CHAPTER – VI

SIGNIFICANCE OF FORMATION PROCESS OF
INTERNATIONAL TREATY UNDER INTERNATIONAL LAW

6.1 Introduction and Definition of Treaty:

The examination of the process of formation or conclusion of a treaty is significant one as treaties create specific obligations on state parties to the treaty under international law. The Courts in countries that follow dualist view; have seldom noted the importance of the formation process of treaties while declining to enforce treaty provisions without domestic legislation. The examination of this process will reveal that States are given ample opportunity to consult their concerned organ that is responsible for its effective implementation at the domestic level be it legislature, executive or judiciary. Most of the multilateral treaties including human rights provide provision for ratification or accession meaning states are required to ratify or accede only if they are willing to carryout the obligations imposed including their effective implementation at the domestic level. Hence the study of formation process, procedure of ratification/accession and States’ resultant obligations under international human rights treaties is of immense importance and is intended to address the core issue - whether domestic legislation is a must for enforcing human rights treaty provisions at the domestic level.

The term ‘Treaty’ is defined under Article 2 (1) (a) of the Vienna Convention on the Law of Treaties, 1969 as:

“treaty means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

As per the definition the requirements of ‘treaty’ are (1) it must be an agreement in written form (2) it must be between states (3) it is governed by international law

The form in which it is written and the terminology assigned to it makes no difference. It may be called as Convention, Covenant, Protocol, Agreement, etc. Thus
an instrument in written form concluded between states governed by international law is a “treaty”. The significant requirement of the definition is that it should be between States only. However, today a large number of treaties are concluded between States and international institutions and States and individuals. The reason behind limiting the operation of the convention between states is to maintain clarity. The convention recognizes the capacity of international organizations to conclude treaties with states and clarifies that such treaties does not lose their legal force.¹

6.2 Formation of Treaty:

Treaties may be made or concluded by the States in any manner they want. There is no prescribed form and procedure and how a treaty is to be formulated and by whom it is actually be signed will always depend upon the intention and agreement of the States concerned.²

Nevertheless, there are certain rules that apply in the formation of international treaties. Part II, Section 6 to 25 of Vienna Convention on the Law of Treaties, 1969 (herein after referred as Vienna Convention), specifically deals with conclusion and entry into force of Treaties. The following are the various steps / requirements usually followed in concluding treaties.³

1. Accrediting of persons who conduct negotiations on behalf of state.
2. Negotiation and adoption.
3. Authentication, signature and exchange of instruments.
4. Ratifications.
5. Accession
6. Entry into force.
7. Registration and publication
8. Application and Enforcement

6.2.1 Accrediting of persons (negotiators); Full Powers and Credentials:

In international law, states have the capacity to make treaties, but since states are not identifiable persons, particular principles have been evolved to ensure that persons representing states have indeed the power so to do in order to conclude

¹ Article 3. What is noticeable is, the convention has not defined the term “State”. However this has not posed a serious problem hither to in the application of provisions of the Convention.
treaties. Thus it is important that persons who represent the state should possess necessary ‘authority’ to conclude treaties. In practice representatives of a state are provided with a very formal instrument given either by the head of state or by minister of foreign affairs. This instrument is called the Full Powers.4

Article 7 of the Vienna Convention deals with “Full Powers”. A person is considered as representing a state for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the state to be bound by a treaty if; a) he produces appropriate full powers; or b) it appears from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers.5

Further, Heads of State, heads of government and minister for foreign affairs, negotiating in person, do not need full powers, but are treated as representing their state for the purpose of performing all acts relating to the conclusion of a treaty, and the same applies to the head of a diplomatic mission for the purpose of adopting a treaty between the sending and the receiving state.6

In practice, when bilateral treaties are concluded, the representatives exhibit their full powers. In the case of diplomatic conferences summoned to conclude a multilateral instrument, a different procedure is followed. At the beginning of the proceedings a Committee of Full Powers is appointed to report generally to the conference on the nature of Full Powers, which each representatives at the conference possesses. The delegates present their Full Powers to the secretary of the Committee of the Full Powers.7

In case, that Full Powers authorize only to negotiate but no power to sign, the committee reports the fact to the conference and the delegate will be specifically requested to obtain from his or her government the necessary authority to sign.8

