

International Treaties: Features and Importance

Preface: International Treaties are most frequent means of creating international rules or standards that States and other actors of international community are supposed to abide by. International treaties are also called conventions, protocols, covenant, "acts", memorandum of understanding, statutes and so on. The terminology varies but the substance is the same: they all denote a 'merger of wills of two or more international subjects for the purpose of regulating their interests by international rules'.¹ This definition indicates towards importance of 'treaty in creating 'international rules' for regulating interests of subjects. In the modern international law, the significance of 'international treaty' to create international rules is highly increased. In brief, their importance in the following spectrum has been pivotal:

- a. Creation of international institutions or mechanisms to enforce international law. One of the biggest weaknesses identified by the classical theorists of international law is related with its 'enforcement' quality. It was often said that the international law failed to have desired impact for its absence of 'enforcement' mechanism. Nevertheless, the argument has largely been set aside by the increasing significance of international treaty making process. The Rome Statute, Statute of ICJ and similar documents of several temporary or transitional tribunals have provided the international law with 'firmly grounded institutions or mechanisms' to enforce rules of it.
- b. Enlarging and institutionalizing the 'universality' of human rights is one of the most important achievements made by international treaties following 1945. While prior to the II World War, the Geneva Conventions played crucial role in formulating humanitarian laws to restrain the war, the proliferation of international human rights law significantly emerged in the context of UN Charter and UDHR. Human rights conventions have gained wider acclamations as well as enforcement capability. One of the most important features of these treaties is 'the treaty mechanism' to enforce obligation under the treaty.
- c. While treaties create obligation for the parties, the moral perspective they generate for community of States and people as well is tremendous. The enforcement of treaty is thus backed by the 'legal as well as moral sanction'. The classical opinion that the treaty only binds the parties to it is not fully true in the modern international law. After the 1945, the changed perspective of the international order and the increasing interdependence of States has created a positive atmosphere for States to 'assume obligations created by treaties' even though they are not parties too.

Treaty Obligations: As indicated right before, the classical theory of international law thought that the 'treaty binds the parties to them, that is the States that have agreed to be bound by their provisions'. This notion was widely reflected in the "*Certain German Interests in Polish Upper Silesia (Merits)*" case in 1926. As the PCIJ put it, 'a treaty only creates law as between the States which are parties to it'.² Hence, for third States treaties are something devoid of any legal consequence: they are a thing made by other (*res inter*

¹ . Cassese, Antonio, 2001. *International Law*, Oxford University Press, Oxford. P. 126

² . Judgment of May 1926, PCIJ, Series A, No. 7, at 29.

alios acta). To put it differently, treaties may neither impose obligations on, nor create legal entitlements for, third States (*pacta tertiis nec nocent nec prosunt*). The classical view is still valid in principle. Definitely, no State or subject is under obligation to 'fulfill the treaty obligation to which it has not been a party'. However, the traditional opinion that 'the treaty which has not been adopted or signed is' *res inter alios acta* is no longer valid, as no State under modern proximity of affairs can dare to go against the 'spirit of the treaty that has not been ratified'. Many countries have yet to ratify ICCPR, for instance. However, they can hardly set aside the values and principles laid down by it. The Article 35-6 of the **Vienna Convention of the Law of Treaties**, has capsulated this development in pragmatic way. These articles provide that 'third States may derive rights and obligations from a treaty only if they consent to assuming the obligations or exercising the rights laid down in the treaty'.

The necessity of being a party for assuming obligations and rights under the treaty is governed by the 'concept of sovereignty'. The international law believes that 'nothing can be done without or against the will of a sovereign State'. International Treaty law is therefore a 'meeting point of the necessity to take international obligations (some kind of limitation on exercise of sovereignty and protection of sovereignty). The sole objective of International law is to 'regulate affairs of subject', and thus to create an atmosphere that the use of 'force in international affairs' is ruled out. The sovereignty of State is thus always one of the 'central points' of the international law. The Treaty law therefore cannot be expected to 'provide for such provisions that negatively affect the 'sovereignty' of State. However, this principle never precludes States for voluntary assumption of 'obligations under international treaties'.

