CHAPTER 23
TREATIES

Definition :

The term treaty means a written agreement by which two or more States or international organizations create or intend to create a relation between themselves operating within the sphere of International Law.[1] The above definition contains four important elements. Firstly, treaties should be in writing. Although classical International Law did not prescribe that treaties should always be in writing, it is rare to find an oral agreement between the States.[2] The Vienna Convention on the Law of the Treaties of 1969 lays down that treaties should be concluded in written form only. Oral agreements are neither precise nor permanent, and therefore at present, it has become essential that treaties should be concluded in writing. Secondly, parties to a treaty may be either States, or a State and international organization, or international organizations. Thirdly, the purpose of a treaty is to create a relationship between the parties. The relationship may be legal relations or political or moral relations. It implies that treaties or provisions of treaties may impose no binding obligations, or be intended not to create legal relations between the parties.[3] For instance, certain treaties of friendship between States do not create any legal relationship between the contracting parties. Fourthly, a treaty should operate within the sphere of International Law. It is submitted that international law is not the only legal system within which the States can contract. Some contracts may be governed by general principles of law including private International Law. Such contracts may be helpful in resolving difficulties but they do not come within the scope of the term treaty in which it is used in International Law.

Different Names of Treaties :

The term treaty denotes a genus[4] and it includes many different names which may be attributed to it by the parties. A treaty may be called a treaty, but at the same time, a variety of other names may be attributed to the term such as convention, agreement, protocol, declaration, arrangements, accord, additional articles, aide memori, code, communique, compact, contract, instrument and optional clause. The above may indicate a difference in procedure or degree of formality, but in generic sense all of

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1. McNair, 'Law of Treaties', p. 4.
2. In Ihlen case, the Permanent Court of International Justice in 1933 decided that oral treaties can be made by the States. In the above case, an oral agreement was made by Denmark with Norway on Greenland on December 22, 1919 wherein it was laid down that the former would not oppose the granting of archipelago of Spitsbergen to Norway provided that its sovereignty was extended to all of Greenland. In 1924, Norway opposed the agreement, making a complaint to the Court which rejected it, stating that a declaration of a Minister of Foreign Affairs in the name of his government is binding on a State regardless of whether it was made orally or in writing.
3. Starke's International Law, Eleventh Edition (1994) p. 5.
4. McNair, op. cit., p. 22 ; See S.K. Agarwala, 'Essays on the Law of Treaties' (Edited) p. XIX.

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them are described as treaties.[1]

In the South West Africa case (Preliminary Objections) the International Court of Justice said : Terminology is not a determinant factor as to the character of an international agreement or undertaking. In the practice of States and of international organisations and in the jurisprudence of international courts, there exists a great variety of usage ; there are many different types of acts to which the character of treaty stipulation has been attached.[2] Apart from the more obvious types of such acts, even an unsigned and uninitialled document such as a press communique may constitute an international agreement.[3]

Treaty through Exchange of Notes :

A treaty may be concluded through the exchange of notes[4] or letters. United Kingdom and Germany concluded an agreement for the Limitation of Naval Armaments on June 18, 1935 through the exchange of notes. In a case concerning Maritime Delimitation and Territorial Questions between Qatar and Baharain (Jurisdiction and admissibility)[5] the International Court of Justice in its judgment on July 1, 1994 found that the exchange of letters between the King of Saudi Arabia and the Amir of Qatar, and between the King of Saudi Arabia and the Amir of Baharain and the documents headed 'Minutes' signed by the Ministers for Foreign Affairs of Baharain, Qatar and Saudi Arabia are international agreements creating rights and obligations for the parties.

The Vienna Convention on Law of Treaties :

Treaties acquire a prominent place in international relations since long before International Law in the modern sense of the term was in existence. The customary rules of International Law relating to treaties gradually acquire considerable certainty and precision. Nevertheless, the very great importance of treaties in international relations and the uncertainty or unsatisfactionness of some aspects of customary International Law led the International Law Commission in as early as in 1949 to include the topic of treaties in the list of the topics selected for the codification.

The codification of the topic of law of treaties was one of those which were selected by the International Law Commission as early as in 1949. When work was completed in 1966, the General Assembly called for in 1968 the United Nations Conference on the Law of Treaties to consider draft articles prepared by the International Law Commission. The Vienna Convention on the Law of Treaties (hereinafter referred to Vienna Convention) was adopted by the Conference on May 23, 1969. The Convention consists of a Preamble and 85 Articles, and is divided into eight parts. The Convention came into force on January 27, 1980 when it was ratified or acceded to by thirty-five States. As of December 1989, there were 59 States parties to the Convention.

