, and human rights are no more matters of exclusive internal concern.[27] Today, a multitude of international tribunals and monitoring bodies call upon states to account for their domestic human rights performances in accordance with the international treaties they ratify, and adjudge them to be in violation of the same for which states are required to provide remedies to domestic victims. D'Amato asserted that there is a fundamental change in the

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[22] Anthony D'Amato, 'Human Rights as Part of Customary International Law: A Plea for Change of Paradigms' (1996) 25 *Georgia Journal of International and Comparative Law* 47, 60.

[23] Id, p. 60-61 (footnotes omitted).

[24] Armin von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6(3-4) *International Journal of Constitutional Law* 397, 399.

[25] Louis Henkin, *The Rights of Man Today* (1979) 90.

[26] D'Amato, cited above at note 22, p. 47.

[27] Takele Soboka Bulto, 'Beyond the Promises: Resuscitating the State Reporting Procedure under the African Charter on Human and Peoples' Rights' (2006) 12 *Buffalo Human Rights Law Review* 57, 57.

international legal environment that has posed a serious challenge to the core of dualism:

> … if we all accept the fact that genocide moved from a purely internal matter prior to 1939 to an international matter after 1945, then dualism cannot describe the new status of the prohibition against genocide. Prior to 1939, what a government did to its citizens within its territory – including mass murder – was purely within its internal law, its "domestic jurisdiction." *If dualism were a correct theory, then nothing that transpired since 1939 could transform domestic mass murder into an international crime. Since we now routinely say that a government is prohibited by international law from committing genocide against its own citizens within its own territory, we must discard the theory of dualism.*[28]

In other words, international norms have long addressed domestic issues that are concomitantly regulated by domestic laws, and certainly so in the area of human rights. The ensuing state of affairs has been described by academics as 'erosion of sovereignty.'[29] The contention that domestic law and international law are devised for separate, parallel planes of application no more holds water: dualism has come to overleap itself. Indeed, the whole idea of monist-dualist debate has outlived its importance.[30]

Dualism thus raises consequences that are in conflict with the way international and national organs and courts have operated in the post-World War II world.[31] The shift of international attention towards the search for 'compromise implementation methods' of the promises of international human rights law at the domestic level means that the monist-dualist debate is now considered outdated.[32] There is an emerging rapprochement between international norms and national laws.[33] The ever increasing domestic application of international human rights treaty norms means that there is a 'creeping monism' not least in the traditionally dualist nations.[34] The situation of the monist-dualist divide and the status of treaties in the Ethiopian legal

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[28] D'Amato, cited above at note 22, p. 60-61 (emphasis added). For an equally forceful rejection of the theory of dualism, see Hans Kelsen, *Principles of International Law* (2nd ed, 1966) 405-406.

[29] Frans Viljoen, *International Human Rights Law in Africa* (2007) 17.

[30] Von Bogdandy, cited above at note 24, p. 398.

[31] Brownlie, cited above at note 10, p. 33.

[32] Scheinin, cited above at note 10, p. 418.

[33] Mchael Kirby, 'The Growing *Rapproachment* between International Law and National Law' in Anthony Anghie, and Garry Sturgess (ed), *Legal Visions for the 21st Century: Essays in the Honour of Judge Christopher Weeramantry* (1998) 333, 335.

[34] See generally Melissa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107 *Columbia Law Review* 628.

strata should be gauged against the backdrop of such emerging international opinions and practices.

3. The Hierarchical Position of Ratified Treaties vis-a-vis Proclamations

As has been introduced at the outset, the fact that the HPR is a source of proclamations and treaty ratifying powers led many an author to the conclusion that ratified treaties and proclamations sit on the same rung in the country's normative hierarchy. The premise behind this line of thought emerges from treating ratified treaties as ordinary domestic laws in all material aspects. The view proceeds along the line of contention that seeks to accord hierarchical normative parity to ratified treaties and proclamations simply because they share the same formal source (HPR) at the domestic level. The logical consequence is that any conflict between the two sets of norms is taken merely 'as a conflict existing *between two sets of domestic laws* of equal status.'[35]

This line of argument loses sight of the essential difference in the *nature* of the two types of norms-the domestic and the international- and focuses only on the *source* which gives domestic effect to them. However, the major difference between ratified treaties and domestic legislations emerges from their inherent nature and the principles from which they derive their binding force. Focusing on these aspects, the next section argues that latter laws of the HPR do not prevail over ratified treaties, and, to the contrary, domestic laws that are inconsistent with ratified treaties will bow to their international counterparts.

3.1 State's Obligations Entailed by Treaty Ratification

The interplay between domestic and international law depicts a relationship of dependence of the latter on the former for its implementation. The domestic legal system must provide a conducive legislative, judicial and administrative framework if treaty-based guarantees are to be translated into reality for domestic beneficiaries. There is a *structural* (as opposed to substantive) dependence of international human rights law on the domestic laws and procedures for its domestic implementation.[36] The domestic legal system can employ any means to give effect to treaties, however. Notably, domestic laws and law-making organs have the liberty of choice regarding the manner and means of incorporating[37] international treaties into 'the law of the land.' This liberty of action, or the margin of discretion, so to speak, is as to *how* to

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[35] Ibrahim, cited at note 2 above, 134.

[36] Carlos Manuel Vazquez, 'Treaties as Law of the Land: The Supremacy Clause and Presumption of Self-Execution' (2008) 121(1) *Harvard Law Review* 1, 14.

[37] The word 'incorporate' is used throughout this paper in its non-technical and ordinary sense to refer to the domestication of international treaty provisions in any of the means and methods used by a country.

incorporate[38] ratified treaties into the domestic legal system but it does not empower local authorities to decide *whether* to incorporate them at all because the state's duty to incorporate them results from the act of ratification.[39]

However, the order of enquiry must be reversed when it comes to the substantive content of the domestic and the international norms. The imperatives of domestically implementing the provisions of international human rights treaties impose essential obligations to respect, protect, promote and fulfil on the ratifying/acceding states. As the African Commission emphasised in its landmark decision against Nigeria:

> [i]nternationally accepted ideas of the various obligations engendered by human rights indicate that all rights - both civil and political rights and social and economic - generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote, and fulfil these rights. These obligations *universally apply to all rights* and entail a combination of negative and positive duties. … Each layer of obligation is equally relevant to the rights in question.[40]

The quartet layers of obligations are analytic tools for gauging whether and to what extent a state has been implementing (or violating) a given human right, while they also reflect the manner in which the state must behave in order to discharge its human rights obligations.[41]

The duty to *respect* human rights implies that the state should refrain from disturbing individual's and groups' enjoyment of the right in question. In other words, it would be a violation of its human rights duties for a state to encroach upon the rights being exercised by the beneficiaries. Thus the duty to respect implies that the state should not do anything that has the direct or indirect effect of worsening the level of enjoyment of the human right concerned. The obligation to *respect* a human right therefore 'constitutes what is essentially a negative duty on the part of the state to

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[38] According to Scheinin, states may opt to employ either or a combination of adoption, incorporation, (active) transformation, passive transformation and reference for purposes of giving effect to a human rights treaties in the domestic law. Regardless of the method of incorporation used, ratified treaties will bind the state and should be given judicial notice by the state's domestic institutions. See Scheinin, cited above at note 10, p.418-419.

