

Domestication of International Treaties in the Somali Constitutional Framework

 Hassan Nur Halane

Abstract

The domestication of treaties varies across jurisdictions and is contingent upon constitutional requirements. The international law grants each country the autonomy to conduct this process in accordance with its internal laws. In accordance with the Provisional Federal Constitution of 2012, the responsibility for domestication and ratification of international treaties is exclusively vested in the Federal Government. Moreover, Article 90(q) of this Constitution acknowledges the role of the House of People in the treaty ratification process, excluding the Upper House of the Federal Parliament. Therefore, the paper advocates for a limitation on the power of domestication and ratification, emphasizing the role of the Federal Government. Additionally, it recommends granting treaty ratification authority to the Upper House of the Federal Parliament as the sole representative and agent of federal member states (FMS). Furthermore, the paper suggests that non-politically sensitive issues to be concluded by the Federal Government with no parliamentary approval for flexibility and simplicity purpose.

Keywords: Domestication, international treaties, Provisional Federal Constitution, legal harmonization, Somalia.

1. Introduction

Every State is responsible for respecting its commitments and obligations arising from international treaties and agreements. The responsibility of states towards fulfilling treaty obligations is enshrined in article 26 of 1969 of the Vienna Convention on the Law of Treaties, known as (VCLT).¹ Article 26 of the VCLT reads: “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*”² This provision codifies the internationally recognized principle of “*Pacta sunt servanda.*” which is loosely translated as “agreements must be kept”) and it is arguably the oldest principle of international Law. What could be derived from article 26 is that states should perform their treaty obligations in good faith and make them enforceable in their territories.³ That means all state organs, especially state legislatures, executives, and judiciary, must observe and apply treaties to domesticate and incorporate them into the national legal system. Domestication of international treaties and agreements in any jurisdiction goes through the rigorous and hectic domestic procedure to make international law part of internal legislation. Domestication is essential because not all state organs are instantly aware of what treaties the executive organ sign or commit, especially the judiciary arm of the Government, without domestication. States should also ensure treaties align with domestic legislation and not violate treaties' obligations based on any pretext or excuse. Article 24 of the VCLT prohibits the State from invoking treaty violations to justify domestic law non-compliance.⁴ Of course, the domestic and constitutional legal framework is distinct from one State to another regardless of the complexity and diversity of domestic legal systems worldwide. The legal framework and how its structured will inform the State of the domestication of treaties and their integration into the State's internal legal system. Therefore, this study adopts doctrinal qualitative legal method analyzing the constitutional framework governing the

domestication of treaties concerning the relevant provisions in the current Provisional Federal Constitution adopted on August 1, 2012.

2. Overview of the Treaty-Making Process

Usually, when involving multilateral and bilateral agreements, states have specific guidelines to facilitate the smooth conclusion of treaties and ensure compliance with domestic requirements. The VCLT provides a general guideline for every treaty and international agreement to fulfill domestic legislation demands.⁵ Nevertheless, the VCLT guidelines do not prevent states from adopting internal processes by accommodating all relevant state institutions and agencies to participate in treaty domestication based on their capacity. A general overview of these processes is explained below.

a) Negotiation

Negotiation is the starting point of international engagements, either multilateral or bilateral, and there is no treaty or international agreement without negotiation in one way or another. The VCLT does not categorize the negotiation phase as part of the treaty concluding process; instead, it is considered a pre-treaty-making process.

In Somalia, according to article 54 of the Provisional Federal Constitution, the powers and responsibilities of engaging in international affairs and negotiations on behalf of Somalia lie exclusively with the Federal Government. In other words, the treaty-making conclusion falls under international affairs, which the Federal Government exclusively manages as the highest executive organ responsible for international negotiations.⁶ Somalia is a federal state, and Federal Member States (FMS) participate in the negotiation as per the Constitution, and we will talk in detail about that later. Usually, subject-matter ministers (the lead

ministry) involve negotiation the Foreign Affairs Committee of the House of People of the Federal Parliament.

b) Role of Subject Matter Ministry

The subject matter ministry means the ministry in charge of the public interest the treaty deals with. In Somalia, the Ministry of Foreign Affairs is in charge of international affairs. The Ministry of Foreign Affairs, as the subject matter ministry, will be responsible for ensuring the domestic compatibility of any treaty before submitting it to the Federal Council of Ministries and House of People of the Federal Parliament, respectively. The House of Peoples of the Federal Parliament ensures all submitted treaties are compatible and align with the domestic legal system before ratifying them.