Application of the Convention :

It is important to note that the Convention applies to those treaties which are concluded by States, 'after the entry into force of the present

1. Denya P. Myers has mentioned variety of names for the word treaty. 'Names and Scope of Treaties'. AJIL Vol. 51 (1957) p. 574 at p. 576.
2. ICJ Reports (1961) at p. 31.
3. Oppenheim, 'International Law', Vol. I, Ninth Edition (1992) pp. 1208-1209.
4. Mc'Nair says : Exchange of Notes, now extremely common ; sometimes it may embody a more important agreements than the term suggests. (op. cit., p. 24).
5. The Judgment was delivered on July 1, 1994.

Convention with regard to such States'. It implies that treaties made before that date are still governed by the 'old' law. Thus, at present treaties concluded by States are governed by the 'old' law as well as 'new' law, i.e., the laws made by the Vienna Convention of 1969. The Convention does not apply to agreements concluded between States and other subjects of International Law, or between such other subjects of International Law. Vienna Convention under Article 2(1)(a) clearly provides that 'treaty is 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'. Thus, agreements concluded between States and international organizations, or between international organizations do not come within the scope of the Convention. It was perhaps done to make the rules of treaties concluded by States more precisely. The agreements concluded between States and international organizations, or between international organizations may have different procedure and form, and may have special rules, and had they been included within the scope of the Convention, its provisions might have become complex and complicated.

The Conference on the Law of Treaties recommended to the General Assembly that a separate Convention should be adopted in respect of treaties concluded between states and international organizations or between international organisations. Accordingly, the Conference adopted a separate Convention on the Law of Treaties to which International Organizations are Parties on March 20, 1986. The Convention consists of eighty six Articles, and shall come into force when it shall be ratified or acceded to by 35 States.

Kinds of Treaties :

Treaties may be classified into three categories on the basis of the parties becoming members to treaties. They are as follows :—

(1) **Bilateral Treaties.**—Bilateral treaties are described as those treaties in which participation and rights and obligations arising from the treaty is limited only to two parties. They are sometimes also called 'bipartite' treaties, although the word is not apt. Many bilateral treaties bear the closest analogy to the private law contract.[1] and therefore they are sometimes referred to as treaty-contract.

(2) **Plurilateral Treaties.**—Those treaties where the participation is open to a restricted number of States are described as plurilateral treaties.[2] The minimum number of parties in such treaties should be more than two. Although the maximum member may differ from one to another, it should not be open to all or most of the members of the international community as in the case of multilateral treaties. The purpose of the conclusion of plurilateral treaties varies from treaty to treaty. For example, it may be either to maintain peace and security within a specific region or to promote and develop the commerce amongst the participating members or to create similar other rights and obligations, the burdens and benefits of which are created in favour of only a group of States. The regional arrangements as envisaged under Article 52 of the Charter of the United Nations are included under this category. The European Coal and Steel Community, Organization of the Petroleum Exporting Countries (OPEC), North Atlantic Treaty

1. Lauterpacht, 'Functions of Law in the International Community', p. 156.
2. See the Report of Special Reapporteur Sri Humphrey Waldock on the Law of Treaties (Doc. A/C. No. 4/144 : Year Book of the International Law

Organization (NATO), League of Arab States are some of the examples of plurilateral treaties.

(3) **Multilateral Treaties.**—Multilateral treaties are those which are open to participation for all the States without restriction or to a considerable number of parties. They lay down general norms of International Law, or to deal in a general manner with matters of general concern to other States as well as to the parties to the treaties. Multilateral treaties are said to perform the functions of international legislation. It is to be noted that they might have semblance of international legislation, yet it would be improper to describe them so because the expression international legislation is more a metaphor than a reality.[1] Oppenheim has very rightly observed that 'there is as yet no international legislature proper in the international sphere.[2] However, in the absence of an international legislation, multilateral treaties are among the most promising methods for the development of International Law.[3]

Multilateral treaties are sometimes, described as law-making treaties.[3] It may be noted that such a description would be inappropriate if it is used to suggest the laying down of a general rule for future conduct, or for creating some international institution.[4] In fact, a treaty is an agreement between the contracting parties. Non-signatories are not bound by it unless it creates a customary rule of International Law. Therefore, in a limited sense, all treaties are law making inasmuch as they lay down rules of conduct which the parties are bound to observe [5] However, multilateral treaties could have been more aptly described as law-making treaties had the term been used to denote those treaties which create a regime of law, either on a multilateral scale, or for all States such as General Treaty for Renunciation of War of August 27, 1928. But each and every multilateral treaty cannot be regarded as a law making treaty because they lack this particular character.