[39] Yuval Shany, 'How Supreme is the Supreme Law of the Land: Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31(2) *Brooklyn Law Journal* 341, 355.

[40] Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights vs Nigeria, *15th Annual Activity Report*, Para 44 (emphasis author's), (hereinafter 'the SERAC' case).

[41] Magdalena Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social, and Cultural Rights* (2003) 172.

neither impede nor restrict the exercise of these rights.'[42] It is thus a 'minimalist undertaking'[43] and an obligation of 'primary level'[44] for the states. Therefore, if a country promulgates a domestic law that restricts or takes away the treaty-based rights that have hitherto been enjoyed by individuals and groups, this is a clear case of violation of its international obligation to respect human rights.

The duty to *protect* requires the state to act positively to prevent and remedy the violations of human rights caused by interferences of non-state actors.[45] The obligation involves the requirement that the state must issue laws and procedures and provide legal and institutional remedial avenues to enforce the horizontal duty of non-state actors. This goes beyond the prescription of the duty of abstention from human rights violations and requires Ethiopia to issue laws that uphold rights and guarantees that are enshrined in the treaties that it has ratified. Issuance of a later law to repeal a ratified human rights treaty is a retrogressive measure and does not fit the bill in this regard.

The duty to *promote* involves the facilitation of the enjoyment of human rights (including treaty-based guarantees) especially through the provisions for legal protections and related enforcement procedures and through the removal of domestic legal obstacles to pave the way for the enforcement of the rights and freedoms. This necessarily involves that comprehensive reviews of legislations take place with a view to identifying laws and polices that negatively impact on the exercise of the rights and eventually repeal and replace them with those that protect and promote treaty-based rights.[46] The state's duty to *fulfill* entails a 'direct provision of basic needs such as food or resources' in the event that the individuals and groups lack the means to access these resources.[47]

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[42] Scott Leckie, and Anne Gallagher, 'Introduction: Why a Legal Resource Guide for Economic, Social and Cultural Rights?' in Scott Leckie, and Anne Gallagher (ed), *Economic, Social, and Cultural Rights: A Legal Resource Guide* (2006) xiii, xx.

[43] Philip Alston, and Gerard Quinn, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 184.

[44] SERAC case, cited above at note 40, Para 45.

[45] See Daphne Barak-Erez, and Aeyal M Gross, 'Introduction: Do We Need Social Rights? Questions in the Era of Globalisation, Privatisation, and the Diminished Welfare State' in and Aeyal M Gross Daphne Barak-Erez (ed), *Exploring Social Rights: Between Theory and Practice* (2007) 3, 7-8; Aeyal M Gross, 'The Right to Health in an Era of Privatisation and Globalisation: National and International Perspectives' in Daphne Barak-Erez and Aeyal M Gross (ed), *Exploring Social Rights: Between Theory and Practice* (2007) 289, 303; SERAC (note 40 above) Para 46.

[46] Leckie and Gallagher, cited above at note 42, p.xxi.

[47] SERAC case, cited above at note 40, Para 47.

Therefore, Ethiopia cannot lawfully issue a domestic law that contradicts ratified treaties as such measures would trample an existing enjoyment of rights and violate the country's duty to respect human rights. The duty to protect, promote and fulfil require the country to issue and maintain legislative and other measures that are consistent with its treaty obligations to give domestic effect to ratified human rights treaties. This leads to the conclusion that later contrary laws cannot be lawfully issued, let alone prevail over treaties.

3.2 The Duty of Good Faith: States' Duty to Ensure Normative Compatibility

International law complements, supplements and overrides contrary domestic law in matters involving the protection of human and peoples' rights. There is a need to bring domestic legislation, administrative rules and practices into conformity[48] with the international treaties which are 'high minded-legal formulations.'[49] As Henkin noted,

> [t]he international law of human rights parallels and supplements national law, superseding and supplying the deficiencies of national constitutions and laws, but it does not replace and indeed depends on national institutions.[50]

Accordingly, with respect to obligations arising from international law, the principle of *pacta sunt servanda* dictates that treaties willfully entered into should be executed (fulfilled) in good faith. Indubitably, the principle of *pacta sunt servanda* in the law of treaties is based on good faith,[51] and the maxim has constituted 'since time immemorial the axiom, postulate and categorical imperative of the science of international law.'[52] According to Hugo Grotius:

> For good faith, in the language of Cicero, is not only the principal hold by which all governments are bound together, but is the key-stone by which the larger society of nations is united. Destroy this, says Aristotle, and you destroy the intercourse of man.[53]

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[48] This is part of the domestic implementation of ratified treaties, which specifically require the state parties to take, inter alia, legislative measures to ensure their domestic applicability. Just to cite examples: ICCPR, Art 2(2) ; African Charter (Art 1).

[49] Philip Alston, 'The Purposes of Reporting' ' in *Manual on Human Rights Reporting Under Six Major International Human Rights Instruments* (1997) 24; see also Ibrahim, cited above at note 2, p.136.

[50] Henkin , cited above at note 25, p. 95.

[51] Under Art 26 of the VCLT, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'

[52] J F O'Connor, *Good Faith in English Law* (1990) 5-10.

[53] Hugo Grotius, *De Jure Belli ac Pacis* (1925), quoted in: Maria Manuela Farrajota, 'Notification and Consultation in the Law Applicable to International Watercourses' in L

The principle of good faith, itself a customary rule of international law,[54] requires states to maintain domestically such laws and institutions as will enable them to discharge their international obligations. This has been codified under the VCLT, which provides that: 'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when… (b) it has expressed its consent to be bound by the treaty.'[55] According to Bradley, this provision reflects customary international law, the rules and principles of which are binding on all nations irrespective of consent, including those states that have yet to ratify the VCLT.[56] More specifically, Brownlie asserted that the law and jurisprudence in this area is nothing but 'settled':

> [a] state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law. The acts of the legislature and other sources of internal rules and decision-making are not to be regarded as acts of third party for which the state is not responsible, and any other principle would facilitate evasion of obligations.[57]

In this regard, the jurisprudence of the Permanent Court of International Justice (PCIJ), the International Court of Justice (ICJ) and the African Commission on Human and Peoples' Rights (the Commission) and the UN human rights bodies are in unanimous agreement. In the *Free Zones* case[58], the PCIJ observed that 'it is certain that France cannot rely on her own legislation to limit the scope of her international obligations.' Similarly, in its Advisory Opinion in the *Greco-Bulgarian Communities* case[59], the PCIJ stated:

> It is a generally accepted principle of international law that in the relations between Powers who are Contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.

Boisson De Chazournes, and Salman A Salman (ed), *Water Resources and International Law* (2005) 281, 281.

[54] J F O'Connor, *Good Faith in English Law* (1990)35-42; Georg Schwarzenberger, *International Law* (3rd ed, 1957) 15.

[55] VCLT, Art 18.

[56] Curtis A Bradley, 'Unratified Treaties, Domestic Politics, and the U.S. Constitution' (2007) 48(2) *Harvard International Law Journal* 307, 307.