Status of Vienna Convention, 1969: Vienna Convention is the Instrument to codify international laws on Treaty. It breaks the traditional concept that 'treaty making is an exclusive freedom of States'. Under this instrument, while the becoming or not party to the treaty is a privilege of the State, the process and methods of making and entering into international treaty is fully guided phenomenon. While dealing with this Convention, we have to pay attention to 'two major aspects': one concerning the 'formal aspect of the law enacted through the Convention, and the other concerning the political and ideological concepts underlying it.

The formal aspect is that 'the Convention in most of its provisions either codify customary law or have given rise to 'rules belonging to the corpus of general law'. It means that any rules that do not embody the 'convention' are customary practices, which States can still follow as and when they are thought to be important. It means that 'the Convention does not alone constitute the 'general international law on treaty'. However, it is hoped that the new law of treaty will emerge in future in the line set forth by the Vienna Convention.

Politically or ideologically, the Vienna Convention seems to have been inspired by three important principles. First, it introduces restrictions on the previously unfettered freedom of States. Obviously, States are no longer free to do whatever they wish but must respect a central 'core of international values from which no country, however, great its economic and military strength may deviate. The theory *jus cogens* set forth in Article 64 is a

'guiding principle'. Second, there is democratization of international relations. While previous oligarchic structure allowed Great Powers formally to impose treaties upon lesser States, this is no longer permitted; coercion on a State to induce it to enter an agreement is no longer allowed (See Article 52 and Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties Annexed to the Convention). Moreover, all States now can participate in treaties without being hampered by the fact that a few contracting parties can exercise a 'right of veto' (See Article 19-23 on reservations). Third, the convention enhances international values as opposed to national claims. Thus the interpretation of treaties must now emphasize their potential rather than give pride of place to "states' sovereignty (See Article 31 on interpretation).

Generally, treaties provide the source of 'most specific international laws'. Yet, the treaty itself does not end the prospect of 'existence of customary laws'. In many occasions, the customary international practices are invoked to 'determine the scope of treaty provision', but the treaty provision does not look need interpretation if it is specific and plain in meaning. As a matter of fact, treaties in general constitute the 'general international law'. This fact however cannot be generalized. Some treaties definitely fall short to constitute 'the general international law'. The Vienna Convention is comparatively new treaty that has come to implementation. Moreover, it has not completely superseded the 'international law developed prior to making of this treaty'. It thus comprises the body of both the customary as well as new provisions.³ There are some important points that need elaboration in this regard. The Vienna Convention has not 'ruled out the prospect of application of customary practices as it itself lays down in Article 4 that 'it applies only to treaties which are concluded by States after the entry into force of the present Convention'.⁴ It means that the treaties concluded before this Convention comes into force are 'governed by international customary practices of treaty law'. Another equally important fact is that not all members of the international community have become parties to the convention. Naturally, the treaties made by countries that are no parties are only governed by the treaty to extent that is declaratory of, or has turned into, customary law. From this point of view, the Vienna Convention of 1969 provides only a weaker and limited international law.

Making of Treaties: Making of treaty is an important 'mode of generating international law'. As treaty making process provides for 'conscious discussion and deliberation on issues to be addressed, it is believed that the treaty provisions provide 'most tangible laws' on those given issues. The making of international laws through treaty making thus the most desired 'mode of generating international laws'.

States enjoy full freedom as regards the modalities and form of agreement, for there are no rules prescribing any definite procedure or formality. However, over the year's two main classes (bilateral and multilateral) treaties have evolved in State practice. The first categories of treaties are concluded in a 'solemn form', and the second categories are concluded in 'simplified form'.

³ . Cassese, Antonio, 2001. *International Law*, Oxford University Press, Oxford. P. 127

⁴ Cassese, Antonio, 2001. *International Law*, Oxford University Press, Oxford. P. 127

In the 'Solemn Form', plenipotentiaries (that, diplomats endowed with 'full powers to engage in negotiation') of contracting States negotiate treaties. Once a written text is agreed upon and adopted, it is signed (or initialed and subsequently signed) by the diplomats and then submitted to the respective national authorities for ratification. Usually, modern Constitutions require intervention of the legislature before the head of the State signs the instrument of ratification. But the ratification does not mean ex- post endorsement or confirmation of the manifestation of the States will to be bound by the treaty. In fact, it is by ratification, the State expresses its intent to be legally bound by the treaty. Until the instrument of ratification is drawn up, signed, and exchanged with the other parties, or deposited with one of them or with an international organization, the State is not bound by the treaty. In this way, the treaty follows the following concrete steps or requirements to 'making and generating legal obligations':