Different countries adopt different ways to examine the compatibility and appropriateness of treaties. For countries like New Zealand, the subject matter agency carries out National Interest Analyzes (NIA) for compatibility purposes which will be reviewed by the Legal Adviser for International Treaties at the New Zealand Ministry of Foreign Affairs and Trade(MFAT).⁷ In Somalia, the lead ministry ensures appropriate consultation is undertaken and conducted with relevant government agencies and offices, such as the International Law And Treaty Section at the Ministry of Foreign Affairs.⁸

c) Federal Council of Ministers Treaty Deliberation

Federal Council of Ministries discusses treaties submitted by the lead ministry. To give a relevant background, the Federal Council of Ministers (the cabinet) is divided into four sub-committees: Economic Development, Inclusive Politics, Security and Justice, and Social Affairs Development.⁹ Based on this structure, ministerial committees are aligned according to their closeness of portfolio of responsibilities to

facilitate comprehensiveness and common objective. Thus, treaties are discussed by respective cabinet committees before tabling at the main cabinet meeting. The purpose of this arrangement is to accommodate the views of the relevant ministerial committees after the lead ministry submits the treaty. There is no legal timeframe for the matter to be concluded by the Council of Ministries, but political urgency and necessities dictate its finalization and submission to the Federal Parliament.

d) Treaty Ratification

The House of People of the Federal Parliament must ratify all bilateral and multilateral treaties signed by the Federal Council of Ministers as per article 90(q) of the Provisional Federal Constitution promulgated on August 1, 2012. All treaties and international agreements must be approved by the House and assented to by the President of the Federal Republic of Somalia and published in National Gazette. As the Parliament of Somalia consists of two chambers, only the House of People of the Parliament is constitutionally entrusted to ratify treaties and international agreements. Several steps need to be fulfilled before the House of People approves treaties. When the House of People receives a draft of a treaty proposal from the Federal Council of Ministries, the speakers of the House invite the lead and the subject ministry to brief the House on the main objectives of the treaty and also prove treaty compatibility to the national legal system following article 110 of the Internal Procedures of the House of People of the Federal Parliament adopted on December 31, 2022.¹⁰ After the briefing, the House of People will assign the draft to the House's Foreign Affairs Committee, which is the relevant committee to review it. After a thorough study, the Committee will submit a detailed report to the House plenary meeting, including provisions subject to reservation. The House Plenary debates the committee report and votes for the treaty after the exhaustion of administrative and procedural steps of the House. If the House accepts the treaty, the President will assent to

it through a presidential decree and published in the National Gazette. After the approval, ratification documents are usually exchanged to bring the treaty into force for Somalia.

3. Treaty Domestication Theoretical Framework

In this section, we will discuss theories relating to the domestication of treaties at the national level. These theories reflect different schools of thought by international scholars on the domestication of treaties, and that goes back to the relationship between the international and domestic legal systems. Most jurisdictions in the world are monists, dualists, or mixed countries, and they select relevant approach based on legal tradition or homogeneity with their constitutional and organizational structure.

a) Monist Theory

Monist theory propagates uniformity of domestic and international Law and considers both laws a single legal system. It believes treaties, once concluded, directly form part of the national legal system following the country's Constitution. The theory also advocates the supremacy of international Law over municipal Law in case of conflict.