[57] Brownlie, cited above at note 10, p. 34.

[58] (1932) *PCIJ Reports*, Ser. A/B, No. 46, p.167.

[59] (1930) *PCIJ Reports*, Ser. A/B, No. 17, p.32.

So too, the PCIJ, in the case of *Polish Nationals in Danzig* case[60], held that '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.'

In the same vein, the ICJ, too, affirmed the principle already established by the PCIJ. Thus, in the *Fisheries* case[61] and *Nottebohm* case[62], the ICJ decided that a state cannot present its domestic law as a defence to evade its international obligations. Afterwards, the VCLT codified the rule that a 'party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.'[63]

The African Commission invariably decided that a state cannot plead its domestic law as a defence to evade its obligations under international law. In *Legal Resources Foundation v. Zambia* case[64], the Commission held that international treaty law prohibits Zambia from relying on its *Constitution* as a justification for its non-compliance with its international obligations. Similarly, the Commission decided that 'Nigeria cannot negate the effects of its ratification of the [African] Charter through domestic action. Nigeria remains under the obligation to guarantee the rights of [the Charter's] article 7 of its citizens.'[65] In another judgment, against The Gambia, the African Commission ruled that:

> By suspending chapter 3 (the Bill of Rights [of The Gambia's Constitution]), the Government therefore restricted the enjoyment of the rights guaranteed therein and, by implication, the rights enshrined in the Charter.... It should, however, be stated that the suspension of the Bill of Rights does not *ipso facto* mean the suspension of the domestic effect of the Charter.... [T]he Commission held that 'the obligation of the . . . government . . remains, unaffected by the purported revocation of the domestic effect of the Charter.'... The suspension of the Bill of Rights and consequently the application of the Charter was not only a violation of article 1 [of the Charter]

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[60] (1931) *PCIJ Reports*, Ser. A/B, No. 44, p.24.
[61] *ICJ Reports* (1951) 116 at 132
[62] *ICJ Reports* (1955) 4 at 20-21.
[63] Art 27 of the Convention.
[64] Communication No 211/98, Legal Resources Foundation vs Zambia, *14th Annual Activity Report*, Para 59-60.
[65] Communication 129/94, Civil Liberties Organisation v Nigeria, *9th Annual Activity Report*, Para 12.

but also a restriction on the enjoyment of the rights and freedoms enshrined in the Charter, thus violating article 2 of the Charter as well.[66]

So too, the UN Committee on Economic, Social and Cultural Rights has argued that States have an obligation to promote interpretations of domestic laws which give effect to their international obligations. Accordingly:

> legally binding international standards should operate directly and immediately within the domestic legal system of each State Party, thereby enabling individuals to seek enforcement of their rights before national Courts and tribunals.[67]

Ideally, a state should conduct a *compatibility study* which in some cases results in amendment of existing municipal laws so as to bring it into conformity with international instruments. Either before or immediately after a state ratifies a treaty, it is expected to review its domestic laws and practices to ensure that it is in compliance with the obligations contained in the treaty. The African Commission was very explicit about the requirement of a state's duty to ensure domestic compatibility of international human rights treaties and domestic legislations. It stated:

> In principle, where domestic laws that are meant to protect the rights of persons within a given country are alleged to be wanting, the African Commission holds the view that it is within its mandate to examine the extent to which such domestic law complies with the provisions of the African Charter. This is because when a State ratifies the African Charter it is obligated to uphold the fundamental human rights contained therein. Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated. This principle is in line with Article 14 of the Vienna Convention on the Law of Treaties of 1980.[68]

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[66] Communications 147/95 and 149/96, Sir Dawda K Jawara v The Gambia, , *13th Annual Activity*
Report, Paras 48-50.

[67] CESCR General Comment 9, 'The Domestic Application of the Covenant' E/C.12/1998/24, CESCR, 03 December, Nineteenth Session (1998), pp 8-52.

[68] Communication 241/2001 – Purohit and Moore v The Gambia, 16th Annual Activity Report (2002-2003) Para 43.

States would normally undertake, at the time of ratifying a treaty, the duty to adopt legislative and other measures to give effect to the rights and freedoms guaranteed in the treaty in question. As far back as 1925, the PCIJ asserted that a ratifying state's obligation to make the changes to its legislations that is necessary for the fulfillment of the duties undertaken in the treaties is simply 'a principle that is self-evident.'[69]

In Africa, the process of *compatibility study* has in some cases resulted in legislative amendments as part of the ratification process.[70] There have been practices of pre-ratification compatibility studies in Senegal, South Africa and Zambia.[71] The initial review may be undertaken in conjunction with each of the relevant national ministries or other authorities responsible for policy making and implementation in the different fields covered by the treaty concerned.[72] Sometimes, states undertake pre-ratification reviews primarily by the foreign ministry or its equivalent with relatively limited inputs from other ministries or from the principal sectors of society.[73] As if to say *better late than never,* Ethiopia has reportedly started the same process as part of the preparation of its already long overdue multiple state reports to the various global and regional human rights monitoring bodies.[74]

The upshot of the above discussion is that the rules of international law and the practices of international judicial practice dictate that obligations of states emerging from international law operate domestically irrespective of (and superseding) contradictory domestic law. And Ethiopia is by no means an exception. In effect, Ethiopia is precluded from pleading domestic laws as a defence for non-compliance with its international obligations, which means that a later law cannot prevail over (but must conform to) all previously ratified

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[69] Exchange of Greek and Turkish Populations, Permanent Court of International Justice, Advisory Opinion, PCIJ Reports 1925, Series B, No. 10, P 20.

[70] C. H. Heyns and Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (2002) 14.

[71] Ibid.

[72] Comment, cited above at note 36 above, Para 2.

[73] Alston, cited above at note 49 , p. 21.

[74] See Solomon Goshu, " Ethiopia to Report on the State of Its Human Rights Implementation for the First Time," *The Reporter* , Zena (Amharic Version) , 7 December 2008. Indeed, the records of the African Commission show that Ethiopia has already submitted its first ever state report (but consolidating its initial and overdue reports) to the Commission and would nominally be considered to be up to date in its reporting duties. The report does not indicate the date of its submission, but the document has been made public by the Commission and can be accessed at: http://www.achpr.org/english/_info/news_en.html , (last accessed on 14 May 2009).

treaties. Indeed, a country that has ratified a treaty is required to amend its domestic laws to conform to and facilitate the domestic application of the international standards,[75] and this invariably applies to Ethiopia. Failing compatibility through amendment of domestic norms, ratified international treaties would apply regardless of inconsistent domestic proclamations in force, superseding and replacing the latter to the degree of their inconsistency. If the domestic judicial and quasi-judicial bodies tend to disregard a ratified human rights treaty in favour of an inconsistent domestic law, individuals and groups have the option of directly accessing international tribunals which would find the country in violation of its treaty obligations through maintaining contradictory domestic laws and denial of local remedies. Thus, international treaties occupy a normative rank that is superior to any of the local laws, save the Constitution.