- a. The Contracting parties must accept proposals to 'initiate discussion or deliberation for making the treaty'.
- b. Contracting parties must specifically appoint the plenipotentiaries to negotiate on terms and references of the treaty,
- c. Completion of negotiation leads to 'finalization of text in written'.
- d. Once the text is written or agreed upon, it is signed (or initialed and later on signed up) or adopted by the plenipotentiaries,
- e. Once the plenipotentiaries sign the agreed upon text, the document is submitted to national authority for ratification,
- f. Once it is ratified (by national legislature in accordance with the requirement of Constitution), it is submitted to the Head of the State for signature of the ratification document, and then it is finally exchanged.
- g. The treaty is finally deposited with one of them or with an international organization.

In the 'Simplified Form', treaties are normally negotiated by diplomats, senior civil servants, or government experts and become legally binding as soon as negotiators themselves or the Foreign Ministers of the contracting parties sign them. Sometimes they taken form of an exchange of notes between Foreign Minister of a given State and the ambassador of another State accredited to the former. This class of agreement does not call for ratification by the Head of State, and consequently does not involve parliaments in their elaboration.

Nevertheless, these rules of making and ratification are not absolute. In fact, it is for the States to decide how to bring into being legally binding undertakings. It all depends on their will. Hence, often there are problems created by these 'uncertainties' in rules. Such uncertainties create confusion as to whether Contracting Parties merely wanted to undertake 'political commitment' or to engage in 'legal obligations'. There are few cases in this regard.

- a. *Aegean Sea Continental Shelf Case 1978*: ICJ had to satisfy itself that its jurisdiction was based on a communiqué jointly issued in Brussels by the Prime Ministers of Greece and Turkey. The document was not signed or even initialed; it had been directly issued to the press during a press conference held at the conclusion of the

Prime Ministers' meeting. The Court first pointed out that it knew 'of no rule of international law which might preclude a joint communiqué from consulting an international agreement to submit a dispute to arbitration or judicial settlement.'⁵ It then noted that whether or not the communiqué constituted an agreement 'essentially depends on the nature of the act or transaction to which the communiqué gives expression; and it does not settle the matter simply to refer to the form -communiqué- in which that act or transaction embodied in the Brussels Communiqué, the Court must have regard above all to its actual terms and to the particular circumstances in which it was drawn up. The Court then held that "Having regards to the terms (of the communiqué) and to the context in which it was agreed and issued, the Court can only conclude that it was not intended to, and did not, constitute an immediate commitment by the Greek and Turkish Prime Ministers, on behalf their respective Governments, to accept unconditionally the unilateral submission of the present dispute to the court.

- b. By contrast, in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain Boundary*, the Court held in 1994 that the minutes of a meeting of 25 December 1990 of the Foreign Ministers of Bahrain and Qatar, in the presence of the Foreign Ministers of Saudi Arabia, constituted an international agreement serving as the basis for court's jurisdiction. After examining the minutes the Court held that the minutes 'include a reaffirmation of obligations previously entered into'.

Two important issues surface from these two cases. Firstly, the mere expression of political commitment does not constitute an agreement with binding effect. An agreement has been created 'to effect the merger of wills of two or more than two parties'. Secondly, the agreement is not necessarily expressed in a prescribed form. If the terms and references in any agreed upon document clearly establish the 'legal obligations', the structure or form of the agreement is immaterial. As it is clear from the *Maritime Delimitation* case, a minute signed between two parties can constitute an agreement. As a matter of fact, the 'the nature and contents of the terms and reference inserted into the document' is the primary basis for constituting the agreement with legal effect. From this point of view, the following features can be taken as instrumental to 'constitute an agreement':

- a. An agreement is agreed upon or signed to 'specifically create the legal obligations'. State parties are necessarily clear about what result they are going to establish. Certainty of the 'result and impact' is therefore a crucial issue of law making process. As it has been established by the ICJ, the mere expression of political commitment does not constitute an agreement.
- b. An agreement for its desired binding effect need to be confirmed by authority of the contracting party. Negotiating plenipotentiaries' signature or adoption alone does not constitute the legal obligation to the concerned party. Ratification or affirmation of the terms and references by the authorities like 'head of the State, prime minister or foreign minister, as it is required by the context and nature of agreement is mandatory.