In the case of International Labour Conferences, Full Powers are generally not given to the various government, employer’s and worker’s delegates of each state represented. As a rule credentials are issued by the government authorizing delegates

4 Ibid.
7 I. A. Sheirer, Supra note 3, p. 408.
8 Ibid.
to the conference merely to attend it and no power to agree or conclude or to sign conventions adopted by the Conference, since these Conventions are not signed by delegates but merely authenticated by the signatures of the President of the Conference and the Director – General of the International Labour Office, and since the conference adopts a text in a different manner from diplomatic conferences.9

Further, acts performed in the absence of Full Powers are without any legal effect unless subsequently confirmed by the State concerned.10

6.2.2 Negotiations and Adoption:

In the case of multilateral treaties negotiations take place in ‘diplomatic conference’ and in the case of bilateral treaties through ‘discussions’. During the negotiations, the representatives of states remain in touch with their governments and if necessary consult their governments for instructions. As a matter of general practice, the representatives of states obtain fresh instructions before signing the final text of treaty with or without reservations.11

It is been a general practice now that several committees including Steering, Legal and Drafting are formed to receive and review the draft provisions proposed by the representatives of participating states at diplomatic conferences for concluding multilateral treaty. Further, the adoption of a treaty text at an international conference will take place by vote of two-thirds of the states present and voting.12

Further, it is pertinent to note that in respect of certain subjects, the procedure of adoption of multilateral instruments by diplomatic conferences is replaced by the method of their adoption by organs of International institutions like U.N. General Assembly, the World Health Assembly and the Assembly of International Civil Aviation Organisation. The conventions adopted by any such Assembly are opened for signature or acceptance. Most of the International Human Rights Conventions are conducted under the auspicious of United Nations Organisation and are adopted through a resolution passed in the General Assembly and are proposed for signature and ratification or accession.13

11 I.A.Sheirer, Supra note 3, p. 409.
13 I.A.Sheirer, Supra note 3, p.410. (emphasis supplied ).
6.2.3 Authentications, Signature and Exchange of Instruments:

When deliberations and negotiations are over and final draft of the treaty is agreed upon, the instrument is ready for signature. In the case of multi-lateral treaties, each representatives of states steps up to a table and signs on behalf of his state. This is usually done during the closing ceremony.\(^{14}\) Signature is an essential act, which authenticates the text of treaty.\(^{15}\) However parties may agree to dispense with signature by adopting a different procedure like “initialing” or a “resolution” passed in the conference. For example adoption of conventions by a resolution passed in the General Assembly of United Nations Organisation. In the case of International Labour Organisation conferences are not signed by the representatives of states but are authenticated by the signatures of the President of the Conference and Director – General of the International Labour Office.\(^ {16}\)

Current practice is to open a convention for signature to all members of the United Nations Organisation and the Specialized Agencies, to all parties to the Statute of International Court of Justice and to any other state invited by the General Assembly of UNO for a certain period, which generally does not exceed nine months. During such period each state may sign at anytime, but after the expiration of the period no further signatures are allowed and a non-signatory state desiring to become a party must accede or adhere to the convention but cannot ratify as it has not signed the instrument.\(^ {17}\)

Further, where a treaty is constituted by instruments exchanged by representatives of state parties, such exchange may result in the state parties becoming bound by the treaty if the instrument provide that the exchange is to have this effect or it can otherwise be shown that the parties were agreed that this would be the effect of such exchange.\(^ {18}\)

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\(^{14}\) Ibid.


\(^{16}\) I.A.Sheirer, Supra note 3, p.410.

\(^{17}\) Ibid. p. 411.

6.2.3(i) Legal Effects of Signature:

Under international law, a nation does not become a party\textsuperscript{19} to a treaty until it expresses its consent to be bound. Traditionally this consent to be bound by a treaty could be expressed in a variety of ways.\textsuperscript{20} It may be either through 1) Signature, 2) Exchange of Instruments, 3) Ratification, 4) Acceptance, 5) Approval, 6) Accession.

When the world was composed primarily of monarchies, signature was typically viewed as consent to be bound, since monarchs had the authority to unilaterally bind their nations to treaties.\textsuperscript{21} The central issue under that regime was one of agency, that is, whether the purported representatives of the monarch actually had the authority to make the commitment.