No parliamentary legislation is required, especially when the treaty is self-executing. A treaty is self-executing when no legislation is required from the Parliament to domesticate. France and Germany are countries with monist constitutions even though they have special matters - according to their respective constitutions- that require legislation. Under article 90(q) of the Provisional Federal Constitution of Somalia, international agreements and treaties require the approval of the House People of the Federal Parliament of Somalia. The Provisional Federal Constitution did not expressly state whether the legal system of Somalia is monist or dualist. However, article 110(8) of the Internal Procedures of

the House of People adopted on 31 December, 2022 obliges the House to issue a resolution to domesticate treaty. The resolution is assented, published and gazette in the National Gazette.

b) Dualist Theory

Under a dualist approach, there is a dichotomy relationship between international and municipal legal systems. The theory proponents argue that these two systems are distinct and operate in two different spheres. According to them, international Law regulates interactions of international law subjects, while municipal Law deals with domestic relations. Dualist constitutions do not implement treaties and international agreements until they are domesticated and incorporated into the national legal system. The United Kingdom and the United States are dualist forefronts, whereby most treaties require domestication through legislation.¹¹ According to article 4 of the Provisional Federal Constitution, Somalia applies constitutional supremacy. It says: *“After the Shari’ah, the Constitution of the Federal Republic of Somalia is the country's supreme Law.” It binds the Government and guides policy initiatives and decisions in all sections of government*”.¹²

The supremacy of the Constitution makes national law to prevail over international law and accords no room for treaties and international agreements that contradict or conflict with the provisions of the Constitution. As also discussed, the Constitution obliges subject-minsters submit all treaties and agreements concluded by them to the federal cabinet in the form draft bill (translated into the local language) annexed with the original version of the treaty for deliberation. After cabinet approval, treaties undergo scrutiny, debate, and discussions by the House of People of the Federal Parliament like any other legislative bill. Therefore, The House can reject treaties for non-consistence or approve them through issuing resolutions as already indicated. Such resolutions

are forwarded for presidential signature and officially published in the national gazettes.¹³ There has also been a practice for the last ten years all treaties and agreements concluded by the executive to be officially proclaimed through a presidential decree. The preliminary ratification of treaties put Somalia under the dualism category since all treaties and international agreements require implementing legislation. From that point of view, the paper is in the opinion of dualism practice because having legislation is crucial for Somalia because it puts the national judiciary fully on board to facilitate the smooth implementation of treaties. It will be an obstacle for the judges to digest treaties concluded due to technical or language barriers unless they are domesticated and translated into the local language. Thus, parliamentary approval without legislation might hinder the full implementation of treaties at the domestic level, and it will be subjected to limited public scrutiny and information.

4. Some Important Constitutional Issues Relating Domestication of Treaties

This heading is devoted to deeply discussing constitutional issues relating functional scope of the Federal Government and Federal Member States in concluding treaties as well as treaty domestication of the Federal Parliament. This kind of discussion will indeed facilitate and contribute implementation and full domestication of treaties in Somalia.

a) Scope of Power of the Federal Government's Executive Branch in Concluding Treaties

We know from the fact that the executive arm of any nation maintains international relations with other countries and other subjects of international Law. Such relationships include engaging and concluding treaties and international agreements. However, concluding treaties is regulated not only under international Law but also subject to a domestic

and constitutional exercise. State constitutions usually clarify to what extent the executive can exercise treaty-making power and whether all treaties should obtain state legislature. Some constitutions express certain treaties whereby the executive should seek state legislature's approval, while others are directly implemented and applied before national courts without parliamentary approval. Constitutionally, a treaty that is directly executed before national courts of Law without the legislature's approval is called a self-executing treaty. On the contrary when a treaty demands the legislature's approval is a non-self-executing treaty.¹⁴ For example, in the French Constitution, treaties relating to peace, trade, and international organizations will not be implemented without the approval of the French National Assembly and Senate.¹⁵ In Somalia, the executive branch is responsible for treaty initiation according to article 90(q) of the Federal Provisional Constitution.

