I. Introduction

The role of International Human Rights Law (IHRL) in framing constitutions of divided and conflicting societies has been lacking scholarly attention. It is only in 2009 that the noted late Thomas Franck and Arun Thiruvengadam gave attention to the area. In fact, their co-authored short paper on this area was published in 2010 in an edited volume on framing the State in times of transition. In this contribution, the co-authors asked the right question: “Does international law have anything to say about the way in which a constitution is negotiated or drafted?” They attempted “to address this issue by approaching it from several perspectives.” They took the International Covenant on Civil and Political Rights (ICCPR) as the principal source of universal procedural norms potentially governing constitution-making processes.

To them, “all states contemplating the drafting of their constitutions are well advised to consider the ICCPR in organizing the framework within which their citizens participate in the process” but they are not sure “[w]hether this is a legal or merely prudential requisite”. They surveyed the practice of the
international system in the application of treaty law and customs and found “no firm evidence of rules applicable to the process of constitution-making. What does appear, however, is a general requirement of public participation in governance.” Thus, they concluded that “the question of whether there are any specific uniform norms to be followed when drafting a constitution must, as yet, be answered in the negative.” They further hold that “it is not yet clear that anything in international law requires a state to adhere to uniform practices.”

These conclusions seem a little problematic particularly when one considers that Franck was an internationalist and the main advocate of the human right to democratic governance. In fact, in the same edited volume, Hart tries to salvage them, though unconvincingly, arguing that a constitution making “is still widely assumed to be a prior condition for, rather than a part of, governance, and so many remain beyond the reach of the right to participate in governance.” Yet, contrary to the two authors, Hart holds that evidence of various kinds allows us to go further than this cautious conclusion of the two authors. According to Hart, participation as a requirement of a constitution-making process has recently gained recognition in international law which nonetheless remains in need of further clarification.

The main focus of the three scholars is on participation in drafting constitutions. They did not pay attention to the possibility that IHRL law indeed supplies a lot of substantive content to constitutions particularly when divided societies are unable to reach agreements. While writing in the context of difficult times of transition when there is no established political and legal system, they missed “[o]ne of the inconvenient facts of life ... that people often disagree, no matter how compelling the arguments that are laid before them.” When political actors helplessly disagree on the content of a constitution, mediating default rules are needed.

For IHRL to be a body of imputable principles guiding a process of constitution-making and content of a constitution, it must be “law” in its true sense and supreme to municipal law. Of course, in regard to that law contained in treaties, the State concerned must be a member; and in regard to customary international law, the State should not be a persistent objector. Again, within the body of IHRL, there must be some accepted hierarchy of norms.

The large part of this paper is busied with showing the supremacy of IHRL and with forging hierarchy of rights within this body of law. It proceeds on the assumption that if the two assertions are convincingly demonstrated or argued their implication is that constitution-making processes and the content of the eventually adopted constitutions can be required to be inconformity with IHRL, particularly human rights treaties the State concerned has accepted. Yet, those matters which IHRL does not regulate are left to its political process.

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5 Id.
6 Ibid, at 15.
8 Ibid, at 20.
II. International Law Versus National Law: The Supremacy Issue

One fundamental use of the law is to preemptively prevent conflicts by sorting out potential issues for clash. In order to do this, the law must start by working out its conflicting provisions. One scholar has given us one way the law does this at the municipal level:10

Systems of law usually establish a hierarchy of norms based on the particular source from which the norms derive. In national legal systems, it is commonplace for the fundamental values of society to be given constitutional status and afforded precedence in the event of a conflict with norms enacted by legislation or adopted by administrative regulation; administrative rules themselves must conform to legislative mandates, while written law usually takes precedence over unwritten law and legal norms prevail over nonlegal (political or moral) rules. Norms of equal status must be balanced and reconciled to the extent possible. The mode of legal reasoning applied in practice is thus naturally hierarchical, establishing relationships and order between normative statements and levels of authority.

Dichotomous expressions such as international law versus national law, State law versus federal law and higher law versus institutional law ... etc are common. Trying to articulate the relationship between international law and national law, there are two main theories: monism and dualism.

1. Dualism and the Original Sense

The dualist school begins with the proposition that law is an act of sovereign will and on this and other basis it contends that international law and municipal law are two completely different legal orders. Municipal law is considered a manifestation of this internally-focused will; whereas international law is the result of a collective act of will by which the sovereign powers undertake obligations with respect to other sovereign powers.11 The second point of difference between the two legal orders relates to subjects of the law: Municipal law is taken as governing affairs among or between municipal organs including the State while international law governs the relationship between equal members of the international community. Thirdly, the two legal orders are taken as different from each other in their substance or subject-matter:12

Municipal law concerns itself with matters affecting the relationship between individuals, or between individuals and State organs. International law confines itself to regulating matters of particular interest to States and other international bodies. It does not concern itself with the well-being of those governed by municipal law.

One consequence of these three differences is that “international law itself is, by its nature, inapplicable in the municipal sphere” for which reason if there is a need to give international law domestic effect, “each rule of international law

12 Schaffer, ibid, at 279.
must be individually incorporated in municipal law” by a process or doctrine called transformation.13 Given that transformation transforms international law into municipal law, dualists contend that “conflict situation between the two orders cannot arise and that it is, therefore, unnecessary to decide which system shall take priority”.14

At one time in the past these points had a lot of sense in them. There is a positive correlation between the sophistication of the subjects of the law and the sophistication of the law itself: simple societies need simple laws; sophisticated life needs sophisticated laws. In the past, international law was called law of nations. Thus, it must have been originated at the time States were originated. The development of modern States is traced to the 17th Century Europe. By then, sovereignty was in the hands of one or few, under different names. So making a treaty of peace, war or trade with another sovereign over there was an exclusive power of the sovereigns. In those times, it was observed with some validity that international law has minimalist regulatory effect on the domestic sphere. Since the birth of the Magna Carta, internally, sovereignty had started to shift towards the people and, after centuries of political evolution, law-making, the main manifestation of sovereignty, has become the power of the peoples’ representative – the parliament.

