

Jaamacadda Ummadda
Soomaaliyeed



الجامعة الوطنية الصومالية

Somali National University

LAW OF THE TREATIES

- The significance of treaties as a source of international law has already been discussed in Chapter Two. This chapter is concerned with the mechanics of treaties: how they are concluded, interpreted, observed, and terminated.
- International agreements are formal understandings or commitments between two or more countries. An agreement between two countries is called “bilateral,” while an agreement between several countries is “multilateral.” The countries bound by an international agreement are generally referred to as “States Parties or Contracting Parties”
- Under Somalia law, a treaty is specifically a legally binding agreement between countries that requires ratification and the “advice and consent” of the Federal Parliament.
- A treaty can be called a Convention, a Protocol, a Pact, an Accord, etc.; it is the content of the agreement, not its name, which makes it a treaty. Thus, the Geneva Protocol and the Biological Weapons Convention are both treaties even though neither has the word “treaty” in its name.

- On the recent example of the most important of these doctrines came up in the case concerning the maritime boundary delimitation between Somalia and Kenya on 2009. Somalia and Kenyan are two neighboring states but had a longstanding maritime dispute relating to boundaries including delimiting extended continental shelf. In 2014 Somalia submitted the dispute to the International Court of Justice. **The ICJ, among other things, considered the argument by Somalia that the Memorandum of Understanding in 2009, which is a treaty entered into by the two countries, was not valid. Somalia assailed/criticized the validity of the treaty on the ground that ‘it was never approved by the national parliament in contravention of Somalia’s constitutional requirements.**
- These contentions were, however, rejected by the court. The ICJ observed that under customary international law, Somalia may not seek to revoke an international law obligation by virtue of internal law provisions regarding competence to conclude treaties; there was no reason to suppose that Kenya was aware that the signature of the minster may be insufficient.

- **As per Article 27 of the VCLT** provides that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
- In the case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening). In its judgment on the merits, the Court addressed an argument made by Nigeria that a Declaration, signed by its Head of State and that of Cameroon, was not valid because it had not been ratified in accordance with Nigerian law. **Maroua Declaration 1975**
- The rules concerning treaties between states are contained in the Vienna Convention on the Law of Treaties (1969). Although Somalia was not state parties to this convention. However, for the interpretation of this MoU the ICJ started out by know whether the parties are or not parties of Vienna Convention on the Law of Treaties (Vienna Convention). Neither Somalia nor Kenya are parties to the Convention, but the ICJ has considered in previous cases that the Vienna Convention reflects customary international law.
- The ICJ had stated in the **North Continental Shelf Case 1969** that some treaties may give rise to international conduct, customs and be of a “fundamentally norm-creating character.”

- There are no specific requirements of form in international law for the existence of a treaty, although it is essential that the parties intend to create legal relations as between themselves by means of their agreement. This is logical since **many agreements between states are merely statements of commonly held principles or objectives and are not intended to establish binding obligations**. For instance, a declaration by a number of states in support of a particular political aim may in many cases be without legal (though not political) significance, as the states may regard it as a policy matter and not as setting up juridical relations between themselves. To see whether a particular agreement is intended to create legal relations, **all the facts of the situation have to be examined carefully**.
- Where the parties to an agreement do not intend to create legal relations or binding obligations or rights thereby under international law, the agreement will not be a treaty, although, **of course, its political effect may still be considerable**. Of particular interest are memoranda of understanding, which are not as such legally binding, but may be of legal consequence.

- International Court addressed this issue in the **Qatar v. Bahrain case**, with regard to **Minutes dated 25 December 1990 signed by the parties and Saudi Arabia**. The Court emphasized that whether an agreement constituted a binding agreement would depend upon ‘**all its actual terms**’ and **the circumstances in which it had been drawn up**, and in the situation involved in the case, the Minutes were to be construed as an international agreement creating rights and obligations for the parties since on the facts they enumerated the commitments to which the parties had consented.

The making of treaties

Formalities

Treaties may be made or concluded by the parties in virtually any manner they wish. There is no prescribed form or procedure, and how a treaty is formulated and by whom it is actually signed will depend upon the intention and agreement of the states concerned. Treaties may be drafted as between states, or governments, or heads of states, or governmental departments, whichever appears the most expedient. For instance, many international law of the most important treaties are concluded as between heads of state, and many of the more mundane/ordinary agreements are expressed to be as between government departments, such as minor trading arrangements.