Article 12 of the Vienna Convention on the Law of Treaties, 1969, specifically deals with the issue of “consent to be bound by a Treaty expressed by signature”. Article 12(1) reads as; “The consent of a state to be bound by a treaty is expressed by the signature of its representative when;

a) treaty provides that signature shall have that effect;

b) it is otherwise established that the negotiating states were agreed that signature should have that effect; or

c) the intention of the state to give that effect to the signature appears from the full powers of its representatives or was expressed during the negotiation”.

Thus if treaty provides that signature is enough to bind the parties, treaty has binding force or if it were to be established that parties agreed that signature shall have the effect of binding force or the instrument of full powers exhibits that the representative is authorized to bind the state through signature.

However, where the treaty is subject to ratification, acceptance, approval or accession, signature will become a mere formality and will mean no more than that state representatives have agreed upon acceptable text, which will be forwarded to their particular governments for the necessary decision as to acceptance or rejection.

\textsuperscript{19} Article 2(1) (g) of Vienna Convention on the Law of Treaties, 1969, defines the term ‘party’ as; ‘party’ means a State which has consented to be bound by the treaty and for which the treaty is in force.

\textsuperscript{20} Articles 12 to 15 of Vienna Convention on the Law of Treaties, 1969.

In such a case Article 18 of the Vienna Convention states that a nation that signs a treaty is obliged to refrain from acts which would defeat the object and purpose of treaty until it shall have made its intention clear not to become a party to the treaty.

The effect of Article 18 is that the unilateral act of signature would create an obligation on states at least not to act contrary to the purpose and object of treaty if not strictly bound by the treaty provisions.

6.2.4 Ratification:

The next stage in the formation of an international treaty is that the representatives who signed the treaty or convention refer it back to their governments for approval, if such further act of confirmation is expressly or impliedly necessary under the terms of treaty.

In theory, ratification is the approval by the head of state or the government of the signature appended to the treaty by the duly appointed representatives. However, in modern practice, the act of ratification has assumed significance and is understood to represent the “formal declaration by a state of its consent to be bound by a treaty”. This understanding is further strengthened by the definition of “ratification” provided under Article 2(b) of the Vienna Convention which says “ratification, acceptance, approval and accession mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty.” Further, the act of ratification does not have retrospective effect, so as to make the treaty obligatory from the date of signature. Thus it is the date of ratification that counts than that of signature as far as bindingness of treaty is concerned.22

6.2.4(i) Absence of duty to ratify or accede:

There is neither a legal nor a moral duty to ratify a treaty except the one imposed under Article 18; ‘not to act contrary to purpose and object of treaty till ratification or rejection’.23 This is because the power to ratify treaty is deemed to be

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22 Malcom Shaw, Supra note 2.
23 Article 18 of Vienna Convention on the Law of Treaties, 1969, reads as; ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed’.
inherent in state sovereignty. However, a State is under an obligation, as a matter of
courtesy, to convey to other States without undue delay of its decision not to ratify the
treaty.24

In the case of multilateral ‘law-making’ treaties, the delays of States in
ratifying or their unexpected withholding of ratifications have caused much concern
and raised serious problems.25 A Committee appointed by the League of Nations
investigated and reported the principal reasons / causes of delay of States in ratifying
treaties which are more or less appear to be valid even today. The principal causes
listed by the Committee are;26

1. the complicated machinery of modern government involving protracted
   administrative work before the decision to ratify or accede;
2. the absence of thorough preparatory work for treaties leading to defects which
   entitle States to withhold or delay ratification;
3. the shortage of parliamentary time in countries where constitutional practice
   requires submission of the instrument to the legislature;
4. serious difficulties disclosed by the instrument only after signature and calling
   for prolonged examination;
5. the necessity for new national legislation or the need for increased expenditure
   as a result;
6. lack of interest by States.

The cautious approach of States in ratifying the treaties would indicate that the
states regard the act of ratification create binding obligation and will have to abide by
the terms of treaty.

6.2.4(ii) Legal Effects of Ratification:

Ratification is one of the modes of expressing ‘consent to be bound’ by a
treaty.27 Ratification is defined as an international act, which establishes State’s
consent to be bound by a treaty.28

24 I.A. Sheirer, Supra note 3, p.415.
25 Article 18 Vienna Convention on the Law of Treaties, 1969, does not impose any time limit for
ratification.
26 Report of the Committee, League of Nations Doc. A.10, 1930,V. Cited in I.A. Sheirer, Supra note 3,
p. 415.
In theory, ratification is the approval by the head of state or the government of the signature appended to the treaty by the duly appointed representative (plenipotentiary). However, in modern practice, it has come to possess more significance than a simple act of confirmation, being deemed to represent the formal declaration by a state of its consent to be bound by a treaty.