3.3 The Right to Domestic Remedies: Implications for Treaties' Domestic Status

Underlying the requirement of internalising the substantive *corpus* of international human rights law is the aspiration that individuals and groups who are victims of violations of (treaty-based) human rights avail themselves of local remedies before local tribunals through local procedures just in the same manner that they enforce the rights guaranteed under local laws. As Popovic noted, '[t]he right to a remedy is the implementing agent for other human rights.'[76] This also explains the structural dependence of international human rights law on domestic law. The incorporation of international human rights guarantees thus links the violations of such standards and accessibility of local remedies. The types and content of local remedies may vary from jurisdiction to jurisdiction but they must be available, adequate and effective. The decision of the African Commission makes it starkly clear:

> …Three major criteria could be deduced from the practice of the [African] Commission in determining this rule, namely: the remedy must be available, effective and sufficient. … A remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.[77]

The requirement of exhaustion of local remedies assumes the availability, adequacy, and effectiveness of local remedies, in the absence of which complainants of human rights violations (including violations of treaty-based guarantees) will be allowed to lay their cases before international human rights bodies. It must be noted that

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[75] Purohit and Moore (note 68 above) Para 42-43.

[76] Neil A. F. Popovic, 'In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment' (1996) 27 *Columbia Human Rights Law review* 487, 561.

[77] Jawara case, cited above at note 66, Para 31-32.

remedies in this context refer to judicial and non-discretionary remedies as opposed to discretionary or executive remedies such as presidential amnesty in cases of death penalty.[78] Similarly, in cases where the jurisdictions of the ordinary courts over the subject matter of a complaint is ousted by domestic laws and procedures, or where such jurisdictions have been given to special tribunals, the local remedies are said to be unavailable.[79] Additionally, '[t]he existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which it will lack the requisite accessibility and effectiveness.'[80]

The availability of the remedy is gauged from a subjective standpoint, with the implication that 'a remedy is considered available only if the applicant can make use of it in the circumstance of his case.'[81] In a case where the present author was involved as a counsel on behalf of the complainants in a litigation currently pending before the African Commission, Ethiopia, the defendant state, argued that the case should be declared inadmissible for want of exhaustion of local remedies.[82] The issue at stake was whether the complainants had any leeway to use the right to appeal, where Ethiopia argued that the complainants had to exhaust local appeal procedures complaining about delayed justice before filing a case before the African Commission. We, the legal counsels, argued that appeal on the sole ground of 'interlocutory matters' such as delayed justice is disallowed under Art 184 (b) and (c) of the 1961 Ethiopian Criminal Procedure Code, and is permissible only if and when the party lodges an appeal alongside the conviction or sentencing of the final verdict which was yet to be handed down at the material time. Even though appeals are generally available under Ethiopian laws, it was not available to the complainants in the case (subjectively) and Ethiopia's argument was overruled and the case was declared admissible. In the same case, Ethiopia argued that the complainants could have approached the Human Rights Commission and the Ombudsman for other remedies. The Commission once again rejected this argument on the ground that these local institutions have no right to intervene in a case pending before domestic courts and that they were not operational or never handed down a decision on any human rights issues as at that point in time. The availability of adequate and effective remedies through litigation before these institutions was thus uncertain at best. This rejection was a result of the Commission's established jurisprudence that a remedy

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[78] Communication 231/99, *Avocats Sans Frontie`res (on behalf of Gae`tan Bwampamye) v Burundi*, *14th Annual Activity Report*, Para 23.

[79] Jawara case, cited above at note 66, Para 33 - 34.

[80] Id, Para 35.

[81] Id, Para 33; See also Communication 275/2003, *Article 19 v The State of Eritrea*, *22nd Annual Activity Report* (2007) Para 73.

[82] Communication 301/05 – Haregewoin Gabre-Selassie and Institute for Human Rights and Development in Africa (on behalf of former Dergue Officials v Ethiopia). This case has passed admissibility, and is currently awaiting the Commission's final decision on the merits of the case.

'the availability of which is not evident, cannot be invoked by the state to the detriment of the complainant.'[83]

Thus the availability, adequacy and effectiveness of domestic remedies are gauged from the standpoint of international law and by the relevant international bodies. In other words, if the domestic laws fail to live up to the treaty requirements, the international human rights monitoring and adjudicatory bodies would intervene and declare the domestic legislative obstacles null and void, paving the leeway for the direct domestic application of international human rights norms. In instances where there are no domestic remedies, or where the available remedies are less than effective or adequate, international monitoring and adjudicatory bodies would be fora of first instance to hear cases of and mete out appropriate remedies to redress the violations of treaty-based rights by local authorities.[84] This is only logical because 'if the right is not well provided for [in the domestic legal system], there cannot be effective remedies, or any remedies at all.'[85]

In the process, individuals and groups who are victims of violations of treaty-based rights will thus be given treaty-based remedies irrespective of a domestic law that denies or restricts access to such by the right-holders. Consequently, the rule that 'latter law prevails over the former' does not apply as between proclamations and treaties. Treaties thus occupy a position superior to that of domestic proclamations, which, if inconsistent with ratified treaties, should give way to the domestic application of treaty-based remedies.

3.4 The Ethiopian Legislative and Judicial Position on the Status of Treaties

Besides the international norms that impose obligations upon states to ensure compatibility of domestic norms and ratified treaties as well as prohibit the presentation of domestic law as a defence for not discharging treaty requirements, the recent trends in domestic legislative and judicial practices also support the conclusion that a proclamation that contradicts ratified treaties should be disregarded. The provisions of Proclamation 251/2001 require the House of the Federation (HoF) as the final constitutional arbiter[86] to interpret the Constitution in conformity with treaties[87]

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[83] Jawara case, cited above at note 66, Para 34.

[84] See Takele Soboka Bulto, 'The Indirect Approach to Promote Justiciability of Socio-Economic Rights of the African Charter on Human and Peoples' Rights' in Rachel Murray (ed.) *Human Rights Litigation and the Domestication of International Human Rights in Africa* (forthcoming 2009), p. 29; See SERAC case (note 40 above) Para 36-41.

[85] SERAC case (note 40 above) Para 37.

[86] The critical importance of the HOF decisions arises from their precedent-setting effects. Under Art 11 (1) of Proc 251/2001, 'The final decision of the House [of the Federation] on constitutional interpretation shall have general effect[s] which therefore shall have applicability on similar constitutional matters that may arise in the future.'

ratified by Ethiopia.[88]If the Constitution and treaties are in consonance with each other's terms, a proclamation that contradicts a treaty, by necessary implication, contradicts the Constitution and as such becomes null and void in pursuance of Art 9(1). In other words, the cumulative reading of Art 9(1) and 13(2) of the Constitution and Art 7 (2) of Proclamation 251/2001 does not allow room for the valid promulgation of a law that is inconsistent with treaties ratified by Ethiopia.