⁵. ICJ Reports (1978), at 39, para. 96

- c. Treaty is an expression of 'wills of parties to be governed by terms and references of agreed upon'. The form or modality of agreement is not crucial element for constituting the legal obligation. Rather the result or impact to be created by terms and reference is what crucial for determination of nature of legal obligation.

Reservations: Reservations to treaty is an important aspect of 'submitting to obligation under treaty'. In multilateral treaty, a State can (a) exclude the application of one or more provisions, or (b) place a certain interpretation on them. Hence, reservation is a process of 'reiterating the stands to the treaty'. If States which are engaged in negotiations have certain specific 'demands or claims or suggestions' concerning the treaty may not agree to adopt it without being those concerns addressed'. In such a situation, the best way is to 'express reservation to those particular provisions', to which concerned State is unwilling to accept.

Reservation destroys the 'unanimity' to the treaty, and as such definitely affects its 'integrity'. In the modern context of increased moral perspective of international law, however, the issue of 'reservation is losing its significance. Often, the practice of reservation to an 'international convention' isolates the State itself. One important issue to deal here as to 'when the State can express their reservation'. Is it open for State practice any time they want? Customarily, the western countries used the right to reservation without limitation, so that they 'could simply put forward the reservation as and when the application of treaty proved to be 'detrimental to their interests'. This privilege of State is now obsolete. The old regulation of reservations proved totally inadequate when membership in the international community increased, the more so because the new comers belonged to political, economic and cultural areas different from the Western Christian countries. Moreover, the doctrine of 'universality of treaties' also rejects the 'old concept of reservation'. With the emergence of this doctrine, a new regime of reservation has emerged. This regime first time emerged in the important Advisory Opinion delivered in 1951 by the ICJ on "*Reservation to the Convention on Genocide*" and then in the 1969 Vienna Convention.

Under the regime established in the Vienna Convention, States can append reservations at the time of ratification or accession, unless such reservations (a) are expressly prohibited by the Treaty (either because the treaty prohibits any reservation or only allows reservations to provisions other than one that is the object of a reservation), or (b) prove incompatible with the object and purpose of the treaty. The treaty comes into force between the reserving the State and the other parties (as modified, between the State and the other parties, by the reservation). One of the latter States may object to the reservation within 12 months after its notification (among other things because it considers the reservation to be contrary to the object and purpose of the treaty).

Anyway, the facility of reservation has great merit as it allows as many States as possible to take part in treaties that include provisions unacceptable to some of them. On the other hand, the demerit is that it impairs the integrity of multilateral treaties (since they may end up being split into a series of bilateral agreements). Recently, some important innovations have been introduced in the area of treaties on human rights by two

monitoring bodies. First the European Court of Human Rights in number of cases such as *Belilos*, *Weber*, and *Loizidou*⁶ and then the UN Human Rights Committee (in general comment of 1994)⁷ and in a decision of 1999 on the Rawle Kennedy cases,⁸ have propounded the following view: "if a State enters a reservation to a human rights treaty that is inadmissible either because it is not allowed by the treaty itself or because it is contrary to its object and purpose, it does not follow that the provision reserved does not operate with regard to the reserving State, or that this State may not join the treaty. It only follows that the reservation must be regarded as null and void, at least in those parts that prove to be incompatible with the object and purpose of the treaty. Clearly under this view standards on human rights must prevail over the concerns of sovereign States".

⁶. See ECHR, *Belilos* Cases, Series A, no 132 (1988), para. 60; *Weber* Case, Series A, no 177 (1990), paras 38-40, *Loizidou* case (preliminary objections), Series A, no 310 (1995), paras 90-8.

⁷. Human Rights Committee, General Comment 24/52 on Issues relating to Reservations to the UN Covenant on Civil and Political Rights, adopted on 2 November 1994, para 17, in ILM, 34 (1995) at 845. The Committee has offered the following rationale for the conclusion just referred to: "Human rights treaties and UN covenant on Civil and Political Rights specifically, are not web of inter-state exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter state reciprocity has no place... and because the operation of the classic rules on reservations is so inadequate for the Covenant, States have often not seen any legal interest in or need to object to reservations. The absence of protest by States cannot imply that a reservation is either compatible or incompatible with the object and purpose of the Covenant".

⁸. See *Rawle Kennedy v. Trinidad and Tobago*, decision of 31 December 1999, Communication no. 845/1999 (CCPR/C?67/D/84571999)