Thus, in part due to inertia, in part because the executive branch of government is more suited to the treaty-making task and in part because of the minimal domestic effect of treaties, treaty-making, which no doubt is law-making, remained in the hands of the executive up to recently. In fact, the executive in major common law countries still retain the power to conclude treaties - bind the State internationally. When certain treaties tend to have substantial effect on the domestic sphere, the dualist doctrine was there to block them. Indeed, relying on Grotius, Vattel, Locke, Montesquieu and Blackstone, one scholar convincingly showed that the dualist doctrine has the concern for separation of power at its bases:15

Anglo-American legal, constitutional, and political world recognized a sharp distinction between the power to make treaties and the power to legislate, with the former seen as an executive power and the latter vested solely in the hands of the people’s most direct representatives. Treaties dealt with matters involving foreign affairs, while the regulation of domestic conduct remained the province of domestic legislation.

2. Dualism and the Lack of Sense

The circumstances that made the foundation for the dualist doctrine have changed and for this reason the doctrine is now unconvincing though not entirely rendered relic of the past. Given that now the most accepted political system is democracy which places sovereignty at the hand of the people, the first distinction between national and international law on which dualism is

14 Schaffer, supra note 11, at 281.
based – that the source of law of both sets of law are different - is clearly invalid. Nowadays, law-making is substantially the power of parliaments with some roles played by the executive branch. Even though international law is to a large extent a consensus with other States, its ultimate source remains the domestic law-maker – the people’s representative.

The last two distinctions are now rendered invalid by the development of IHRL. The claim that municipal law governs affairs among or between municipal organs while international law governs the relationship between equal members of the international community is no longer valid as individuals have become subjects of international law. This development is clear from the fact that individuals can sue their States before international tribunals and they can also be tried by international criminal tribunals. In terms of subjects, the ever-growing corpus of IHRL not only regulates in detail how States should treat their citizens but also “has increasingly become involved in issues concerning the way in which governments ought to be structured.”16 “We live in a world of treaties.”17 Unlike the exigencies of war and peace, which were the concern of ancient treaties, today’s treaties exist “to establish positive rules of conduct that will govern the activities of individuals.”18

Yet, some common law countries such as the United Kingdom, Canada, Australia or Israel still leave treaty ratification power in the hands of the executive.19 At the international level “[r]atification is the term for the final confirmation given by the parties to an international treaty concluded by their representatives. ... The function of ratification is, therefore, that it makes the treaty binding”.20 In the modern world, “ratification” is “the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty”.21 The need for ratification, which in essence is second-time (or even third or fourth) communication of consent, “is that States want to have an opportunity of re-examining not single stipulations, but the whole effect of the treaty upon their interests.”22 There is a lot of sense here! Another reason is that “treaties on many important matters are, according to the constitutional law of most States, not valid without some kind of consent of parliaments. Governments must therefore have an opportunity of withdrawing from a treaty in case parliaments refuse their recognition.”23

The second reason came together with the shift in the law-making power from the king to parliament and it makes a lot of sense. Historical examination of treaty-making shows that at the time when the king was the sole sovereign,

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16 Emanuel Gross, Fighting Terrorism: Bringing Democratic Regime to Nondemocratic Countries—The Legal Implications, 16 Tulane Journal of International and Comparative Law 17, 23 (2007).
17 Yoo, supra note 15, at 1956.
22 Oppenheim, supra note 20, at 532.
23 Ibid, at 532-3.
treaties became binding the moment agreement was reached particularly if no delegation was involved and there was no need to verify. In fact, “a modern analogy is to be found in the personal signature of treaties on the part of permanent heads of governments of what may be called ‘authoritarian’ states, as opposed to states governed under a genuine parliamentary system.”

In these two situations the sovereigns did not need to go back home and seek ratification from another sovereign. Seen in a modern day light, the problem here is essentially a democracy problem – that a single dictator is binding a whole population.

Yet, with regard to international human rights treaties, the widely held assumption being that these treaties are good, no one is bothered by the fact that a single dictator can ratify them at times even in violation of his country’s statutory or constitutional law. For example, this seems to be the case with the major human rights treaties Eritrea has accepted.

In fact, there is a lot of pushing and hand-twisting aimed at forcing States to accept international treaties. However, as a matter of principle, as Oppenheim held, in case the head of a State ratifies a treaty illegally, such ratification is invalid and the State concerned cannot be held to be bound by the treaty.

The real problem is that with many common law countries, the act of ratification is, domestically, no more than signature of the monist countries. When these countries ratify, the international community take them as parties to the ratified treaties. This problem is magnified because the depositories of treaties have not been inquiring as to whether instruments of ratification are properly obtained in accordance with the national law of the State concerned.

In regulating the effect of this problem scholars are divided. Some hold that “a state which acting qua state, purports to do everything that is necessary from the international point of view in order to bind itself by a treaty should be held to have become duly bound, and ought not subsequently to be able to plead its own failure to satisfy its constitutional requirements as sufficient reason for not being bound.” A “treaty is law domestically only because and to the extent that it is law internationally; it has no domestic legal effect apart from that.” On the other hand, it has been asserted that such an “unconstitutional treaty must be regarded as void internationally too.