In the case of multilateral treaties including human rights, ratification was regarded as so necessary that without it a treaty should be deemed ineffective. In Eliza Ann 29 Lord Stowell observed that:

“Upon abstract principles we know that, either in public or private transactions, the acts of those who are vested with a plenary power are binding upon the principal. But, as this rule was in many cases found to be attended with inconvenience, the later usage of States has been to require a ratification, although the treaty may have been signed by plenipotentiaries. According to the practice now prevailing, a subsequent ratification is essentially necessary; and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentaries are limited by the condition of a subsequent ratification. The ratification may be a form, but is an essential form; for the instrument, in point of legal efficacy, is imperfect without it.”

Further, in the Marvomnatis Palestine Concessions Case 30 Judge J. B. Moore observed that, the doctrine that treaties may be regarded as operative before they have been ratified is obsolete and lingers only as an echo from the past.

Today most of treaties make it quite clear the method in which “consent to be bound by treaty” has to be made – either by signature or ratification or accession. The more acceptable view today is that it is purely a matter of the intention of the parties whether a treaty does or does not require ratification as a condition precedent for its bindingness. The practice of states is also consistent with the methodology enunciated under Article 14 of the Vienna Convention which provides that the consent of a state

30 1924 PCIJ Series A, No.2, p.57, cited in I.A. Sheirer, Supra note 3, p. 413.
to be bound by a treaty is expressed by ratification if; a) the treaty expressly so provides; or b) the negotiating states otherwise agree that ratification is necessary; or c) the treaty has been signed subject to ratification; or d) an intention to sign subject to ratification appears from the Full Powers or was expressed during negotiations.

The practice of ratification rests on the following grounds: 31

1. States are entitled to have an opportunity of examining and reviewing instruments signed by their delegates before undertaking the obligations therein specified.

2. By reason of its sovereignty, a state is entitled not to become a party to any treaty should it so choose.

3. Often a treaty requires amendments or adjustments in municipal law. The period between signature and ratification enables state to pass the necessary legislation or obtain the necessary parliamentary approvals, so that they may thereupon proceed to ratification. This consideration is important in the case of federal states, where, if legislation to carry into effect treaty provisions falls within the powers of the member units of the federation, the central government may have to consult the other members of the federation before it can ratify.

4. There is also democratic principle that the government should consider/consult public opinion either in Parliament or elsewhere as to whether a particular treaty should be confirmed.

The main advantage of waiting until a state ratifies a treaty before it becomes a binding document is that the delay between signature and ratification allows extra time for consideration for the state to place it before the concerned organ of the state that has authority/competence over the subject and most importantly the public will have an opportunity to express their views and a strong negative reaction may result in the state deciding not to ratify the treaty under consideration.

Under modern practice, signature is not regarded as manifestation of consent to be bound, especially for multilateral treaties and accordingly consent is manifested through a subsequent act of ratification – the deposit of an instrument of ratification

31 I.A. Sheirer, Supra note 3, p.414.
with a treaty depository in the case of multilateral treaties and the exchange of instruments of ratification in the case of bilateral treaties.32

There is no prescribed form in which instrument of ratification is to be made under International Law. The definition of ratification under Article 2(1) (b) and Article 14 of Vienna Convention which deals with mode of expressing consent to be bound by treaty by way of ratification do not mention any format in which ratification could be made. Further, the definition of ratification says that ratification is an “international act” which establishes states’ consent to be bound by treaty. What is an “international act” is not defined. Whether mere declaration orally or press statement constitute ratification?

Article 16 of Vienna Convention on the Law of Treaties, 1969, prescribes three modes in which the “international act” establishing consent to be bound by treaty could be made. Article 16 reads as “unless the treaty otherwise provides, instruments of ratification, acceptance, approval, or accession establish the consent of a state to be bond by a treaty upon: a) their exchange between the contracting states; b) their deposit with the depository; or c) their notification to the contracting states or the depository, if so agreed”.