Unfortunately, there are no express self-executing constitutional provisions in the Provisional Federal Constitution of Somalia, paragraph (q) under article 90 of the Provisional Federal Constitution seems to restrict the power of the executive to the treaty-making. The executive cannot initiate treaties without the consent of the House of the People of the Federal Parliament. It could be interpreted that even small-scale and less important political matters must be approved by the House of the People of the Federal Parliament before being implemented and constitute part of the domestic legal system.

b) Participation of Federal Member States in Concluding Treaties

Somalia is a federal state with two layers of Government: the Federal Government acts as the central layer of the Government, and Federal Member States (FMS) operate at the state level. The Constitution defines the powers of each layer of the Government. Article 54 of the Provisional Federal Constitution makes foreign affairs, along with three other issues

(national defense, citizenship, and monetary policy), within the powers and jurisdiction of the Federal Government. Article 54 says: “*The allocation of powers and resources shall be negotiated and agreed upon by the Federal Government and the Federal Member States (pending the formation of Federal Member States), except in matters concerning (A) Foreign Affairs; (B) National Defense; (C) Citizenship and Immigration; (D) Monetary Policy, which shall be within the powers and responsibilities of the federal government.*” It is understood that foreign affairs, including treaties and international agreements, are under the Federal Government's jurisdiction. However, the preceding article 53 of the same Constitution makes exceptions to article 54 of the Constitution. It gives a constitutional avenue for FMS to be consulted by the Federal Government on matters concerning *aid, trade, treaties, or other significant issues related to international agreements*. Furthermore, paragraph 2 of article 53 of the Constitution demands full participation of FMS in treaty negotiations if negotiations directly affect their interest. The FMS, whose interests are affected, will have a delegate alongside federal ministries at the negotiating table.

If you analyze the wording of the above provisions, FMS states have a say in negotiating and concluding international treaties and agreements that connote the respective State's interest. Making FMS on board is a positive step because it contributes and re-enforces collaboration between the two national structures. On the other hand, it may affect the smooth exercise and cohesion of Somali foreign affairs, especially when the two structures are not on good terms. At this juncture, the FMS share competence with the Federal Government in the competences elaborated above but foreign affairs are the federal Government's sole responsibility under the Constitution. FMS states have no authority under the current Constitution to independently enter treaties and international agreements. Some Federal constitutions, like Germany, allow their federation units to

enter agreements on specific matters with the Federal Government's prior approval.

C) Federal Parliament Treaty Domestication

The Federal Parliament of Somalia consists of two houses: the two houses of People and the Upper House. They perform shared responsibilities, although each House has some specific tasks individually. Treaty domestication is one of the specific duties of the House of People as enshrined under Article 90(q) of the Provisional federal Constitution. Excluding the Upper House, Paragraph (q) of the Provisional federal Constitution requires the House of People's approval of the treaties and international agreements proposed by the Federal cabinet. In other bicameral jurisdictions like Germany and South Africa, treaty domestication is a joint responsibility of both houses if treaties fall under non-self-executing treaties.¹⁶ What is peculiar here in Somalia is that the Upper House is out of the picture constitutionally when it comes to the domestication(ratification) of treaties entered by the executive branch. Constitutionally, the Upper House of Somalia is important as it represents *"the interests of the Federal Member State that the member represents and safeguards the federal system while acting in the spirit of inter-governmental cooperation."*As an agent and guardian of the FMS' interest, the Upper House is supposed to co-domesticate and co-ratify on matters with political importance that affect FMS without exception. FMS involvement in the treaty negotiation could be considered a serious matter and challenge, but the ultimate decision lies with the House of People, which the Upper House has no role to play at this stage.

All three constitutional issues discussed above require attention and consideration during the constitutional review. The national constitutional review committees should address issues relating to the type of treaties

that need parliament approval, the scope of FMS participation in treaty negotiation, and the Upper House's role in the ratification of treaties.

5. Conclusion

Domestication of international treaties is a necessary step for the implementation of international treaties. Such domestication represents state commitment to fulfilling international obligations and making them enforceable before national courts. Although the domestication of international treaties and agreements attracted different theoretical debates that revolve around the best approach to be considered, the paper analyzed the process of treaty domestication in Somalia at the federal and State levels with reference to provisions of the current Provisional Federal Constitution.

As discussed, there are underlined problems concerning the conclusion of treaties by the Federal Government, the role of FMS federating states in negotiating treaties, and the exclusive jurisdiction of the House of People of the Federal Parliament in treaty domestication. Therefore, it is recommended that all these issues be emphasized and clearly explained in the Constitution to avoid confusion. The paper further suggests that a similar treaty ratification authority should be given to the Upper House of the Federal Parliament as the Upper House represents FMS federating states. A constitutional clarification is also needed in relation to the conclusion of treaties by leaving technical and non-politically sensitive issues to be concluded by the Federal Government with no parliamentary approval.