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26 Oppenheim, supra note 20, at 536-7.
28 Fitzmaurice, supra note 24, at 130.
3. Monism: Still Valid

In maintaining municipal law and international law form one unified normative order sharing the same sources and subjects, the monist school has a lot of sense in the contemporary world.\textsuperscript{32} For this reason, the monist school does not face the problem of transformation.\textsuperscript{33}

However, there are some clashes when it comes to hierarchy of laws. Some "extreme monists" who take international law "as a world constitution"\textsuperscript{34} argue that municipal law which is contrary to international law is automatically void. Their reason is that "municipal law derives its authority by way of delegation from international law. The latter system determines the territorial and personal sphere of validity of national systems of law and makes their co-existence legally comprehensible."\textsuperscript{35} Moderate monists assert that municipal law which is contrary to international law is not automatically void; it is binding internally until someone invokes international law which then "ultimately supersedes contradictory principles of municipal law".\textsuperscript{36} A third school of monists called as "inverted monists" assume that municipal law is superior to international law as, to them, international law is only that part of municipal law which regulates relations of one State with foreign States eventually emanating from the sovereign State which is superior and antecedent to the international community and remains the only-law making authority.\textsuperscript{37}

The extremes and moderates of the monist school hold that international law is supreme. Without considering their logic at present they are indeed right. Indication of the supremacy of international law over national laws is available in the Vienna Convention on the Law of Treaties which states that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."\textsuperscript{38} This provision is widely interpreted as indicating that in case of conflict international treaties stand supreme to national laws. The Convention itself is widely considered as a code of customary international law; thus binding even upon non-member States. Indeed, pre 1950 publications testify to this fact:

It appears to be generally agreed that international law is binding upon states, that failure to observe international law in the municipal sphere involves the responsibility of the state, and that the latter cannot rely upon its constitution as excuse. These facts alone are sufficient to establish the supremacy of international law over municipal law.\textsuperscript{39}

We admit unreservedly the supremacy of international law. ... We admit that, if by reason of any deficiency in our legal institutions our Courts fail to give effect to a rule of international law binding us, it is the duty of the executive part of our Government to make good that deficiency by making reparation to the injured State. We admit also that

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  \item \textsuperscript{32} Schaffer, supra note 11, at 279.
  \item \textsuperscript{33} Ibid, at 280.
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Ibid, at 281.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Ibid, at 282.
  \item \textsuperscript{38} Vienna Convention on the Law of Treaties (1967), art 27.
  \item \textsuperscript{39} Felice Morgenstern, Judicial Practice and the Supremacy of International Law, 27 British Yearbook of International Law 42, 43 (1950).
\end{itemize}
we cannot plead as an excuse for a breach of an international obligation and defect in our legal system.\textsuperscript{40} In 2006 one writer has asserted that international human rights law requires such incorporation in constitutional law\textsuperscript{41} and a State’s failure to integrate international human rights law into constitutional law might thus lead to a breach of its international obligations.\textsuperscript{42} In the modern world, the African Commission on Human and Peoples’ Rights has come very clear on this issue when it grappled with references to “law” in the African Charter on Human and Peoples’ Rights. Consider article 9(2) of the Charter on the right to freedom of expression: “Every individual shall have the right to express and disseminate his opinions within the \textit{law}.” Even though the African Commission agrees that “within the law” means within national law, for the latter to be valid it has to be compatible with international standards. Clearly, the African Commission has ruled that “international human rights standards must always prevail over contradictory national law.”\textsuperscript{43}

It is helpful to return to each sub-school and try to make sense of the reasons for placing one set of law as supreme to another. The extreme monists hold that “municipal law derives its authority by way of delegation from international law”. Now, this position is unconvincing. As Louis Henkin rightly observed, at present “[s]overeign states accept international human rights standards, if they wish to, when they wish to, to the extent they wish to. They submit to monitoring, to judgment by international human rights courts and commissions, if they wish, to the extent they wish.”\textsuperscript{44} Indeed, international law is based on the consent of States; it is made only by States and only for States and States can only be persuaded or induced to accept international norms.\textsuperscript{45}

In this modern world based on principles contained in the Charter of the United Nations, the principle of State sovereignty leaves a lot of powers in the hands of States. For centuries, State sovereignty has been an area of huge interest to scholars of various disciplines and diplomats.\textsuperscript{46} However, in international law, State sovereignty has not been clearly defined. Article 2(7) of the UN Charter comes closest to defining sovereignty by indicating that the UN is not authorized to intervene “in matters which are essentially within the domestic jurisdiction of any state”.\textsuperscript{47} This article could also be read in light of article 2(4), which prohibits the threat or use of force to attack the “territorial

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\item\textsuperscript{40} Sir Arnold McNair quoted in Morgenstern, id.
\item\textsuperscript{41} Shany, supra note 19, at 342.
\item\textsuperscript{42} Ibid, at 344.
\item\textsuperscript{44} Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, \textit{68 Fordham Law Review} 1, 5 (1999).
\item\textsuperscript{46} For a detailed tracing of the evolution of State sovereignty up to the present, see John Hilla, The Literary Effect of Sovereignty in International Law, \textit{14 Widener Law Review} 77, (2008).
\end{itemize}
\end{footnotesize}
integrity or political independence of any state.” Importantly, article 2(1) provides that the UN “is based on the principle of the sovereign equality of all its Members.” Thus, in a broader context and with reference to one another, the corollaries of the principle of State sovereignty include, but are not limited to, the following:\(^{48}\)

1. sovereign equality;
2. political independence;
3. territorial integrity;
4. exclusive jurisdiction over a territory and the permanent population therein;
5. freedom from external intervention and the corresponding duty of non-intervention in areas of exclusive domestic jurisdiction of other States;
6. freedom to choose political, economic, social and cultural systems; and,
7. dependence of obligations arising from international law and treaties on the consent of States.