From the judiciary's standpoint, we have now come to have some judicial decisions that indicate that ratified human rights treaties remain unaffected despite subsequently promulgated inconsistent domestic laws. In the case between *Federal Police Criminal Investigation Department vs Naod Misale* and others,[89] the Court ruled that the Amendment to the Federal Anticorruption Proclamation[90] that almost flatly disallows the right to bail to persons arrested on suspicion of corruption does not empower the police to keep suspects in its custody indefinitely. It found that the 'prohibition of bail' under this law has led to the violations, inter alia, of Ethiopia's international human rights obligations, particularly those guaranteed by the ICCPR. Interestingly, the ICCPR, which was allowed to override the 2001 Anticorruption Proclamation, was acceded to by Ethiopia on the 11 June 1993, about a decade before the promulgation of the instant Proclamation.[91]

Consistent with this ruling, the High Court, in another bench involving a trio of other judges, reached the same conclusion in the interpretation of Proclamation 255/2001[92] which barred any outgoing presidents from taking part in partisan politics. In the case litigated between *Dr Negasso Gidada (former President of Ethiopia) vs HPR and the HOF*[93], the Court relied, inter alia, on the ICCPR and the Universal Declaration of Human Rights (UDHR)[94] in rejecting the proclamation's attempt to limit the outgoing Presidents' right to run as a candidate for election into the HPR.

It is fairly clear that the emergent domestic judicial and legislative practices have put ratified international human rights treaties above proclamations. As Scheinin rightly stressed, the 'domestic role and effect of international human rights norms cannot be

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[87] This is also in line with the original intent of the drafters of the Constitution. See Minutes of the Ethiopian Constitutional Assembly, Volume 2, p 68 (Tikimt 30-Hidar 7 1987 EC).
[88] See also footnote 133-134 and accompanying text (below).
[89] Case No. 17705, Federal High Court, Pagume 5, 1995 EC (10 September 2003), p. 28.
[90] See Art 2(1), Proclamation No. 239/2001, *Anti-Corruption Special Procedure and Rules of Evidence (Amendment) Proclamation*, Federal Negarit Gazeta, 7th Year, No 27, 12 June 2001.
[91] See Status of Ratification, available at < http://www2.ohchr.org/english/bodies/ratification/4.htm >.
[92] Arts 7 and 14(b), Proclamation No. 255/2001, *Administration of the President of the Federal Democratic Republic of Ethiopia*, Federal Negarit Gazeta, 8th Year No 1, 8 October 2001.
[93] Computer File No 41183, Tahsas 26,1998 EC (6 October 2005), p. 7
[94] Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. Ethiopia was one of the countries that adopted the UDHR in 1948.

assessed in the abstract on the basis of studying the written constitution of a given country. What counts in the last resort is whether courts of law apply human rights norms in their concrete decisions.'[95] As the limited analyses of Ethiopian judicial practices reveal, ratified treaties cannot be placed on equal footing with proclamations and they remain in force despite subsequent contradictory laws and practices which themselves need to conform to Ethiopia's international obligations contained in ratified treaties.

4. The Hierarchy of Ratified Treaties Relative to the Constitution

As has been shown above, Ethiopia cannot lawfully issue domestic proclamations that contradict its treaty obligations and, as a result, later proclamations do not prevail over previously ratified treaties. We have thus concluded that ratified treaties prevail over contradictory proclamations regardless of domestic proclamations' date of promulgation as the latter must conform to human rights treaties ratified by Ethiopia.

It now remains for us to explicate the hierarchical relationship of ratified treaties and the Ethiopian Constitution. It needs stressing that the incorporation of treaties into domestic law does not take away their international character and convert them into pure domestic law. While ratification is a 'sticking point' in the process of expressing the country's consent to be bound, the treaty still remains an instrument of international character destined for domestic application. This remains to be the case even after the treaty has been domesticated through ratification or accession. Thus, domestication of a treaty does not have the effect of turning the nature of the treaty into pure domestic norm amenable to domestic legislature's manipulation. As a Nigerian court recently commented, international treaties such as the African Charter are 'statute[s] with international flavour."[96] Revisited in the light of this special nature of international instruments, an attempt to put treaties hierarchically below the Constitution reveals numerous anomalies and contradicts the constitutional text itself. The next section thus argues that ratified treaties are not below the Constitution, as is usually asserted, and are rather part and parcel thereof, with the implication that ratified treaties and the Constitution form an integrated whole and share equality of normative status.

4.1 The Nature of Treaties and Re-Reading the Constitutional Text

Views have been expressed that ratified treaties in Ethiopia sit on the same footing as proclamations which are also primary laws, having been made by the HPR. According to this view, ratified treaties would come second to the Constitution in the pyramid of

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[95] Scheinin, cited above at note 10, p.421.

[96] Inspector-General of Police v All Nigeria Peoples Party and others, Court of Appeal of Nigeria in the Abuja Judicial Division, Appeal No CA/A/193/M/05, Decided on 11 December 2007, Para 22. Full text of the decision is available at < www.chr.up.ac.za>.

laws.[97] This has led scholars to the conclusion that, because treaties share the same status with domestic legislations, they can be overridden by latter Proclamations.[98]

If this line of thought is followed, all treaties ratified by Ethiopia will only operate within the intervals of its ratification and the issuance of a subsequent but contradictory proclamation which will prevail over and terminate the application of treaties in the country.[99] One can only wonder as to the implications of the 'latter prevails over the former' rule if domestic proclamations are to prevail over former treaties to which Ethiopia is a party. Does such a scenario constitute a reservation, a suspension, a termination, or a withdrawal by Ethiopia from the treaty? Under the VCLT, a reservation is made 'when signing, ratifying, accepting, approving or acceding to a treaty.'[100] The striking down of a treaty by a later proclamation, as a post-ratification measure, does not fit the definition of reservation. The issuance of a later law that contradicts a state's international treaty obligations is no cause for suspension, termination or withdrawal from the treaty regime.[101] In any case, suspension, termination and withdrawal from a treaty regime are formal processes which require a country to submit a written declaration, similar to the instrument of ratification, to be communicated to all other state parties to the treaty and should be signed by a state delegate who has the power to negotiate treaties on behalf of the country.[102] As the African Commission ruled:

> Given that Nigeria ratified the African Charter in 1983, it is presently a convention in force in Nigeria. If Nigeria wished to withdraw its ratification, it would have to undertake an international process involving notice, which it has not done.[103]

Unless and until these formalities are complied with, the treaty continues to bind the country. If latter laws repeal earlier treaties, an anomalous situation arises wherein a

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[97] Ibrahim, cited above at note 2, p. 135. Sisay, cited at note 2 above, p.147; Gerbeamlak, cited at note 2 above, 45-46.

[98] Ibrahim, cited at note 2 above, 133-135; Getachew, cited above at note 2, p. 257-258.

[99] This line of contention led Minasse to conclude that 'ordinary laws may contradict international human rights and still be constitutional …[and] a later domestic law can always override an international treaty obligation regarding human rights, for all domestic purposes.' See Minasse, cited above at note 8, p.28.

[100] See VCLT, Art 2(1) (d).

[101] The VCLT is explicit in stating that '[t]he validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.' See VCLT, Art 42(1). The causes and effects of impeachment of the treaties have been extensively listed from Arts 42-72 of the VCLT, but excludes a country's issuance of contradictory law in order to bring about the end of the binding force of the treaty in its domestic sphere.

[102] VCLT, Art 67 (1) and (2).