Thus, it is clear from the language of Article 16 that the ‘international act establishing consent to be bound by treaty’ has to be done through an ‘instrument’ necessarily indicating that it should be in writing and needs to be exchanged, deposited as the case may be. Once the instrument of ratification is deposited or exchanged by a state, the treaty is binding on the state concerned and must perform its obligations under the treaty in good faith. It is not permissible for a state party to cite its municipal law or constitution for its inability to perform the treaty obligations.33 It is submitted that under international law the “act of ratification binds the state party and entails liability for violation of treaty obligations”.

6.2.5 Accessions & Adhesion

In practice, when a state has not signed a treaty it can only accede or adhere to it. According to present practice, a non-signatory state may accede to treaty at any

32 Malcom Shaw, Supra note 2.
33 Advisory Opinion on the Treatment of Polish Nationals and Other Persons of Polish Origin in the Danzig Territory, PCIJ, Series A/B, No. 44, at p.24. Full text of the judgment is also available at www.icj-cij.org
time. Under Article 2 (b) of Vienna Convention the meaning of “Accession” is same as that of ratification. Further under Article 15 of Vienna Convention, accession imports consent to be bound much in the same way mutatis mutandis as under Article 14 dealing with ratification which deals with consent to be bound by treaty.

Further, a state can accede only if treaty provides for it. If accession clause is absent in the treaty, question of acceding to it does not arise.34

6.2.6 Entry into force:

The entry into force of a treaty depends upon its provision or upon what the state parties have otherwise agreed.35 For example Article 49(1) of International Covenant on Civil and Political Rights, 1966, provides that the covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession and Article 49(2) states that each state ratifying the covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the covenant shall enter into force three months after the date of deposit of its instrument of ratification or accession.

6.3 Observance, Application and Interpretation of Treaty:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.36 Further a state party cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.37 Generally treaties do not have retrospective effect unless the treaty provides for the same.38 Further a treaty is binding upon each party in respect of its entire territory unless a different intention appears from the treaty.39

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.40 To avoid any difficulties arising out of the construction of particulars clauses or Articles, an instrument such as a Protocol or Process-Verbal, or

34 I.A.Sheier, Supra note 3, p. 417.
Final Act is often annexed to the main convention providing a detailed interpretation or explanation of the doubtful provisions.

6.4 General Principles of Treaty Interpretation:

Several rules, canons and principles have been laid down by International Tribunals and by writers to be used as tools in the interpretation of treaties. They are;

6.4.1 Grammatical interpretation and the intention of the parties:

Words and phrases are in the first instance to be construed according to their plain and natural meaning.41

Further, primary regard must be paid to intention of the parties disclosed within the four corners of text. It is also legitimate to consider what was the purpose or plan of the parties in negotiating the treaties.

6.4.2 Object and context of treaty:

If particulars words and phrases in a treaty are doubtful, the general object should govern their construction, purpose of the treaty and by the context.42 The context need not necessarily be the whole of the treaty, but the particular portion in which the doubtful word or phrase occurs. However, for the purposes of interpretation, it can include the preamble and annexes to the treaty and related agreements or instruments made in connection with the conclusion of the treaty.43

6.4.3 Reasonableness and consistency:

Treaties should be given an interpretation in which the reasonable meaning of words and phrases is preferred and in which a consistent meaning is given different portions of the instrument. In accordance with principle of consistency, treaties should be interpreted in the light of existing international law.44

6.4.4 The Principle of Effectiveness:

This principle requires that the treaty should be given an interpretation, which ‘on the whole’ will render the treaty ‘most effective and useful’. This principle is of

41 This principle was reaffirmed by the I.C.J in the Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation, ICJ 1960, 150. cited in I.A.Sheirer, Supra note 3, p.435.
particular importance in the construction of multilateral conventions, containing rules of international organizations.\textsuperscript{45} It does not, however, warrant an interpretation which works a revision of a convention or any result contrary to the letter and spirit of treaties.\textsuperscript{46}

6.4.5 Recourse to extrinsic material:

If the situation, facts and circumstances warrants, recourse may be had to the following, provided clear words are not thereby contradicted:\textsuperscript{47}

a) past history, historical usages relevant to the treaty,

b) preparatory works, like, preliminary drafts, records of conference discussions, draft amendments etc, where normal interpretation leaves the meaning ambiguities or obscure or leads to a result which is manifestly absurd or unreasonable,

c) Interpretative Protocols, Resolutions and Committee Reports setting out agreed interpretations,

d) a subsequent agreement between the parties regarding the interpretation of the treaty,

e) subsequent conduct of states parties, as evidencing the intention of the parties and their conception of the treaty and

f) other treaties, in pari materia, in case of doubt.