No other principle of international law is abused as State sovereignty is and many writers have cried the situation.\(^{49}\) Some of the attacks are based on “ought to be” argument. They are based on the sound premise that State sovereignty “is a social creation. It is not an objective or natural phenomenon, but the result of choices made by men and women, indicative of a mindset located in, rather than a natural force creative of, a social and political order.”\(^{50}\) State sovereignty “is a legal status ... from which certain legal consequences, in particular rights, but also obligations, are derived. As a legal phenomenon, sovereignty is not a physical reality”.\(^{51}\) Further, the argument goes, “sovereignty is not self-sustaining and no end in itself, but must be justified.”\(^{52}\) As such, if State sovereignty were ever defined in a way that now seems absurd, they call for a reformulation.

In providing a different take on sovereignty, some start “from the traditional premise that sovereignty as a functional concept must serve some greater good than the preservation or expansion of state power.” To them “a humanist, federal conception of sovereignty remains the best answer to the new challenges of international peace and security”.\(^{53}\) This position holds that sovereignty must be justified and the justification they offer is that “sovereignty is not merely limited by human rights, but should be seen to exist only in function of humanity.”\(^{54}\)

There are also scholars who tend to argue that even under the UN Charter, State sovereignty means the sovereignty of the people of each State.\(^{55}\) Some commentators have argued that “basing sovereignty on a more robust


\(^{50}\) Kirke Kickingbird et al., Indian Sovereignty 2 (1977).

\(^{51}\) Anne Peters, Humanity as the A and Q of Sovereignty, 20 European Journal of International Law 513, 515 (2009).

\(^{52}\) Ibid, at 518.

\(^{53}\) Sourgens, supra note 49, at 434.


\(^{55}\) Ibid, at 519.
notion of consent and self-determination would give the international community as international judge a firmer philosophical basis for action.”  

They argue that “the right to self-determination provides the best counterpoint to universal demands, and thus the best substitute for the notions of sovereignty.” Indeed, under the UN Charter, State sovereignty is invoked in the context of international relations. The UN Charter has several purposes one of which is “[t]o develop friendly relations among nations” and friendly relations is “based on respect for the principle of equal rights and self-determination”.

One need not labor hard to show that when a State violates the right of self-determination of its people, it becomes unfriendly to those States which respect the right to self-determination. In other words, a State is sovereign, to the extent that sovereignty is a reflection of self-determination of its people. Even though there is a valid argument that holds that as expressed in article 1(2) of the UN Charter, self-determination is not linked to the Charter’s avowal of sovereign equality in article 2(1) and the right of self-determination is not conceptually linked to the historical basis of either the UN as an organization or sovereign equality as a Westphalian myth and work of authorship by Vattel, at least in one UN General Assembly resolution, State sovereignty is indeed linked to the right of self-determination.

The 1970 UNGA Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States mentioned the right of self-determination of peoples enshrined in the Charter of the United Nations by virtue of which “all peoples have the right to freely to determine without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter”. Normally, the right of self-determination the Declaration provides cannot “be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.” Yet, for their territorial integrity to be maintained, the Declaration indicates that the States must be “conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”

The argument that State sovereignty should mean the sovereignty of the people of each State manifested through democratic means is, of course, strongly supported by another source of international law. As one scholar observed, at the time the Universal Declaration of Human Rights (UDHR) was adopted, “by 1948, almost all states – whether liberal democracies, one party revolutionary states, military dictatorships, or traditionalist regimes – subscribed to the notion that ‘the will of the people’ constitutes the ultimate

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57 Ibid, at 555.
58 UN Charter, art 1(2).
59 Hilla, supra note 46, at 135-36.
source of governmental legitimacy.” The constitutional unanimity easily qualifies as one source of international law - “a general principle of law recognized by civilized nations”.

In view of the foregoing discussion, the position of the “inverted monists” that international law emanates from the sovereign State is indeed sound. Democracies “accept international human rights standards, if they wish to, when they wish to, to the extent they wish to.” When it comes to treaties, peoples do this regulation by the power of ratification they leave at the hand of their legislature. In this way, international law emerges from the same sources as municipal law.

4. Making Sense of Monism’s Supremacy

The conclusion that both international and national law emerge from the sovereign people does not tell anything as to which set of law should be supreme. The “inverted monists” assume that municipal law is superior to international law because the latter emanates from the sovereign State. This by itself is unconvincing. For the African Commission, the reason why national law should not have precedence over international law is because such a relationship “would defeat the purpose of the rights and freedoms enshrined in” international law as States would be free to dodge their international commitments by simply passing restrictive domestic legislation. Clearly, according to the Commission, the reason for the supremacy of IHRL is the belief that certain values are universally valid and there is no justification for a State to depart from them - they cannot defeat them by passing legislation which may be dear to them. Something is considered universally valid that even though States are not forced to subscribe to it, once they have committed themselves to, they cannot depart from it.