The Vienna Convention has classified all the treaties into bilateral treaties and multilateral treaties. Plurilateral treaties do not find place in the above Convention. They have been included in the category of multilateral treaty. A question arises : Can a multilateral treaty, to which only a few States are the parties, create a general norm of International Law ? Tunkin is of the opinion that a multilateral treaty concluded between, say, five States, though it concerned general norms of international Law or dealt with matters of general interest to States as a whole, could not be considered a general multilateral treaty.[6] It is to be noted that a multilateral treaty accepted and enforced by limited members of States cannot create a general norm of International Law. The codification process of International Law admits of a widespread agreement upon norms and if this requirement is not fulfilled, it is difficult to call that a particular multilateral treaty has created a general norm of International Law. Jennings has clearly pointed out that : It would be contrary to all principles to hold that a regime established by an essential contractual instrument could be opposable as such against representative and specially interested States which had elected not to accept the treaty. The very existence of ratification and acceptance clauses in multilateral treaties negatives the notion that such a

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1. Oppenheim, op. cit., p. 1204, f.n. 3.
2. *Ibid.*
3. Brierly, op. cit., p. 58, Starke, op. cit., p. 42.
4. Brierly, op. cit., p. 58
5. Oppenheim, op. cit., p. 1204, Schwarzenberger, op. cit., p. 31.
6. Year Book of the International Law Commission (1963) p. 69.

treaty could of itself and without the evidences of custom become legislative for concerned States which do not ratify or accept.[1] The above statement makes it clear that the number of States parties to a treaty, i.e., the quantitative point is one of the essential elements which a multilateral treaty should possess, for creating a general norm of International Law.

Who Can be Parties to a Treaty :

Oppenheim lays down that a State possesses the treaty making power only so far as it is sovereign.[2] Making a treaty is one of the characteristic forms of the exercise of the sovereignty. States which are not fully sovereign can also become parties only to such treaties as they are competent to conclude. Competency to conclude treaties by them depends upon the 'special case'.[3] The Vienna Convention under Article 6 lays down that 'every State possesses capacity to conclude treaties'. However, the word 'State' has neither been defined by the Convention, nor it lays down the elements which go to determine statehood. It may therefore be interpreted that all the States including those which are not-fully-sovereign have a capacity to conclude treaties. Thus, a colony, trust territory, a protectorate or a vassal State may also be a party to a treaty. In the case concerning the Rights of Nationals of the United States of America in Morocco,[4] the International Court of Justice stated that Morocco had "made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco", but that Morocco had nevertheless "remained a sovereign State" and had "retained its personality as a State under International Law". Tunisia was another example of the same kind. In the above cases, the protected States retained a measure of treaty-making capacity, even although its exercise may be subject to the consent of the protecting Power. Thus, all States have been put on equal footing for the conclusion of treaties despite obvious inequalities. However, if there is a limitation in the capacity of a State to enter into any category or all categories of treaties by reason of its qualified status or by existing treaty obligations, that State may not enter into treaties. Thus, the Free City of Danzing, though held to be a State by the Permanent Court of International Justice, was subjected to certain limitations affecting both the extent and manner exercise of its treaty making power. Likewise, a neutralized State is presumably incapable of concluding a treaty of offensive alliance.[5]

Apart from the States, international organizations also possess capacity to make a treaty. Thus the United Nations[6] and its specialized agencies can make treaties in order to exercise their functions. The United Nations has concluded many agreements with States which are members and with non-member States. However, treaties concluded by international organizations do not come within the scope of the Vienna Convention. Such treaties are governed in accordance with a separate Convention which has been adopted in 1986.

1. Treaties as Legislations' in Philip C. Jessup (ed) *Jus et Societias* : Essays in Tributes to Wolfgang Friedmann (1979) p. 167.
2. Op. cit., p. 1217.
3. Ibid.
4. ICJ Reports (1952) pp. 182 and 183.
5. See Treatment of Polish Nationals in Danzing, PCIJ Series A/B No. 44 pp. 23-25.
6. Parry Clive, The Treaty-Making Power of the United Nations', BYIL Vol. 26 (1949)

FORMATION OF A TREATY :

International law does not prescribe any specific form for the conclusion of a treaty. The parties are free to agree upon the language or languages in which the treaty is expressed, and upon which (if any) of them is to be regarded as authentic or as prevailing in case of dispute. In the Temple of Preach Vihear case (Preliminary Objections) the International Court of Justice said that 'where.....as is generally the case in International Law, which places the principal emphasis on the intention of the parties, the law prescribed no particular form, parties are free to choose what form they please provided their intention clearly results from it.[1] As such, there exists no precise procedure or standard in this regard. However, following are the steps which are generally adopted in concluding a treaty :—

(1) Accrediting of Persons by the Contracting States :

The first step in the conclusion of a treaty is the appointment of the representatives or plenipotentiary by the States. The representatives should be equipped with the necessary authority for the conclusion of a treaty. Normally, the representatives of the States are provided with a formal instrument which is given either by the Head of the State or by the Minister of Foreign Affairs. The instrument is called 'full powers'. The Vienna Convention under Article 2(1)(c) lays down that 'full powers' means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty. The representatives are required to exchange their full powers. However, the full powers are not necessary if it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person concerned as representing the State for such purposes and to dispense with full powers.[2] Full powers are also not necessary if a treaty is concluded on behalf of a State by the Heads of the States, Heads of Governments, Ministers of Foreign Affairs, heads of diplomatic missions, and representatives accredited to international conferences or organizations.[3] They are considered to represent the State *ex-officio*.