[103] *Communication* 129/94, Cited above at note 65, Para 12.

treaty's domestic force expires while it continues to bind the country internationally. Such contradictions are outcomes of the misconception arising from attempts to locate treaties amid and on equal footing with local proclamations. The view is a by-product of the notion of state's 'exclusive jurisdiction' within its territory according to which human rights are matters of exclusive internal concern. As a result a state may change its mind at any time to disobey international law, and if it changes its mind, the rule loses its force against the nation.[104] This view emanates from the theory of dualism which has now come to lose its sway.

It would be odd to expect the HPR to *intentionally* issue a proclamation that contradicts any of the human rights treaties that have been ratified by the country with a view to withdraw from a human rights treaty regime, even if there were a possible legal avenue to do so. A careful reading of the Constitutional provisions reveals that the HPR is prohibited from promulgating proclamations that contravene the terms of ratified treaties. Providing for the position of local laws, customs and decisions vis-à-vis itself in its Art 9(1), the Constitution has regulated the situation of treaties under a separate sub-Article 9(4). If the disparate provisions are to be given proper meaning, the separate provision for domestic laws and practices on the one hand and treaties on the other is indicative of the Constitutional intent to treat different norms differently. Thus ratified treaties are not merely 'any other' proclamation but are special types of norms integrated into domestic legal system. Irrespective of contradictory domestic laws and practices they remain binding on the country, and a law, conduct or decision that deviates from the treaty requirements can only be found in the realm of treaty violation.

In addition, Art 13 (2) of the Constitution prescribes a mandatory rule of interpretation specifically applicable to the Bill of Rights such that the fundamental rights and freedoms guaranteed therein "shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia." This interpretation is further bolstered by the provisions of Proclamation 251/2001, which requires the House of the Federation (HoF) as the final constitutional arbiter[105] to interpret the Constitution in conformity with treaties ratified by Ethiopia.[106]

International human rights treaties thus provide a source of inspiration in the ascertainment of the meaning of otherwise ambiguous Constitutional provisions.

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[104] D'Amato, cited above at note 19, p.59.

[105] The critical importance of the HOF decisions arises from their common-law type of precedent-setting effects in a civil law jurisdiction. Under Art 11 (1) of Proc 251/2001, 'The final decision of the House [of the Federation] on constitutional interpretation shall have general effect[s] which therefore shall have applicability on similar constitutional matters that may arise in the future.'

[106] See also footnote 133-134 and accompanying text (below).

Conversely, it has not prescribed that treaty interpretation should follow the Constitution's meaning; it is to the contrary. If this situation is to be given a meaningful application, the Constitution is either below or on par with ratified treaties.

4.2 Customary Human Rights Standards

A perusal of the rights guaranteed in the Bill of Rights of the Constitution reveals a close similarity with those of the UDHR, giving rise to the assertion that the latter's guarantees have been directly incorporated into the text of the Constitution. According to the *travaux preparatoires* of the Constitution, 'there is an inherent interrelatedness and compatibility between treaties ratified by Ethiopia and the Constitutional provisions.'[107] While this is invariably true of the relationship between the Bill of Rights and provisions of the UDHR, a closer perusal of the corresponding provisions of both instruments reveals a close-to-verbatim similarity.

The fact that the UDHR has achieved the status of customary norm of international law is a subject of widespread agreement, and is well documented.[108] Despite the original 'soft law' nature of the Declaration, with passage of time, subsequent consistent state practice and *opinio juris* have given it an overriding credence such that it has acquired the status of customary international law and its provisions are binding irrespective of consent.[109] Transcending and surpassing the original intent and imagination of the drafters, the UDHR has now taken 'a life of its own.'[110] It has become a 'world-wide secular religion,'[111] the 'yardstick by which we measure human

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[107] Minutes (note 87 above) p 68 (Tikimt 30-Hidar 7 1987 EC). (Translation mine).

[108] See generally the works of the following eminent jurists: Hurst Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law' (1996) 25 *Georgia Journal of International and Comparative Law* 287; D'Amato, cited above at note 19; Bruno Simma, and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1989) 12 *Australian Yearbook of International Law* 82; Richard B Lilich, 'The Growing Importance of Customary International Human Rights Law' (1996) 25 *Georgia Journal of International and Comparative Law* 1

[109] Lilich, cited above at note 117, 1; Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional, and International Jurisprudence* (2002)29-30; Louis Henkin, 'Human Rights and State "Soveriegnty"' (1996) 25 *Georgia Journal of International and Comparative Law* 31, 38.

[110] Egon Schwelb, 'The Influence of the Universal Declaration of Human Rights on International and National Law' (1959) 53 *Proceedings of the American Society of International Law* 217, 217-218.

[111] Elie Wiesel, 'a Tribute to Human Rights' in Y Danieli et al (ed) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (1999) 3.

progresses[112] and 'the essential document, the touchstone, the creed of humanity that surely sums up all other creeds directing human behaviour.'[113]

Although the Constitution is silent about the status of customary rules in Ethiopia, limiting itself to provisions on 'treaties' under Art 9(4) and Art 13, the absence of an explicit provision on the domestic hierarchical status of customary international law can be explained by the fact that it is binding on all states irrespective of the states' consent thereto without a need for enabling domestic law. Indeed, if the Constitution had mentioned the hierarchical status of customary international law, it could have helped obviate possible ambiguities regarding their domestic normative status but would have equally proved redundant and superfluous. Their absence would not take anything away from their normative force in Ethiopia.

Saving some domestic flavours the discussion of which is beyond the aspiration of this article, the wording and catalogue of the Ethiopian Bill of Rights closely resembles those of the provisions of the UDHR, and the twin Covenants (the ICCPR and ICESCR) that grew out of it.[114] The Constitution also makes explicit reference to the UDHR and other ratified treaties as interpretative sources of inspiration. The rights guaranteed in the UDHR which have found their ways into the Ethiopian Constitution cannot be set aside by a contradictory domestic law (including the Constitution) as they form part of customary international law. The argument that Constitutional provisions prevail over human rights treaty norms thus loses sight of the customary nature of most of the Bill of Rights provisions of the Constitution. Some of the rights guaranteed in the UDHR and other international treaties and incorporated in the Constitution are not derogable at all even for a transitory period in situations of state of emergency.[115] As the Constitution is an embodiment of the UDHR and other treaty provisions, it would be impossible to draw a neat dividing line between the Constitution and human rights treaties ratified by Ethiopia. As a result, the UDHR, ratified treaties and the Bill of Rights form an indivisible whole, and they jointly occupy the status of the supreme law of the land.

4.3 The Constitutional 'Charming Betsy' Analogy

The belief that in the process of legal adjudication judges merely uncover and expound pre-existing law without making any new improvements has gone out of favour. Decision making by judges is no longer perceived as a purely deductive

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[112] Kofi Anan, quoted in Michael Ignatieff, *Human Rights as Politics and Idolatry* (2001)53.

[113] Nadine Gordimer, 'Reflections by Nobel Laureates,' in Y Danieli et al (ed) *The Universal Declaration of Human Rights: Fifty Years and Beyond* (1999) vii.

[114] This resemblance is not typical of Ethiopian Constitution. Given the similar purpose of the Bills of Rights of national constitutions and international human rights treaties, 'cross-fertilisation' between Constitutions and such treaties have now become the norm. See Shany, cited above at note 39, 342-343.