This conviction becomes clear when one considers the reason behind the development of international treaties and, more importantly, the preamble of the UDHR. According to some noted human rights scholars, the preamble “is a statement of seriousness and position of the one who wears it, a signifier of origin, present status and lofty purpose.” It answers why the General Assembly adopted the Universal Declaration as can be discerned from the word “whereas” opening each paragraph. Even though it is widely accepted that “the Nazi period caused a genuine reaction which generated a commitment to

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62  According to article 38 of the Statute of the International Court of Justice which is widely regarded as listing the sources of international law, “general principles of law recognized by civilized nations” is one source as treaties and international custom are. The “teachings of the most highly qualified publicists of the various nations” is also listed “as subsidiary means for the determination of rules of law.”
63  Henkin, That “S” Word, supra note 44, at 5.
64  Schaffer, supra note 11, at 282.
65  Supra note 43.
human rights among many individuals, but also among governments”\textsuperscript{68} the commitment started by agreeing on standards.

One of the aims of the UDHR is thus to develop a “common understanding of these rights and freedoms” which the preamble regards as “of the greatest importance for the full realization” of the pledge member States made, which is “to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”. Clearly, the preamble states that “a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge”. Indeed, the UDHR is a standardizing effort. On this front and referring to the world wide and serious acceptance the UDHR has won in the past 60 years, two writers have concluded that “the UDHR has fulfilled the promise of its own preamble, namely to become ‘a common standard of achievement for all peoples and all nations’.”\textsuperscript{69} Without much ado, the UDHR is a strong realization of the hazard of not having a commonly agreed definition of the common good. In addition, human rights being considered universally valid norms, the international community needs permission to interfere in case some States violate them.

Why should a State care to have another State treat its citizens in the same ways the first does to its citizens? It is true that certain values are universally shared so much so that a pain to one is a pain to another one who may be miles away. However, on top and beyond the universality argument of human rights, the interconnectedness of the world has given rise to valid desire to regulate extra-territorial affairs which have territorial effect. If the people of a State are happily governed, one cannot imagine such people causing problems to neighbor States. On the other hand, if the people are badly governed, as is the case in many repressive governments, they are probably going to seek a better life and safe haven somewhere else. Due to the advancement in transportation, human rights violations in Asia can flood European countries with asylum seekers. At the moment, tens of thousands of Eritreans have flooded Sudan, Ethiopia, Israel and many European countries. These countries have committed themselves to offer safe haven but that commitment does tax their citizens considerably and there is a limit to what they can absorb. They have vested interest in requiring other States treat their citizens in manners that do not force them to flee.

As to the supremacy of international law, the African Commission has got it perfectly right in stating that “international human rights standards must always prevail over contradictory national law” because to “allow national law to have precedence over the international law” “would defeat the purpose of” international law.\textsuperscript{70} If what it takes to dodge international commitments is passing a national legislation, there is no international law worth of its name. “Do we not” after all “believe that we can agree today to bind ourselves

\textsuperscript{68} Ashild Samnoy, The Origins of the Universal Declaration of Human Rights, in Alfredsson & Eide, supra note 66, at 3 & 8.
\textsuperscript{69} Asbjørn Eide & Gudmundur Alfredsson, Introduction, in Alfredsson & Eide, supra note 66, xxv, at xxxii.
\textsuperscript{70} Supra note 43.
tomorrow, and, further, that we can agree today that we shall not have the right tomorrow to change our minds?71

5. A Look at the Reality: How Supreme is the Supreme

As one scholar observed, for “at least the last two centuries, courts throughout the British Commonwealth have followed a fairly strict dualist approach to treaties, generally refusing to grant legal effect to treaties that have not been legislatively incorporated into domestic law.”72 Now, there is a strong realization that the old dualist doctrine has run out of sense. Thus, the same scholar has also witnessed that recent U.S. Supreme Court decisions show a transnational trend among common law courts which are increasingly abandoning their traditional dualist orientation to treaties and are beginning to utilize human rights treaties despite the absence of implementing legislation giving domestic legal effect to the treaties. They are doing so by developing a wide variety of so called interpretive incorporation techniques.73 The degree of appreciation of this shift, of course, varies. Thus, one can still see “largely inadequate degree of incorporation of” international human rights treaty norms in the constitutional law of six common law countries (the United States, Canada, Australia, Israel, the United Kingdom, and South Africa).74

When it comes to supremacy issues, Buergenthal observed that in the past, the vast majority of States followed one of two approaches in giving domestic legal effect to international agreements. One approach used by the US Constitution and others accord duly ratified treaties the same normative rank as national statute law and a latter treaty overrides an earlier statute in conflict with it and vice versa. In order for the treaty to take precedence over an earlier statute, the treaty must be self-executing. That is, it has to be capable of judicial application without additional implementing legislation.75 The other approach, reflected in British and Australian constitutional practice and to a lesser extent in some Scandinavian countries, is governed by the proposition that a treaty becomes domestic law only when the national parliament has conferred that status on it by special legislation and “the resulting implementing legislation has the same normative rank as any other.”76

Buergenthal also observed that this principle “is gradually being rejected by an increasing number of States, particularly Western democracies, in favor of legal regimes that accord a higher normative status to treaties in general and human rights treaties in particular.”77 It seems that “academic consensus has emerged that sharply criticizes non-self-execution.”78 Buergenthal has

74 Shany, supra note 19, at 341.
75 Thomas Buergenthal, Modern Constitutions and Human Rights Treaties, 36 Columbia Journal of Transnational Law 211, 213 (1997).
76 Ibid, at 213-4.
77 Ibid, at 212.
78 Yoo, supra note 15, at 1958.
documented that “a growing number has elevated treaties to a higher rank than statutes while maintaining the requirement that both treaties and statutes conform to the national constitution.”79 “A more recent trend, propelled by the dramatic proliferation of human rights treaties and the jurisdictional expansion of international judicial and quasi-judicial institutions supervising their observance, has prompted a number of states to accord human rights treaties a special or preferred status with a normative rank higher than that of other treaties and ordinary domestic law.”80 However, there are not many States, with the exception of the Netherlands, that rank treaties above all national laws, including the constitution.81

### III. The Will of the People and Supremacy of IHRL

Having said that “international human rights standards must always prevail over contradictory national law”82 one may then ask: how about within the supreme body of laws; which one overrides in case of conflict? After all, if IHRL gives the people the right to “freely determine their political status and freely pursue their economic, social and cultural development”,83 if IHRL declares that “[t]he will of the people shall be the basis of the authority of government”,84 the system of government and rights the people of a State willfully write into their laws should be supreme. Essentially, this argument falls on the premise that some rights override others.