(2) Negotiation :

The accredited persons of contracting States proceed for negotiation. While negotiating a treaty, the representatives may consult their governments.

(3) Adoption :

When States have negotiated a treaty they settle its form and content by drawing up a text setting out its provisions. In expressing their agreement with this text, States are said to 'adopt' the text.[4] In a bilateral treaty, the adoption of the text of a treaty is an informal step but where a large number of a States participate in the drawing up of the text the matter assumes more significance. The normal rule in such circumstances is that the consent of all those States is needed for the adoption of the text. The application of a unanimity rule for texts prepared at international

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1. ICJ Reports (1961) at p. 131.
2. *See* Article 7(1)(b) of the Vienna Convention on the Law of Treaties.
3. *See* Article 7(2)(a) of the Vienna Convention on the Law of Treaties.
4. Oppenheim, op. cit., p. 1208.

conferences is, however, unrealist and is not the normal practice.[1] Accordingly, the Vienna Convention under Article 9(2) lays down that the adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.[2] In other treaties, the adoption of the text takes place by the consent of all the participating States.

(4) Signature :

After the adoption, the text of a treaty is required to be signed by the accredited representatives of the contracting parties. The text of a treaty is regarded as authentic and definitive by the signature, signature *ad referendum* or initialling. Signature and initialling both have been recognized as valid by the Vienna Convention. However, the initialling of a text constitutes a signature of the treaty when it is established that the negotiating States so agreed.[3] It is important that the signature or initialling is done by each representative at the same time and place and in the presence of each other.

The effect of signature of a treaty may be different from treaty to treaty. It depends on whether or not the treaty is subject to ratification, acceptance or approval. Where a provision is not made for ratification, acceptance or approval, a treaty comes into force on signatures of the representatives. However, where a treaty is subject to ratification, acceptance or approval, the signature has no meaning except that the representatives have agreed upon a text and willing to accept it and refer it to Governments which have a competency either to approve it or reject it. However, where a treaty is subject to ratification, acceptance or approval, signatory States are required not to do any act which may frustrate the object of the treaty. In the case of certain German Interests in Polish Upper Silesia[4] it was pointed out that a signatory States' misuse of its rights in the interval before ratification may amount to a breach of the treaty. The Vienna Convention has incorporated the same principle under Article 18 which says that signatory States are under an obligation to refrain from doing acts which would defeat the object and purpose of a treaty. The above implies that with the signature of a treaty, a certain limited status is conferred upon the signatory State with respect to the treaty. However, the precise nature of this status may not be easy to define.[5]

(5) Ratification :

When a treaty signed by the representative of the State is confirmed by the State, the act of confirmation is called ratification. Vienna Convention under Article 2(1)(b) lays down that ratification is an international act whereby a State establishes on the international plane its consent to be bound by a treaty. Thus, it is an act by which a State confirms its signature and by that act finally gives its consent to be bound by a treaty. It implies that the process of ratification is confined only to the

1. Oppenheim, op. cit., p. 1223.
2. See Article 10 of the Vienna Convention.
3. See Article 12(2)(a) of the Vienna Convention.
4. PCIJ Series (1926) A. No. 7. Also see McNair op. cit., pp. 199-205 ; Bin Cheng, General Principles of Law.
5. McNair, op. cit., pp. 199-205. In its Advisory opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, the Court recognized that 'signature' establishes a 'provisional status' in favour of the signatory States which entitles it to formulate objections of a provisional kind to reservations made by other signatories. (ICJ Reports 1951).

signatory States. Ratification of a treaty by the States is done only in those cases where it is so required by the provisions of a treaty. In those cases where ratification is not required to be done by a State, a treaty comes into force from the time of signature of the representative of States. It is significant to note that those treaties which require ratification, rights and obligations of the treaty become applicable to the ratifying State only as from the date of ratification and not from the date of signature. The ratification does not operate retrospectively. Multilateral treaties come into force on the deposit of a prescribed number of ratification and accession. Ratification of a treaty therefore is made by which a State gives its consent to be bound by a treaty. According to Article 14 Part (1) of the Vienna Convention ratification of a treaty is necessary when (a) the treaty provides for such consent to be expressed by means of ratification ; (b) it is otherwise established that the negotiating States were agreed that ratification should be required ; (c) the representative of the State has signed the treaty subject to ratification ; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation..