Where precisely in the domestic constitutional establishment the power to make treaties is to be found depends upon each country's municipal regulations and varies from state to state. In the Federal Republic of Somalia, the treaty-making power is within the Power of Executive Branch of Government but subject to be approved by the Federal Parliament. International law leaves such matters to domestic law **according to article 90 of the Constitution.**

STEPS IN THE TREATY-MAKING PROCESS

- Although there is no prescribed procedure in international law for the conclusion of a treaty, nonetheless, it is possible to identify a number of steps towards the conclusion of a treaty which are generally adopted.

1. Accrediting of Representatives

Nevertheless, there are certain rules that apply in the formation of international conventions. In international law, states have the capacity to make agreements, but since states are not identifiable human persons, particular principles have evolved to ensure that persons representing states indeed have the power so to do for the purpose of concluding the treaty in question. Such persons must produce what is termed '**full powers**' according to **article 7 of the Convention**, before being accepted as capable of representing their countries.

- Full powers' refers to documents certifying status from the competent authorities of the state in question. This provision provides security to the other parties to the treaty that they are making agreements with persons competent to do so. However, certain persons do not need to produce such full powers, by virtue of their position and functions. This exception refers to heads of state and government, and foreign ministers for the purpose of performing all acts relating to the conclusion of the treaty; heads of diplomatic missions for the purpose of adopting the text of the treaty between their country and the country to which they are accredited; and representatives accredited to international conferences or organizations for the purpose of adopting the text of the treaty in that particular conference or organization.
- The International Court noted in the preliminary objections to jurisdiction phase of the **Genocide Convention (Bosnia v. Serbia 1996)** case that, 'According to international law, there is no doubt that every head of state is presumed to be able to act on behalf of the state in its international relations.'

- Article 8 of the Convention, on the other hand, prevents an agent without required competence from binding his State. Pursuant to Article 8, the formation of a treaty performed by an unauthorised person does not give rise to legal consequences unless afterwards approved by the State concerned. In the case of **international organizations**, the head of the organization's secretariat accredits "full powers"
- What is most important to note here is that certain representatives of a state possess the treaty-making authority without the obligation of producing full powers by virtue of the office they hold which are; **heads of State, heads of government and Ministers for Foreign Affairs**.
- To conclude, Article 7 of the Vienna Convention is of fundamental importance since it ensures the legal certainty of international treaty negotiations by defining the negotiators with competence to bind their State, thus, it contributes to facilitating the conclusion of treaties.

2. Expression of Consent

Once a treaty has been drafted and agreed by authorised representatives, a number of stages are then necessary before it becomes a binding legal obligation upon the parties involved.

The expression of consent to be bound must be expressed by States before its terms can become binding on them. The Vienna Convention provides several applicable modes of expressing consent to become a party to a treaty.

There are, however, a number of ways in which a state may express its consent to an international agreement. It may be signaled, **according to article 11 of the VCLT 1969**, by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession. In addition, it may be accomplished by any other means, if so agreed.

3. Consent by Signature

- Article 12(1) suggests that a State may demonstrate consent through the signature of its negotiator if: (a) There is such a substance indicating that signature will give rise to that legal effect; or (b) a State had aimed at giving that effect to the signature by specifying it in a full power document; or (c) that is the common intent of the negotiating parties.
- In the case where the signature does not constitute the ultimate consent to be bound, a treaty is subject to ratification or approval. In this instance, signature is considered as an **intermediate phase**.
- When the treaty is not subject to ratification, acceptance or approval, "definitive signature" establishes the consent of the state to be bound by the treaty. Most bilateral treaties dealing with more routine and less politicized matters are brought into force by definitive signature, without recourse to the procedure of ratification.

4. Consent by exchange of instruments

Article 13 provides that the consent of states to be bound by a treaty constituted by instruments exchanged between them may be expressed by that exchange when the instruments declare that their exchange shall have that effect or it is otherwise established that those states had agreed that the exchange of instruments should have that effect.

5. Ratification

Another stage in the formation process of an international treaty is ratification which is the most common form of expression of consent to be bound by a treaty. In this step, an agent of a State who signed a treaty submits it to his government for approval if such a further action is essential under the terms of the treaty. In practice, most of the multilateral treaties and bilateral treaties of great importance requires ratification as the **final confirmation**.