Notes

- ¹ See Vienna Convention of the Law of Treaties accessed January 10, 2023, https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf.
- ² Vienna Convention on the Law of Treaties (1969), ” article 26
- ³ “Vienna Convention on the Law of Treaties (1969), ” article 49.
- ⁴ “Vienna Convention on the Law of Treaties (1969), ” article 24.
- ⁵ “Vienna Convention on the Law of Treaties (1969)”, articles 9, 10, 11, 12, 13, 14, 15, 16.
- ⁶ “Somalia-Constitution2012.Pdf, ” <http://hrlibrary.umn.edu/research/Somalia-Constitution2012.pdf>. Accessed October 11, 2022.
- ⁷ “International-Treaty-Making-Guide-2021.Pdf, ” <https://www.mfat.govt.nz/assets>. Accessed October 11, 2022.
- ⁸ <https://www.mfa.gov.so/home/departments/> Accessed September 24, 2023.
- ⁹ “Roadmaps – Office of the Prime Minister of Somalia,” <https://opm.gov.so/en/q/roadmaps>. Accessed October 28, 2022,
- ¹⁰ “Somali House of People Internal Procedure” pdf <https://www.google.com>. Accessed October 11, 2022.
- ¹¹ Ibid.
- ¹² See article 4 of Provisional Federal Constitution of Somalia, 2012.
- ¹³ “Somali House of People Internal Procedure - Google Search,” 106.
- ¹⁴ Damos Dumoli Agusman, *self-executing, and non-self-executing treaties. What does it mean?* (Indonesian Journal of International Law 11, 2014), 321, <https://doi.org/10.17304/ijil.vol11.3.501>.
- ¹⁵ “Modern Treaty Law, *ibid*, 183.
- ¹⁶ Ferreira, Gerrit, and Anel Ferreira-Snyman. “The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism.” Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 17, no. 4 (2014): 1470-14. F, <https://doi.org/10.4314/pelj.v17i4.08>.

References

- Agusman, Damos Dumoli. 2014. "Self-executing and non-self-executing treaties what does it mean?" *Indonesian Journal of International Law* 11, no. 3 (April). <https://doi.org/10.17304/ijil.vol11.3.501>.
- Aust, Anthony. 2013. *Modern Treaty Law and Practice*. Cambridge University Press.
- Borchard, Edwin. 1940. "The Relation between International Law and Municipal Law." *Virginia Law Review* 27, no. 2 (December): 137. <https://doi.org/10.2307/1067438>.
- Butt, Simon. 2014. "The Position of International Law within the Indonesian Legal System." *Emory Int'l L. Rev.* 28: 1.
- Cassese, Antonio. 2005. *International Law*. OUP Oxford.
- Charlesworth, Hilary, ed. 2005. *The Fluid State: International Law and National Legal Systems*. Sydney: The Federation Press.
- Davið Þór Björgvinsson. 2015. *The Intersection of International Law and Domestic Law: A Theoretical and Practical Analysis*. Cheltenham, UK: Edward Elgar Publishing.
- Ferreira, G., and A. Ferreira-Snyman. 2014. "The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 17, no. 4: 1470–96. <https://doi.org/10.4314/pelj.v17i4.08>.
- Fuentes Torrijo, Ximena. 2008. "International and Domestic Law: Definitely and Odd Couple." *Revista Juridica Universidad de Puerto Rico* 77: 483.
- Knop, Karen. 1999. "Here and There: International Law in Domestic Courts." *New York University Journal of International Law and Politics* 32 (2000): 501.