The modern institution of ratification in International Law developed in the course of the nineteenth century under the influence of France and the United States. Earlier, ratification was not an approval of the treaty. It had been an essentially a formal and limited act by which, it was confirmed that the representative had been invested with authority to negotiate the treaty and, that being so, there was an obligation upon sovereign to ratify his representative's full powers, if these had been in order. France and United States, however, used ratification as a means of submitting the treaty-making power of the executive to parliamentary control, and ultimately, the doctrine of ratification underwent a fundamental change. This development took place at a time when the great majority of international agreements were formal treaties. Later, it became a general rule that ratification is necessary to render a treaty binding, unless it has been agreed that the treaty shall be binding without ratification.

Purpose of Ratification : — To make a treaty agreement

At present, generally all the treaties are required to be ratified by the States. The practice in the case of multilateral treaties is adopted uniformly. Purpose of ratification of a treaty may be many. For instance, ratification gives an opportunity to the contracting parties to re-examine and review the treaty signed by their representatives. The implications of a treaty therefore can be studied thoroughly. Secondly, a State ratifies a treaty on the basis of sovereignty. If so wishes it may withdraw itself from a treaty by non-ratifying it. Thirdly, a State may require to amend its own laws in order to give an effect to the provisions of a treaty. The period between signature and ratification may be utilized in doing so. Fourthly, it is one of the principles of the democratic set up that the Government should consult public opinion either in Parliament or elsewhere as to whether a particular treaty should be confirmed.[1]

Mode of Ratification :

Ratification of a treaty is an internal procedure. It is determined by the internal laws and usage of each State and therefore the process or ratification of a treaty is different from State to State. For instance, in the United States of America, a treaty must be ratified by the President with the advice and consent of the Senate, given by two-thirds of the senators

present. The above, provision is laid down under para 2 of Article 2 of the Constitution of the United States. In the United Kingdom, ratification is done by the Crown on the advice of the minister concerned. In India, President ratifies the treaty on the advice of the Central Cabinet.

Refusal of Ratification

International Law does not prescribe any time within which ratification must be given. States certainly must allow each other a reasonable time in which to ratify a treaty.[1] If a treaty does not make any provision as to the time for ratification. Whether after the lapse of an unreasonable time a State may still ratify a treaty, or whether the other State can regard the unreasonable delay as rendering the treaty stale and incapable of ratification or as having constituted a positive refusal to ratify, is uncertain.[2] Much will depend upon the nature of the treaty. Certainly some treaties are still ratified after a lapse of many years. If a State does not ratify, it shall not be binding on it. However, in between the period of signature and ratification, a State is under a duty not to do any act which is likely to defeat the object and purpose of a treaty. Vienna Convention lays down that a State is obliged to refrain from acts which would defeat the object and purpose when it has signed the treaty or has exchanged instruments of a treaty 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.[3]

(6) Accession and Adhesion :

Accession is the traditional method by which a State may, in certain circumstances, become a party to a treaty of which it is not a signatory. The right to accede is determined by the provisions of the treaty and, if the treaty contains no provision concerning accession, a State may only accede with the consent of all the States. When a State becomes a party through accession, ratification is not required. The act of accession therefore includes signature as well as ratification. The Vienna Convention under Article 2(1)(b) lays down that accession is an act whereby a State establishes on the international plane its consent to be bound by a treaty. Thus, the effect of accession is the same as to that of ratification. It is also therefore a mode by which a State gives its consent to be bound by a treaty. The Vienna Convention has recognized it under Article 15. Normally accession is open only in multilateral treaties. They provide that a State may become a party either by ratification or accession. The instrument of accession is deposited with the depositary of a treaty.[4] But a State does not become a party to a treaty merely by depositing the instrument of accession. A State becomes so only when the other contracting parties notify to the depositary that they have no objection in accepting a State as a party to the treaty. This is done by them when they are communicated by the depositary of the treaty about the instrument of accession of a State. It is to be noted that a State does not become a party to a treaty by depositing an instrument of accession in those cases wherein the instrument has expressed that accession is subject to 'ratification or approval'. Such accession is called conditional accession. Accession subject

1. Oppenheim, op. cit., p. 1225.
2. *Ibid.*
3. Article 18.
4. The Secretary-General of the United Nations exercises the depositary functions in respect of multilateral treaties concluded under the auspices of the United Nations.

to 'ratification or approval', strictly speaking has no positive legal effects. Neither can its effect be said to be equivalent to that of signature ; for signature has its own special function and status, nor can there be any question of the deposit of the instrument making the State a provisional party to a treaty ; for the subsequent ratification or approval of the State is a condition precedent to its becoming bound by the treaty.