The discussion on formation process of an international treaty would be incomplete without discussion on reservation. State Parties to international human rights treaties do attach reservations, declarations, and understandings to the provisions of treaties so as to avoid specific obligation, which is otherwise binding on them. The exercise of attaching reservations, declarations and understandings take place at the time of ratification/accession of a treaty, the stage that signifies the consent of a State to be bound by treaty provisions. The instrument of ratification/accession usually carries the statement of reservations, declarations and understandings.

6.5 The Problem of Reservation:

\textsuperscript{45} Advisory Opinion on Reparation for Injuries Suffered in the Services of the United Nations, ICJ 1949, 174

\textsuperscript{46} South West Africa Cases, 2nd phase, ICJ 1966, 6 at 48.

\textsuperscript{47} I.A. Sheirer, Supra note 3, p.435-38. See also Articles 31(3) and 32 of Vienna Convention on the Law of Treaties, 1969.
Reservation is defined as ‘a unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty, in their application to that state’.  

It is so often that a state which wishes to sign or ratify or otherwise consent to be bound by a treaty in such manner that certain provisions of the treaty do not bind it or apply to it subject to modifications. This can be effected either by express provisions in the treaty itself or by agreement between contracting states or by reservations duly made.

This means generally that where a state is satisfied with most of a treaty, but is unwilling to accept one or two particular provisions, it may wish to refuse to accept or be bound by such provision, while consenting to the rest of provisions of treaty.

By this device of excluding certain provisions, states may agree to be bound by a treaty, which otherwise they may reject entirely. In the case of multilateral treaties, it induces as many states as possible to adhere to the proposed treaty. It is a means of encouraging harmony amongst states of widely differing social, economic and political systems, by concentrating upon agreed, basic issues and accepting disagreement on certain other matters.

There is no prescribed form for recording the reservations. Sometimes they are inserted in a protocol of signature annexed to the convention. Sometimes in the Final Act or in an exchange of notes or by Declarations at the Conference recorded in the Minutes of the proceedings. Reservations and of acceptance or objections to it must be in writing and duly be communicated and also reservations made when signing a treaty subject to ratification, acceptance or approval must be confirmed in the subsequent instrument of ratification, acceptance or approval.

In principle, a state making reservation can do so only with consent of other contracting states; otherwise the whole object of the treaty might be impaired. The practice of making reservations has, however, become so common that states have tended to ignore the requirement of obtaining the assent of other states parties. Thus reservations have frequently been made at the time of signature without being

49 Malcom Shaw, p. 642.
announced during the deliberations of the conference, or at the time of ratification or accession without previous consultation or inquiry of states which have signed or ratified the treaty.51

With the increase in the number of multilateral conventions the unchecked practice of making reservations to multilateral instruments has created a disturbing problem. Further, excessive number of reservations tends to throw out of gear the operation of a multilateral treaty. In 1949-1950, the problem of maximum participation in a multilateral treaty arose in relation to objections taken to reservations of parties to the Genocide Conventions, 1948. The questions of; a) the admissibility and (b) the effect of such reservations and (c) the rights of states of object thereto, were submitted for Advisory opinion to the International Court of Justice.52 The Court’s views on the questions submitted are as follows:

(1) **Admissibility of Reservations:** Reservations are allowable notwithstanding the absence of a provision in the convention permitting them. There need not necessarily be an express assent by other interested states to the making of reservations; such assent may be by implications, particularly in the case of certain multilateral conventions, where clauses are adopted by majority vote of the drafting conference. If a reservation is compatible, objectively, with the nature and purpose of a convention, a state making it may be regarded as fully a party to the instrument; this test of compatibility is consistent with the principle that the convention should have as universal an operation as possible, and with the principle of ‘integrity’ of the instrument.

(2) **Effect of Reservations:** The test of compatibility applies and therefore if a state rightly objects that a reservation is incompatible with the convention, it may legitimately consider that the reserving state is not a party thereto.