[115] See, for instance, Art 4(2), ICCPR.

exercise. The very indeterminacy of language has a consequence that no legal text, however detailed, can have a wholly precise meaning or determinate range of application. As Willis correctly argued, '[w]ords do not have inherent meaning. At best, they point toward a meaning.'[116] The usually general constitutional text 'posits, with great authority, a starting point for interpretation, and eventual application, but it invites, with equal authority, improvisation, thereby recognizing its own inconclusiveness.'[117] Seen in this light, Article 13 of the Constitution cannot be, as some would have us believe, easily discounted as 'just a rule of construction'[118] or as a rule of infrequent application, that courts employ *only* when interpretation is needed in the determination of cases.[119] The nature of constitutional provisions, broadly worded as they are, means they tend to raise questions of interpretation more often than is foretold by many an author. It has already been commented that the brevity of the 'crude'[120] socio-economic provisions of the Bill of Rights, for instance, necessitates a heavy reliance on ratified treaties for the explication of the rights contained therein.[121] In such cases, employing international treaties could be more of a norm than an exception.

Thus, it becomes the task of bodies interpreting constitutions to examine as many of the alternative meanings as possible before selecting the one that is deemed most appropriate for the resolution of a particular case. This entails a value-coherent construction, the aim of which is to uphold rights and freedoms of individuals and groups as *explicitly* and *implicitly* provided for in the constitutional text. This in turn engenders an extension, a reformulation, a reading of something into the text. Thus usually the text:

> has an unambiguous and predictable … capacity for expanding. Once something new and different appears, something not thought of before, it can be felt to fit within existing categories. In this sense, every category in fact has an immanent and expansive category.[122]

As noted above, the Ethiopian Constitution has provided for a mandatory interpretational approach to the Bills of Rights section. Accordingly, a local interpreting body must make every effort to arrive at a constitutional meaning that is consistent with the terms and the spirit of the UDHR and other human rights treaties ratified by Ethiopia. A differential meaning cannot be given to the constitutional Bill

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[116] Clyde Willis, *Essays on Modern Ethiopian Constitutionalism: Lectures to Young Lawyers* 1997)(Unpublished) 4.
[117] Lourens Du Plesis, 'Legal Academics and the Open Community of Constitutional Interpreters' (1996) 12 *South African Journal on Human Rights* 214, 223.
[118] Getachew, cited at note 2 above, 257.
[119] Ibid; Gebreamlak , cited at 2 above, 48.
[120] See Sisay, cited at note 2 above, 139.
[121] Id, 147-148.
[122] Willis, cited above at note 116, p.

of Rights provisions. Given that the Bills of Rights are modelled upon and have incorporated the provisions of the UDHR and other human rights treaties, interpretation of the Constitutional provisions in line with these treaties could be easier than proving that such a meaning is unavailable.

The approach of interpreting constitutional provisions in line with a country's international obligations has the effect of making constitutions convenient 'sites for implementation of international law' [123] and has long been in use in other countries. Perhaps it is most elaborated and nuanced in the United States, where the approach grew out of the famous Supreme Court decision in the case of *Murray v Schooner Charming Betsy in 1804*.[124] In his decision, Chief Justice Marshal decided that US courts must construe ambiguous federal statutes in a manner that would not violate either US treaty obligations or customary international law,[125] giving rise to the now widely accepted *Charming Betsy canon*. The application of the canon now transcends the US judicial practice and has influenced several constitutional and statutory interpretations in many other jurisdictions.[126]

While it had been originally applied only to statutory interpretation, the Charming Betsy canon has now come to be referred to as 'Constitutional Charming Betsy'[127] to imply that constitutions should also be interpreted in a manner that is consistent with a country's international obligations. The provisions of Art 13 (2) of the Ethiopian Constitution can therefore be appropriately referred to as the Ethiopian Constitutional Charming Betsy Rule.

The underlying justification is the presumption that is 'reflective of a hypothetical parliamentary intent – that, barring contrary evidence, judges must assume that legislators had not intended to compromise their state's international obligations via legislation.'[128] Indeed, the *travaux preparatoires* of the Constitution was explicit in this regard. It states that the spirit of Article 13 (2) of the Constitution is based on the

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[123]Vicki Jackson, 'Constitutional Comparisons: Convergence, Resistance and Engagement' (2006) 119 *Harvard Law Review* 109, 112.

[124] See 6 U.S. (2 Cranch) 64 (1804).

[125] For an elaboration of the Charming Betsy canon, see 'The *Charming Betsy* Canon, Separation of Powers and Customary International Law' (2008) 121(4) *Harvard Law Review* 1215; Waters, cited above at note, 34, p. 660 *et.seq.*

[126] Waters, cited above at note 34; Shany, cited above at note 39; John Dugard, 'The Role of International Law in Interpreting the Bill of Rights' (1994) 10 *South African Journal on Human Rights* 208; John Dugard, 'The Role of Human Rights Treaty Standards in Domestic Law: The South African Experience' in Philip Alston, and James Crawford (ed), *The Future of UN Human Rights Treaty Monitoring* (2000) 269; Neville Botha, 'International Law in the Constitutional Court' (1995) 20 *South African Yearbook of International Law* 222.

[127] See Waters, cited above at note 34, p.679.

[128] Shany, cited above at note 39, p.367.

conviction that 'there would be no problem of incompatibility between ratified treaties and existing and future domestic legislations.'[129]

Faced with a similar ambiguity about status of treaties as the one that is prevailing in Ethiopia, a Nigerian Court has decided to rely on the presumption of consistency of legislative intent and international treaties. It thus ruled:

> The African Charter on Human and Peoples' …is a statute with international flavour. Being so, therefore, if there is a conflict between it and another statute *its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation.*[130]

This presumption has found expression in Ethiopia not only in Art 13 (2) of the Constitution but also in an implementing legislation. Under Proclamation 251/2001, the HoF, a Federal body with the highest power of Constitutional interpretation,[131] is instructed to heed the Constitutional *Charming Betsy* canon:

> Where the Constitutional case submitted to the House [of the Federation] pertains to the fundamental rights and freedoms enshrined in the Constitution, the interpretation shall be made in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights, and International instruments adopted by Ethiopia.[132]

As a matter of *opinion juris*, Ethiopia also declared its support for the normative development of its laws in line with the regional and international standards: it was enunciated that 'the Ethiopian Government consistently expressed its support for regional and international efforts to achieve normative standards for basic human rights.'[133] It remains for the constitutional interpreting bodies to ensure that the Constitution is construed in a manner that conforms to Ethiopia's treaty commitments. The concordance of the letters and spirit of the Constitution and ratified treaties means that it is impossible to differentiate norms that belong in the Constitution and those which are treaty-based. The Charming Betsy rule of Art 13 (2)

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[129] Minutes (note 87 above) p 68 (Translation mine).

[130] Inspector-General, cited above at note 96, Para 37, (emphasis author's).

[131] Under Art 83 (1) of the Constitution: "All constitutional disputes shall be decided by the House of the Federation."

[132] See Art 7(2), Proclamation No. 251/2001, *Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation*, Negarit Gazeta, 7th Year, No. 41, 6 July 2001.