The meaning of the term 'adhesion' is the same as to that of accession.[1] While the term accession is used in the Commonwealth of Nations, the United States of America prefers to use the term adherence in place of accession. The Vienna Convention uses accession and not adherence or adhesion. Formerly, some writers used the word 'adherence' or adhesion, to the partial acceptance of a treaty by a third State and accession to a full or complete acceptance. The distinction has become obsolete and both are regarded as complete, and when permitted, partial acceptance may be described as accession.[2]

(7) Entry into Force :

A treaty enters into force in accordance with the provisions of a treaty. Article 24 of the Vienna Convention provides that a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree. If no provision is made in a treaty as to this effect, it enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States. Normally, bilateral treaties enter into force when both the contracting parties have exchanged their documents of ratification.[3] In those treaties where ratification by the parties is not required, a treaty comes into force after the signature on behalf of all the parties, and the exchange or deposit of signed copies. The rule applies to plurilateral treaties also.[4] Multilateral treaties enter into force from the date when the prescribed number of ratification or accession has been made. Some treaties provide that a treaty shall enter into force after a lapse of certain period from the date of receipt of the prescribed number of ratification or accession. For instance, the Vienna Convention provides, under Article 84(1) that the Convention shall enter into force on the thirtieth day following the date of receipt of the thirty-fifth instrument of ratification or accession.

A treaty may also enter into force provisionally. The Vienna Convention under Article 25 lays down that "A treaty or a part of a treaty is applied provisionally pending its entry into force if (a) the treaty itself so provides ; or (b) the negotiating States have in some other manner so agreed." But the provisional application of a treaty or a part of a treaty with respect to the State shall be terminated if the State notifies the other States of its intention not to become a party to the treaty.

(8) Registration and Publication :

A treaty is required to be registered with the Secretary General of the United Nations, after it has come into force. Article 102 of the Charter of the United Nations lays down that every treaty and international agreement entered into by any member of the United Nations after the present Charter comes into force, as soon as possible, be registered with the Secretariat and published by it. The rules of registration and publication were adopted by

1. McNair, 'Law of Treaties', p. 148.

the General Assembly on December 14, 1946.[1] The Vienna Convention also provides likewise. Under Article 80(1) it says that treaties shall, after their entry into force, be transmitted to the Secretariat of the United Nations for registration or filing and recording as the case may be, and for publication. The purpose of the registration of a treaty with the Secretary-General of the United Nations is neither laid down in the Charter nor in the Vienna Convention. However, the registration and publication serves two-folded purposes. Firstly, it prevents the States to conclude secret agreements, and secondly, it would not be easily possible for the parties to violate the provisions of a treaty when it has been published. If it is done, it will considerably damage its position and prestige in international community.

It may be noted that the registration or non-registration of a treaty with the Secretary General of the United Nations does not make any effect as to the validity of a treaty. A non-registered treaty shall be valid as much as those of registered treaty. However, if a treaty is not registered, Article 102(2) of the Charter provides that no party can invoke that treaty or agreement before any organ of the United Nations. Thus if any party of an unregistered treaty wishes to invoke before the International Court of Justice, in order to claim its rights arising from the treaty against other party to the treaty, it cannot do so. The Secretariat of the United Nations performs the functions of publication of treaties in the United Nations Treaty Series (UNTS) together with lists from time to time of ratifications and accessions by the States. However, if it fails to publish it, it would not render the instrument unenforceable. Since the non-registration of a treaty with the Secretary General of the United Nations does not make it invalid, many States ignore their obligation to register treaties may be because of lack of concern or because of carelessness. It is suggested that the States must be pressed strenuously for the prompt registration of every treaty so that the goal of comprehensive coverage by the United Nations Treaty Series is adequately achieved.

CERTAIN GENERAL PRINCIPLES OF TREATIES

PACTA SUNT SERVANDA :

Before the Vienna Convention was adopted, the question as to what is the basis of validity of a treaty, or to say, what is the binding force of a treaty was much disputed. The opinion of jurists on the above question was different. According to some writers, the binding force is the law of nature. To others, it is religious and moral principles that bind a State. To some other writers, it is the will of the parties which gives binding force to their treaties. According to Oppenheim 'treaties are legally binding, because there exists a customary rule of International Law that treaties are binding.'[2] The binding effect of that rule rests in the last resort on the fundamental assumption, which is expressed in the form of the principle *pacta sunt servanda* which means that States are bound to fulfil in good faith the obligations assumed by them under treaties. To carry obligations in good faith arising from treaties is one of the duties of the States. The Draft Declaration on Rights and Duties of the States prepared by the International Law Commission has expressly laid down under Article 13 that every State has the duty to carry out in good faith its obligations arising from treaties. McNair lays down that no Government would decline