(3) **Rights of States to object to the reservations:** A state, which has ratified the convention, can validly object to the reservations of another state. In other words a state party to the convention can only object. Objections made by a signatory state come into effect only after its ratification of the treaty.53

The General Assembly in its Resolution of 12-01-1952 recommended to States that they should be guided by the ICJ’s Advisory Opinion on Genocide Convention,

51 I.A. Sheirer, Supra note 3, p.422.
52 Advisory Opinion on Reservation to the Genocide Convention, ICJ 1951, 15. cited in I.A. Sheirer, Supra note 3, p. 423.
53 See Appendix - Table 4 for a list of Reservations India has made to major human rights treaties and States objection t hem.
1951. Vienna Convention on the Law of Treaties, 1969, has also endorsed the views of the Court.\textsuperscript{54}

Several experiments have been tried in order to overcome the complications caused by reservations. Article 39 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 1952 and Article 309 of the United Nations Convention on the Law of the Sea, 1982, and the recent Agreement on establishing the World Trade Organization and related other Agreements of 1995, provide by a special clause in the convention / agreement that no reservation at all are permissible. Another experiment was that ‘no reservations were allowed as to certain important provisions of the Convention’.\textsuperscript{55} Article 19 of the Vienna Convention also recognizes these methods.\textsuperscript{56} Another method, known as ‘authorisation’ method, is to specify certain admissible reservations in a clause in the convention so as to limit the choice of any parties to make reservations.\textsuperscript{57}

A practice has developed in recent years of ratifications or accessions, subject to statements by the ratifying or acceding governments of their special understandings or interpretations of the treaty concerned or particular provisions of it, or subject to some declaration as to some matter in the treaty or as to its domestic implementation by them. However there is a thin line between such understandings, on the one hand, and reservations, on the other hand. If an understanding thus declared operates clearly to vary or to exclude an obligation under the treaty in question lying on the ratifying or acceding state, it should be considered as a reservation.\textsuperscript{58}

6.6 Conclusion:

The above analysis of formation process of treaty making (conclusion of treaty) makes it abundantly clear that, States are given enough opportunity and unlimited time to consult their concerned organs/agencies responsible for

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\textsuperscript{54} Articles 19 and 20 of Vienna Convention on the Law of Treaties, 1969.

\textsuperscript{55} No reservations were allowed as to Articles 1 to 3 of the Geneva Convention on the Continental Shelf, 1958 and also to the Agreement establishing World Trade Organisation and related Agreements like TRIPS, TRIMS etc. The non-availability of reservation clause in a treaty is called \textit{no ala-carte} provision.

\textsuperscript{56} Article 19 reads as; A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object ad purpose of the treaty.

\textsuperscript{57} I.A. Sheirer, Supra note 3, p. 425.

\textsuperscript{58} Ibid.
enforcing/implementing the treaty provisions at the domestic level before ratifying or acceding to international treaties. What is most important to note here is that, there is no compulsion for States to sign or ratify a treaty. States volunteer to participate in negotiation and sign the treaty and thereafter ratify the treaty. For example, International Covenant on Civil and Political rights, 1966 (ICCPR) came into force on 23-03-1976 and India acceded to it on 10-04-1979. This would mean that, India, after assessing the pros and cons of the treaty obligations including its domestic effect, acceded to ICCPR signifying its acceptance. Thus the onus is on the State Party to see to it that is competent to conclude international treaties in terms of its constitutional requirements so that it can fulfill the treaty obligations.

This aspect further necessitates the examination of “constitutional requirements” for conclusion of international treaties. If the international law were concerned only with the activities of absolute monarchs, viewed from outside, is a much more complex organism than the absolute monarch. Needless to say a “State” is a fiction and cannot act internationally except through the instrumentalities of the Government, like, the President, Prime Minister or Minister and so forth and therefore it is not surprising that the question should arise whether or the not the particular organ of the State, which has concluded a treaty, is duly authorized by the law of that State to create an international obligation binding that State. In the case of every State enjoying treaty making capacity some provision must exist, either as part of a written Constitution or Statute or customary law (practice), which indicate the organ or organs possessing power to conclude treaties and defining the mode of exercise of that power. Thus, in the light of the above it is necessary to examine the constitutional requirements for concluding international treaties in India.