#### 1. Difficulties in Drawing Hierarchy of Human Rights

It is common to see the words “fundamental” or “basic” attached to the word “right” and not many see a problem with the exception of those who delved deep into the business of drawing hierarchy of rights but to no avail. It makes sense to say that some rights are more fundamental than others. However, those who delved into the question of hierarchy of rights have observed that the “Declaration and Covenants, as well as later statements from the U.N. General Assembly, reveal that the common understanding of human rights maintains the interrelated nature of those rights.”85 “The task of discerning which rights are fundamental and which are not has proved to be a difficult one.”86 Some are of the opinion that perhaps “it is only natural that the hierarchy of human rights ultimately comes down to the practical question of which rights are the most endangered and need the greatest defense here and now”87 but, they hold, it still “remains to be determined ... who will identify the fundamental values

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79 Buergenthal, supra note 75, at 214.
81 Ibid, at 214.
82 Supra note 43.
83 ICCPR, art 1(1).
84 UDHR, art 21(3).
86 Ibid, at 396. See also Theodor Meron, On a Hierarchy of International Human Rights, 80 American Journal of International Law 1, 5 (1986).
and by what process.” Indeed, normative conflict in international law is “real” but some are a bit positive about it thinking that it “does not lead to legal paralysis or confusing legal contradictions.” In any case, they add, it can be addressed in several ways and “it may be counterproductive to come up with rigid moral priorities for all of the values enshrined in international law.” To others, the “international community must work to provide criteria for differentiating among rights.”

I think that the law should do its function. As it has been noted, “law, being a rule for the solution of human conflicts ... [it] should be harmonious and should not allow for contradictory rules of behavior.” As noted above, national systems of law usually establish a hierarchy of norms and international human rights law needs to do the same. In this regard, the principle of *jus cogens* exists as a possible method for identifying the most important human rights with significant consensus on it. *Jus cogens*, a peremptory norm of general international law, “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” For this reason the Vienna Convention on the Law of Treaties states that a “treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” Yet, “no common understanding exists as to those rights which may have status as *jus cogens*.” Other than this there is no consensus on hierarchy of rights.

Even though this paper cannot credibly claim to have checked all the good discussions in this area, it asserts that one helpful tool of drawing hierarchy is overlooked in the debate on hierarchy of rights. It is offered below.

### 2. The Place of Self-Determination and the Will of the People

One important tool for drawing a hierarchy and that fits the main theme of the paper is to look at the relationship between the peoples’ right of self-determination by virtue of which “they freely determine their political status and freely pursue their economic, social and cultural development” and the rest of the body of IHRL. Another similar provision to the peoples’ right of self-determination is found in the UDHR which declares that “[t]he will of the people shall be the basis of the authority of government.”

At this time, there is a roughly defined international right to democratic governance which is derived from the above quoted provisions and newly added

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88 Shelton, supra note 10, at 323.
90 Wuerffel, supra note 85, at 402; Meron, supra note 86, at 22.
92 Shelton, supra note 88, at 291.
93 Wuerffel, supra note 85, at 400.
95 Id.
96 Wuerffel, supra note 85, at 402; Meron, supra note 86, at 22.
97 ICCPR, art 1(1).
98 UDHR, art 21(3).
declarations and charters on democracy. Granted, these two provisions alone are sufficient to outlaw dictatorship, provided dictatorship is not the will of the people. But, what if the “people”, rare as it may be, wish or freely determine to be governed by a dictatorship? In other words, what if the “people” desire or freely determine to be governed contrary to the content of international human rights law? These two questions may sound absurd. But, what if the will of the “people” is that the “people” want to be governed in accordance with their Islamic Law? What if it is culturally legitimate and acceptable (to women too) for a certain community to treat women as slaves?

Some writers tend to hold that the right of self-determination or the “will of the people” can trump everything including the rest of the rights in the documents. Eckert, for example, contends that until now, “self-determination has never been equated with one particular political outcome, so to equate it with democracy misconstrues the content of self-determination. Mandating that a people must determine to be free, as defined by a particular procedural model of democracy, significantly constrains their right to make a free determination of their own political status.” From the reading of Resolution 1514, 1541, the Friendly Relations and the two covenants, Eckert is of the opinion that the “interpretation of self-determination that gives respect to a people’s wishes, rather than one which prescribes a particular result, seems most consistent”.

Indeed, as we live in a world of preferences with no justification and reasoning attached, Eckert’s point cannot be easily dismissed. Contrary to the premise of advocates of deliberative democracy that “preferences without reasons are prejudices,” a recent empirical study showed that folks of these days do not “want to offer reasons for their own preferences to those with different perspectives” in part “because they believe that preferences need no justification.” “Indeed, they think we should respect one another’s preferences without requiring a defence of them because it is our right as citizens to believe whatever we want.”