- The advantages of waiting until a state ratifies a treaty before it becomes a binding document are basically twofold, internal and external. In the latter case, the delay between signature and ratification may often be advantageous in **allowing extra time for consideration**, once the negotiating process has been completed. But it is the internal aspects that are the most important, for they reflect the change in **political atmosphere**.
- Ratification does not have retroactive effect, so states are only bound from the date of ratification, not the date of signature.
- Article 14(1) of the Vienna Convention defines the conditions in which ratification will be necessary as a way to express consent: (a) When there is such a substance specifying that the expression of consent shall be made by ratification; (b) when the negotiating parties decided that ratification should be required; or (c) when it does not appear from the full power documentation accrediting to the negotiator that a State had intended to give the legal effect to his/her signature to be bound by a treaty.

6. Approval and Acceptance

In many ways, Approval or 'acceptance' is comparable to ratification since a State may demonstrate its consent to become a party to a treaty by this method following its signature. **It is internal, domestic legal processes required for approval. In general, States' constitutions stipulate that certain treaties with high political importance must be approved by parliaments prior to ratification of a treaty.** In practice, States usually adopt this mode in relation to treaties of great political importance. Some claim that parliamentary involvement could minimise the risk of controversies between **Parliament and the Government over the desirability of ratification.**

In some cases, signatures to treaties may be declared subject to 'acceptance' or 'approval'. The terms, as noted in articles 11 and 14(2), are very similar to ratification and similar provisions apply. Such variation in terminology is not of any real significance and only refers to a somewhat simpler form of ratification.

7. Consent by Accession or Adhesion

- Lastly, accession is the way used by a State that has not participated in negotiations or put a signature to a treaty. In this case, a State may subsequently consent to be bound by provisions of a treaty. Accession is regulated by Article 15 of the Vienna Convention and it has the same legal effect as ratification. **Under Article 15 of the VCLT**, the circumstances in which a State may express its consent to become a party to a treaty by accession are stated.
- With reference to Article 15, a State may declare its by accession when (a) the treaty suggests that it is possible to become a party to that agreement by accession; (b) the negotiating parties were agreed on it; or (c) the contracting parties have afterwards reached a consensus on the possibility of becoming party to a treaty by accession.
- A third state can become a party to an already existing treaty by means of accession. Accession and Adhesion is a consequential part of the treaty. Accession is a process when a non-party state joins the already concluded treaties. They are not the original members of such treaty.

- **Entry into Force**

It is of great importance to know that once a State has declared its consent to become a party to a treaty, it will not be bound by the terms of it immediately. A treaty will have a binding effect on a State until the date on which it comes into force. **According to Article 24**, a treaty comes into effect upon its clause related to it or upon what the parties have otherwise decided. From the date of entry into force, the parties that ratified a treaty must perform it in good faith.

- **Attaching Reservations**

States parties to an agreement may intend to alter or exclude the legal consequences of specific rules of a treaty. The notion Reservation is described **under Art 2(1) of the Vienna Convention**. According to this, reservations are a unilateral statement and they do not need to be agreed by contracting parties during the negotiations. It is no longer possible to attach a reservation after consent has been expressed by one of the means mentioned in the definition. A State may attach reservations to an entire article, or only a paragraph, or even only one or some words

- However, reservations may cause undesirable consequences, especially in cases of an objective regime. In the case of the international human rights regime, for instance, reservations might water-down the obligations. **Article 23 of the VCLT clarifies the procedures in formulating reservations.**
- That is why some treaties put a ban on all reservations. Chemical Weapons Convention is one of the instances of those. (adopted 3 September 1992, entered into force 29 April 1997).

Registration and Publication

- Article 102 of the UN Charter suggests that every international agreement has to be registered at the United Nations.
- After a treaty has been concluded, the written instruments, which provide **formal evidence** of consent to be bound, and also reservations and declarations, are placed in the custody of a depositary.

For treaties with a small number of parties, the depositary will usually be the government of the state on whose territory the treaty was signed. For example, the Kenyan Minister of foreign Affairs Hon. Moses Watungula deposited the MoU between Somalia and Kenya to the Secretary-General of the United Nations **On 11 June 2009, the MOU, registered under registration number 1-46230 and was Recognized the existence of ‘Maritime Dispute’.**

A statement of the registered treaties and international agreements is published every month by the Secretariat. Furthermore, they are sent to all members of the United Nations



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