1. General Assembly Resolution 97/1, December 14, 1946. Earlier the Covenant of the League of Nations had also laid down under Article 18 for the registration and publication of treaties.
2. Oppenheim, op. cit., p. 1206.

to accept the principle *pacta sunt servanda*.[1] It is one of the elementary and universally agreed principles for which it is impossible to find a specific authority. The principle of *pacta sunt servanda* has also been incorporated in the Vienna Convention. The Preamble appended to the Convention stipulated that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized. Under Article 26, the Convention expressly laid down this principle by stating that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'. Article 2 Paragraph 2 of the Charter of the United Nations also lays down that 'All members in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in 'good faith the obligations assumed by them in accordance with the present Charter.' It is to be noted that the good faith principle has also been recognized by the International Court of Justice in Nuclear Tests Case (*Australia* v. *France*) by stating that the principle of good faith is "one of the basic principles governing the creation and performance of legal obligations."[2]

A question arises as what is meant by good faith. In the strict legal sense it has no meaning. However, parties to a treaty are required to interpret and perform the provisions of the Treaty in good faith, i.e., in accordance with the ordinary meaning to be given to its term in the context of the treaty and in the light of its object and purpose.[3] If a treaty is open to two interpretations, one of which does and other does not enable the treaty to have appropriate effects, good faith, and the object and purpose of the treaty demand that the former interpretation should be adopted. *Pacta sunt servanda* is therefore the basis of validity of a lawfully concluded treaties.

A State may not invoke the provisions of its internal law as justification for its failure to perform a treaty in accordance with Article 27 of the Vienna Convention. The Draft Declaration on Rights and Duties of the States had stipulated similar provision under Article 13 by stating that a State shall not invoke provisions of its constitution or its laws as an excuse for failure to perform the duty.

The principle of *pacta sunt servanda* is regarded as the basis of validity of a treaty. It serves two essential functions as both a source of International Law of ever increasing importance and an effective instrument of international co-operation. The contracting parties are required to carry out their obligations arising from a treaty in good faith. If they fail to observe this very principle, treaties which are regarded as the most important source of International Law would become questionable.

FREE CONSENT OF THE PARTIES :

A treaty shall be binding only upon those States which have given their consent. Mutual consent of the parties is necessary. The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. It is one of the principles of

1. Op. cit., p. 493.
2. ICJ Reports (1974) p. 268. Also see case Concerning Rights of Nationals of the United States of America in Morocco. ICJ Reports (1952) p. 212. Earlier, Permanent Court of International Justice had also recognized the principle in a few cases. See Minority Schools in Albania, PCIJ Ser. A/B No. 64. (1935) pp. 19-20 ; Treatment of Polish Nationals and other Persons of Polish Origin, PCIJ Ser. A/B. No. 44 (1932) p. 28.
3. See Dharam Pratap, 'Interpretation of Treaties' in S.K. Agarwala, Essays on the 'Law of Treaties'. (Edited) p. 66.

treaties that the consent of a State to be bound by a treaty should be 'free'. If a State has not given its 'free consent', or in other words, if the consent of a State has been obtained by fraud, or by corruption of a representative of a State, or by coercion of a representative of a State by the threat or use of force, a treaty shall be void. If the consent of a State bound by a treaty has been given in error or under a mistake it shall not be binding on it even if the consent was free provided the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded by and formed an essential basis of its consent to be bound by the treaty. These are the grounds which make a treaty void because in such cases consent of a State to be bound by a treaty is not obtained freely. It may also be noted that the consent of a State to be bound by part of a treaty may be effective only if the treaty so permits or when the other contracting parties so agree.[1]

RESERVATIONS :

Another notable point in relation to the consent is that a State may give its consent to be bound by a treaty, yet it may accept a treaty in part. When a State accepts a part of a treaty and thereby excludes the legal effect of certain provisions of the treaty in its application, it is known that a State has accepted a treaty with reservation. Under Article 2(1)(d), the Vienna Convention defines the term reservation 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'. Thus, a State may accept a treaty subject to certain conditions unless the reservation is prohibited by the treaty.