[133] See Preamble, Para 2, Proclamation No. 114/1998, A Proclamation to Provide for Accession to the African Charter on Human and Peoples' Rights , Negarit Gazeta, 4th Year, No 40, 2 June 1998.

and the presumption of consistent parliamentary intent mean that there is a 'merger', so to speak, between Constitutional and treaty-based fundamental rights and freedoms such that assigning differential status to either set of rules due solely to its material source borders legal and practical impossibility.

4.4 Sovereignty

The position of domestic laws vis-à-vis ratified treaties have traditionally been explained in terms of state sovereignty according to which a state enjoys territorially rooted exclusive power to prescribe laws. Arguments related to sovereignty have been advanced by Ibrahim who grounded his contention in Art 86 (4) of the Constitution[134], and interpreted the provision as implying that 'the Constitution requires Ethiopia to observe only those international conventions respecting its sovereignty and promoting its national interests.'[135] According to him, 'any ratified international convention that poses a threat to Ethiopia's interest could be subject to repeal. It can thus be maintained that a national law prevails over an international convention in case the latter runs contrary to Ethiopia's interests.'[136]

But this argument fairly quickly runs into internal contradictions. Firstly, the ratification of international human rights treaties is an exercise of a state's sovereignty and an unambiguous declaration of a state to be bound by the relevant treaty. It signifies a state's consent to the limitation of its sovereignty in favour of the respect and realisation of human rights to the extent warranted by the requirements of the treaty in question. If state sovereignty is strictly adhered to, almost all human rights treaties would end up in repeal as they generally limit (and thereby contradict) state sovereignty. It needs stressing that human rights are 'derogations'[137] from state sovereignty and their contradiction with (and consequent erosion of) state sovereignty is more of a norm than an exception. Thus it has been remarked that 'the time of absolute and exclusive sovereignty has passed.'[138] I have argued elsewhere that '[i]nfractions of basic human rights are no longer matters of internal concern, just as sovereignty is no longer an acceptable defence to deprivation of fundamental rights of nationals and other residents of a country.'[139]

Secondly, and at least in the Ethiopian legal context, the Constitution is made by the Nations, Nationalities and Peoples of Ethiopia.[140] Accordingly, '[a]ll sovereign

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[134] According to this provision, Ethiopia aspires '[t]o observe international agreements which ensure respect for Ethiopia's sovereignty and are not contrary to the interests of its Peoples.'
[135] Ibrahim, cited above at note 2, p.134-135.
[136] Id, p. 135.
[137] Henkin, cited above at note 109, p. 34.
[138] B Boutros-Ghali 'An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peacekeeping' (1992) 31 ILM 953, Para 17.
[139] Takele, cited above at note 27, p. 57.
[140] Preamble, Para 1.

powers reside in the Nations, Nationalities and Peoples of Ethiopia'[141] which they exercise through their representatives and in accordance with the Constitution. The exercise of sovereignty according to the Constitution requires the creation of 'supportive conditions for ensuring respect for our rights and freedoms and for the collective promotion of our interests…[and]…consolidate, as a lasting legacy, the peace and the prospect of a democratic order which our struggles and sacrifices have brought about.'[142] Granted, state sovereignty must be exercised for the purpose of upholding international human and peoples' rights which should inspire the constitutional interpretation of fundamental rights and freedoms. The reversal of the domestic application of international treaties would almost inevitably lead to the curtailment of treaty-based rights and freedoms hitherto enjoyed by Nations, Nationalities and Poples of Ethiopia who are the ultimate holders of sovereignty. Ethiopia's sovereignty must be used for the better protection and promotion of the rights and freedoms of 'Nations, Nationalities and People of Ethiopia' in whom resides the ultimate state sovereignty.

The contention that the exercise of sovereignty would entitle Ethiopia to "repeal"[143] its ratified international treaties at will, if such are found to contradict Ethiopia's national interests is extremely controversial at best. It is difficult to imagine the situation where a ratified human rights treaty all of a sudden starts to contradict Ethiopia's sovereignty and national interests to a degree that is different from the time of its ratification to bring about the nullification of the domestic effects of the treaty.

It is now generally accepted that human rights assume priority over national sovereignty, and as such states have accepted international scrutiny of their human rights credentials.[144] Strict sovereignty has now been 'eroded' by the exigencies of human rights protection and promotion.[145] To the extent that sovereignty is limited by the necessities of domestic implementation of international human rights standards, such has been accepted as part of the norm and cannot be used as a ground from which to argue towards the repeal of binding human rights treaties.

5. Conclusion

Dualism has outlived its usefulness and must be laid to rest. The choice of methods for treaty incorporation into domestic legal system is discretionary and dependent on a country's legal procedures. But depositing ratification instruments with relevant treaty depository bodies, issuing ratification proclamations to incorporate the treaties into the law of the land, and publishing those proclamations in the Negarit Gazetta are unmistakable and unequivocal indicators of legislative intent to abide by ratified

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[141] Constitution, Art 8(1).
[142] Preamble, Constitution, Paras 6-7.
[143] Ibrahim, cited above at note 2, p. 135.
[144] Takele (note 27 above) 57.
[145] Viljoen, cited above at note 29, p. 17.

international treaties in Ethiopia. Just in a similar manner that the legislature has devised its own discretionary means of domesticating international human rights treaties, so should judicial and quasi-judicial bodies seek ways of translating the promises of international human rights treaties into domestic reality through purposive interpretation and application. It is for the courts and the HoF to clarify the ambiguities surrounding the status of treaties in the country's normative hierarchy: just as they mould and remedy domestic legal deficiencies and inconsistencies in the "run-of-the mill" cases, so is it part of their routine duty to interpret and apply constitutional provisions in line with international treaties. It remains for the legal professionals to invoke treaties in appropriate domestic fora in order to help promote the process.

The principle of good faith and the resultant states' duty of ensuring compatibility between its national laws and international obligations, the substantive independence of international law, and Ethiopia's duty to provide domestic remedies for violations of treaty-based rights warrant the conclusion that treaties are above any proclamation. The domestic legislative and judicial trends also support this conclusion. It is with the intention of treating international agreements to a different status that the Constitution has provided for them separately under Art 9(4) as contrasted to other domestic laws whose status is defined under Art 9(1). The drafters' omission of treaties from the list of inferior norms explicated in the supremacy clause must have been intentional and purpose-oriented: it bears witness to the differential position of treaties as contrasted to other domestic norms.

Due to the customary nature of the UDHR whose provisions have cross-fertilised the Constitution's Bill of Rights, and because of the Constitutional Charming Betsy rule it is almost impossible to separate the Constitutional Bills of Rights from international treaties ratified by Ethiopia. It is safe to conclude that treaties share at least the same status as the Constitution. Any other interpretation gives rise to the unwarranted scenario where Ethiopia will contravene its international obligations through contrary domestic law. The supremacy clause should be taken at its words: as explicitly stated under Art 9(1), the Constitution's supremacy is over "law, customary practice or a decision *of an organ of state or a public official* which contravenes this Constitution." Treaties as embodiments of international norms are different to what is *normally* referred to as 'law, customary practice or a decision of an organ of state or a public official' proper – and, so is their normative status.