Roth also makes a similar argument by linking the UDHR to the UN Charter. The UDHR stipulates that the will of the people shall be the basis of

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99 See the Universal Declaration on Democracy, adopted without a vote by the Inter-Parliamentary Council at its 161st session, Cairo, 16 September 1997; the Inter-American Democratic Charter, adopted by the General Assembly at its special session held in Lima, Peru, on September 11, 2001 and the African Charter on Democracy, Elections and Governance, adopted by the eighth ordinary session of the AU Assembly, held in Addis Ababa, Ethiopia, 30 January 2007. For a leading discussion on this area see Gregory H. Fox, Brad R. Roth (ed), Democratic Governance and International Law, (Cambridge: Cambridge University Press, 2000).

100 Amy E. Eckert, Free Determination or the Determination to be Free? Self-Determination and the Democratic Entitlement, 4 UCLA Journal of International Law & Foreign Affairs 55, 57 (1999).

101 Ibid, at 71.


the authority of government. According to Roth, “what counts as an articulation of that will has generally been thought to be a matter ‘essentially within the domestic jurisdiction’, to be resolved by the political community itself, free from external interference.”\textsuperscript{104} The UN holds the organization to be “based on the principle of sovereign equality”\textsuperscript{105} and its purposes include development of “friendly relations among nations based on the respect for the principle of equal rights and self-determination of peoples.”\textsuperscript{106} Accordingly, the Charter prohibits intervention “in matters which are essentially within the domestic jurisdiction of any state”.\textsuperscript{107} To Roth, this means that each “people” is sovereign over its internal affairs and:\textsuperscript{108}

its manifest will is to be deferred to, irrespective of the basis of the people’s decision. Therefore, in theory, if a people is perceived to opt for a government that predicts its rule on the doctrine of Divine Right of Kings, the international community will recognize that government without regard to the merits of the doctrine.

Democracy itself has been the subject of the same debate. It has been asked if democracy has definitive content or if it is a set of procedures for freely determining its content. Is it democracy if 90\% of the population of a State support and like a dictatorial regime? The question of whether democracy includes only procedural elements or also embodies substantive features has gripped the theory and the practice for a long time, and given the complex character of the concept of democracy and its bent for relentless re-contextualization, some commentators fear that agreement will probably never be reached.\textsuperscript{109}

However, two scholars have offered helpful guidance as to what democracy in the understanding of the international community is. They note two opposing theories. The first defines democracy as a set of procedures - “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”\textsuperscript{110} This sort of democracy provides a framework for decision-making but does not prescribe the decisions themselves. Decisions “are not somehow ordained a priori, but rather arise from a decision of the people. If a popular majority may create a democratic system, it would seem to follow that it should also have the power to disband it.”\textsuperscript{111} The second view of democracy is substantive, defining democracy not as the process of ascertaining the preferences of political majorities, but as a society in which majority rule is made meaningful. To the substantive view “democratic procedure is not an end

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\item \textsuperscript{104} Brad R. Roth, Government Illegitimacy in International Law, 27 (1999).
\item \textsuperscript{105} UN Charter, art 2(1).
\item \textsuperscript{106} UN Charter, art 1(2).
\item \textsuperscript{107} UN Charter, art 2(7).
\item \textsuperscript{108} Roth, supra note 104, at 37.
\item \textsuperscript{109} Jean d'Aspremont, Legitimacy of Governments in the Age of Democracy, 38 New York University Journal of International Law and Politics 877, 895-6 (2006).
\item \textsuperscript{111} Fox & Nolte, ibid, at 16.
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\end{footnotesize}
in itself but a means of creating a society in which citizens enjoy certain essential rights”.

Fox and Nolte concluded, and convincingly so, that “[s]ources of law that include human rights treaties, the decisions of human rights bodies, United Nations practice in election monitoring, and the practices of representative democratic states all point overwhelmingly to a substantive theory of democracy.” To them, the “international community thus seems to have adopted a substantive view of democracy as a legal norm.” The international human rights treaties make part of the substantive content of democracy. This conclusion is plausible and it settles one controversy: that the will of the people or the end result of the right of self-determination must be respectful of the other internationally recognized rights. In other words, the right to democratic governance derived from the UDHR and the two Covenants is subject to the other rights. The other rights make the boundary of self-determination or “the will of the people” beyond which the two cannot go. Thus, the “will of the people” and self-determination are literally gap-fillers. States cannot invoke these two rights to justify violation of the other rights. In this context, this paper asserts that both rights are lower in the hierarch of rights.

It is cultures, traditions, faiths, believes and other norms that have to be brought in line to IHRL; not the reverse. And, of course, certain human rights treaties such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) bluntly prohibit certain cultural practices despite popular legitimacy such practices may have. The United Kingdom’s House of Lords also declared certain elements of Sharia Law “wholly incompatible” with the European Convention on Human Rights and certainly with international human rights law. One may regret IHRL as a new form of colonialism and there is some truth in this lamination. However, in the above case, it is important to note that the House of Lords came to deal with Sharia Law because a Lebanese woman sought safe haven from “her law” - Sharia Law. If a choice must be made from two evils, IHRL must then be embraced.

It is true that there is, in IHRL, a margin of appreciation of incompatible national or local norms and practices. This doctrine of margin of appreciation, judicially created out of necessity is “the latitude of deference or error which” international institutions will allow to national legislative, executive, administrative and judicial bodies before it is prepared to declare a national derogation or restriction or limitation upon a right guaranteed internationally, to constitute a violation of one of the Convention’s substantive guarantees. It

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113 Fox & Nolte, supra note 110, at 69.
114 Id.
115 Article 5(a) of CEDAW for example states that “States Parties shall take all appropriate measures ... [t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.
has been defined as “the line at which international supervision should give
way to a State Party’s discretion in enacting or enforcing its laws.”\textsuperscript{117} To give one
fitting example, IHRL would not be offended if two parties voluntarily submit to
govern their common affairs by Sharia. It is a widely supported doctrine even
though with many caveats.\textsuperscript{118} The extent to which national incompatibleness is
appreciated is in the hands of international institutions/judges.