- Lammers, Johan G. 2009. "The Monist or Dualist Approach to the Relationship Between International Law and National Law." *NJA LJ* 3: 207.
- Maniruzzaman, A.F.M. 2001. "State Contracts in Contemporary International Law: Monist versus Dualist Controversies." *European Journal of International Law* 12, no. 2 (April): 309–28. <https://doi.org/10.1093/ejil/12.2.309>.
- Mestral, Armand de, and Evan Fox-Decent. 2008. "Rethinking the Relationship between International and Domestic Law." *McGill Law Journal* 53: 573.
- Oikonomidēs, Kōnstantinos P., and European Commission for Democracy through Law. 1993. *The Relationship Between International and Domestic Law*. Council of Europe.
- Partsch, Karl Josef. 1987. "INTERNATIONAL LAW AND MUNICIPAL LAW." In *Encyclopedia of Disputes Installment 10*, 238–57. Elsevier. <https://doi.org/10.1016/B978-0-444-86241-9.50063-4>.
- Peters, Anne. 2009. "Supremacy Lost: International Law Meets Domestic Constitutional Law." *ICL Journal* 3, no. 3 (September): 170–98. <https://doi.org/10.1515/icl-2009-0306>.
- "Roadmaps – Office of the Prime Minister of Somalia." n.d. Accessed October 28, 2022. <https://opm.gov.so/en/q/roadmaps>.
- Sloss, David L. 2017. "International Law in Domestic Courts." In *Research Handbook on the Politics of International Law*, by Wayne Sandholtz and Christopher Whytock, 79–115. Edward Elgar Publishing. <https://doi.org/10.4337/9781783473984.00012>.
- "Somali House of People Internal Procedure" pdf - Google Search." n.d. Accessed October 11, 2022.
- "Somalia - The Federal Republic of Somalia Provisional Constitution of 2012." n.d. Accessed October 30, 2022.

- Starke, J. G. 1936. "Monism and Dualism in the Theory of International Law." *British Year Book of International Law* 17: 66.
- Toope, Stephen J. 2001. "Inside and out The Stories of International Law and Domestic Law." *University of New Brunswick Law Journal* 50: 11.
- Verdier, Pierre-Hugues, and Mila Versteeg. 2015. "International Law in National Legal Systems: An Empirical Investigation." *American Journal of International Law* 109, no. 3 (July): 514–33. <https://doi.org/10.5305/amerjintelaw.109.3.0514>.
- "Vienna Convention on the Law of Treaties (1969)." 31.
- "Xeer-Hoosaad." Golaha Shacabka, Baarlamaan Jamhuuriyadda Federaalka Soomaaliya.. <http://gsh.parliament.gov.so/index.php/faafin/xeer-hoosaad>. Accessed January 5, 2023.

About the Author

Hassan Nur Halane, a legal expert and researcher based in Mogadishu, holds a Bachelor's degree in Sharia and Law from Mogadishu University, a Master of Comparative Laws from the International Islamic University Malaysia (IIUM), and is currently a Ph.D. candidate in International Law and Treaty Law at Euclid University. His research interests primarily focus on Public International Law, Constitutional Law and Election Laws. He previously held the position of dean at SIMAD University and, before that, served as a law lecturer at both Mogadishu University and SIMAD University. Hassan is the author of the article "*The Restoration of Peace and Stability in Somalia: The Critical Role of the African Union Mission in Somalia (AMISOM)*" published in 2012, and has contributed to various academic articles. He can be reached via email at bahdo82@gmail.com.

About this Journal

Somali Studies: A Peer-Reviewed Academic Journal for Somali Studies is a broad scope multidisciplinary academic journal specialized in Somali studies, published annually, in print and online forms, by the Institute for Somali Studies at Mogadishu University. The journal aims to promote a scholarly understanding of Somalia, the Horn of Africa and the Somali diaspora communities around the globe. It is an open access journal, and all articles are freely available to access, print and download from the website of the institute, www.isos.so.

Disclaimer: All views and opinions expressed in the article(s) published in *Somali Studies: A Peer-Reviewed Academic Journal for Somali Studies* are the sole responsibility of author(s) of the article(s), and do not necessarily reflect those of the editors, the journal, or the Institute for Somali Studies.

Published by Institute for Somali Studies

Hodan District, Near Km4 Square

Website: www.isos.so

Email: isos@mu.edu.so

Tel/Fax: +252 1 858118

Mogadishu, Somalia