It must also be noted that IHRL provides for minimal treatment of
citizens and States are free, in fact they are encouraged, to provide for more
favorable treatment to their citizens.

\textbf{IV. Conclusions}

As the dynamics of life change in a fast-changing world, we should not be
prisoners of old dogmas. Principles of international law that made sense
centuries ago may not be valid in our times. Certainly, the dualist doctrine has
lost resonance. At present, for a person who looks at how the entire world is
socio-politically organized, the various international and regional laws and
institutions (the African Union, the European Union, the Organization of
American States, the United Nations Organization \ldots e.t.c) can only be viewed as
a continuation of the hierarchy of organizations of socio-political life starting
from the smallest locality to the village/county, to the district, to the region and
to the State. The principle of State sovereignty and territorial integrity has been

\textsuperscript{117} Howard Charles Yourow, The Margin of Appreciation Doctrine in the Dynamics of

\textsuperscript{118} See Eyal Benvenisti, Margin of Appreciation, Consensus, and Universal Standards, 31
\textit{New York University Journal of International Law and Politics} 843, 853 (1999) holding that the
“doctrine of margin of appreciation, especially when coupled with the consensus rationale,
essentially reverts difficult policy questions back to national institutions, in complete disregard of
their weaknesses. Considerations of democracy and subsidiarity do merit such a \textit{renvoi}, but only
when the national procedures can be trusted, namely when the policies in question affect the
existing majority of citizens or when effective domestic guarantees offset the numerical inferiority
of the minorities. But where national procedures are notoriously prone to failure, most evident
when minority rights and interests are involved, no margin and no consensus should be
tolerated. Anything less than the assumption of full responsibility would amount to a breach of
duty by the international human rights organs.” See also Yuval Shany, Toward a General Margin
of Appreciation Doctrine in International Law?, 16 \textit{European Journal of International Law} 907,
939 (2005) arguing that margin of appreciation doctrine “generally merits our support: it
improves the quality and perceived legitimacy of legal pronouncements; it promotes the
accountability of decision-makers; it produces a more realistic match between law-application in
theory and practice; and it encourages the application of inter-institutional comity. However,
several caveats should be noted. First, the doctrine is particularly suitable only for certain types
of international law norms, which are intrinsically uncertain or consciously sacrifice legal
certainty for pluralism (standard-type norms, discretionary norms and result-oriented norms). It
should not be used to obfuscate areas of the law where legal precision has been or is in the
process of being attained. Second, the scope of the margin of appreciation could change over
time, in the light of emerging specific norms, the development of value choices which place a
higher premium on legal certainty (or uniformity) and shifts in the respective institutional
capacities of national and international courts. Finally, the degree of judicial deference in the
context of application of the doctrine is not fixed. It should vary in the light of a variety of
considerations.” Of course, there are critical writers too who argue that the European Court of
Human Right where the doctrine emerged “must return to the text. It must do the hard work of
interpreting”. See Jeffrey A. Brauch, The Margin of Appreciation and the Jurisprudence of the
European Court Of Human Rights: Threat to the Rule of Law, 11 \textit{Columbia Journal of European
used to mediate relations between (or among) supra-State institutions and actors and States as federalism does at the national level. State sovereignty has done a lot of disservices and scholars have started suggesting better organizing principles.119

In the 20th Century in particular, a thick body of law - IHRL – has been produced at the international level. As one scholar explained, IHRL has deep “penetration into domestic law in ways that subvert, or at least ignore, some of the [ancient] central structural concepts of classic international law, such as sovereignty, territoriality, and domestic jurisdiction.”120 Throughout the twentieth century, “international law has undergone significant changes. From a set of norms whose primary purpose was to allow states to implement their sovereignty over their territories and prevent external intervention by foreign states, international law has increasingly become involved in issues concerning the way in which governments ought to be structured.”121

It still makes sense for the people of the State through their constitutional order to be supreme. However, given that the world is a common place for many peoples, one people’s supremacy must be subordinate to the entire peoples’ supremacy. There are many sound arguments that support that IHRL be supreme to national laws. As things stand now and probably continue for the near future, States make international law. When it comes to international law-making, pragmatism still dictates that it is the executive branch fit for negotiation. However, it is time to harmonize the national and international law-maker. It is not unimaginable for a legislature to bypass the executive and embrace international norms either by enacting word for word an international human rights treaty or by simply declaring the State’s commitment to abide by such treaty. If this happens it is difficult to see any reason why a State cannot be considered as a party to a treaty for want of signature from the executive.

If the power of signing a treaty is in the hand of the executive and ratification in the hands of the parliament, the first should table signed treaties as a bill for the latter’s ratification. Those States that leave the power of ratification in the hands of the executive and then refuse to give domestic effect to ratified treaties until a parliamentary acceptance is given (transformation/incorporation), they are advised to remove the misleading power of ratification at the hand of the executive. In any case, whether a treaty needs implementing legislation should solely depend on the nature of the treaty and failure to adopt implementation legislation cannot be a valid excuse. A State which has committed itself to free elementary education may need to build more schools but that it has not adopted budget or drawn a policy is not an excuse.

Importantly, when a State posits to write or revise a constitution after it has accepted several human rights treaties, it is obvious that these treaties govern both the process and the content at least as minimalist requirements.

120 Carozza, Ibid, at 58.
121 Gross, supra note 16, at 23.