A State is free by virtue of having sovereignty to formulate such reservations as it thinks fit. But a reservation formulated by one State shall be deemed effectively only when it has been assented to by other contracting parties. Thus, in cases of bilateral treaties if a party does not accept the reservation, the treaty is regarded to have terminated. Reservation in such cases amounts to a new proposal which must be accepted by the other State before a treaty comes into effect. In case it is not accepted, the treaty comes to an end. In case of multilateral treaties, if a reservation is made by a State, the treaty itself shall not come to an end. But the treaty shall be applicable to the State making reservations subject to those conditions and restrictions which are made by it by way of reservations. Article 19 of the Vienna Convention lays down that a State may accept a treaty with reservation unless (a) the reservation is prohibited by the treaty ; or (b) the treaty provides that only specified reservations which do not include the reservation in question, may be made ; or (c) in the cases where it is not compatible with the object and purpose of the treaty. Reservation was not accepted valid if it is not compatible with the object and purpose of the Convention was laid down by the International Court of Justice in the advisory opinion on the Reservations to the Convention on Prevention and Punishment of the Crime of Genocide.[2] The State making an objection may consider in such a case that the reserving State is not a party to the treaty. It implies that each objecting State will consider either that a reserving State is a party to the treaty or that it is not. This decision will only affect the relationship between the objecting and reserving States. The objection of a single contracting party could not

1. Article 17

prevent another contracting party from formulating a valid reservation.[1]

Once a reservation has been made by a State, it does not require any subsequent acceptance by the other contracting States unless the treaty so provides. However, when in a treaty, the number of parties is limited, and it is intended that a treaty should be accepted in its entirety between all the parties, acceptance of reservation by all other parties is essential. When a treaty is a constituent instrument of an international organization, reservation requires the acceptance of the competent organ of the organization.[2] Apart from the above cases, Article 20 of the Vienna Convention also provides that if a State accepts the reservation made by another State, both the States become party to the treaty in relation to each other. Acceptance of a treaty with reservation does not become effective unless at least one State has accepted the reservation. A reservation made by a State shall be considered to have been accepted by another State if no objection to such reservation has been raised within twelve months from the date of notification of reservations or by the date on which it expressed its consent to be bound by the treaty, whichever is later.[3] If no such objection is raised by a State, it will be presumed to have been accepted by it.

The effect of the reservation is laid down under Article 21 of the Vienna Convention. Article 21(1)(a) states that the effect of a reservation that is established with regard to another party is to modify "for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservations. The second part of para 1 of Article 21 (Article 21(1)(b)) sets out the rule of reciprocity of reservations. A reservation established with regard to another party modifies those provisions to the same extent for that other party in its relations with the reserving State. Article 21(2) clearly lays down that the legal relationship between other non-reserving parties is not affected. The reservation accordingly creates legal rights and obligations different from those arising from the original treaty between the reserving State and the accepting State.

A reservation made by any party to a treaty may be withdrawn by it at any time in accordance with Article 22 of the Vienna Convention. The consent of a State which has accepted the reservation is not required for its withdrawal. Withdrawal of a reservation becomes operative in relation to another State only when notice of it has been received by that State.

PACTA TERTIS NEC NOCENT NEC PROSUNT :

It is a general principle of treaties that a treaty is binding only to the contracting parties. In other words, rights and obligations arising from a treaty are binding only to the parties to a treaty and not to a third State without its consent. This customary law principle has been expressed in a Latin maxim which is called *pacta tertis nec nocent nec prosunt*. International Law Commission considered that there appears to be almost universal agreement upon such a general rule, which is based not only on a general concept of the law of contract but also on the sovereignty and independence of States.[4] This rule has been incorporated under Article 34 of the Vienna Convention which says that "a treaty does not create either obligations or rights for a third State without its consent." However, a treaty

1. ICJ Reports (1951) p. 27.
2. Article 20(3) of the Vienna Convention.
3. Article 20(5).
4. Year Book of International Law Commission, 1966 Part II, p. 226.

may create rights and obligations to a third State in certain cases. They are as follows :—

(1) Where a Treaty provides for Obligations for Third States : The rule that treaties cannot validly impose obligations upon third States follows clearly from the sovereignty of States. However, as international society has become a more integrated community, a departure from the accepted principle has become unavoidable.[1] A treaty may impose obligation on a State which is not a party to a treaty if it accepts the obligation in writing.

Article 35 of the Vienna Convention lays down that if an obligation is imposed for a third State from a provision of a treaty, the third State may expressly accept the obligation in writing. By accepting the obligation, the third State is deemed to have considered itself bound by the provisions of the treaty.

(2) Where a Treaty provides Rights for Third States : Similarly, if a right is given to a third State from a provision of a treaty, the third State may give its assent thereto according to Article 36 of the Vienna Convention. The assent of the third State shall be presumed so long the contrary is not indicated.

(3) When a Treaty creates International Custom : A treaty may be binding to a third State even if it has not accepted in writing the obligations provided in a treaty, if a treaty creates customary rule of International Law in accordance with the provision of Article 38 of the Vienna Convention. Perhaps, because of this rule, the Charter of the United Nations is binding to non-members of the United Nations when it lays down under Article 2 Para 6 that Organization shall ensure that States which are not members of the United Nations act in accordance with these principles so far as may be necessary for the maintenance of international peace and security. The above provision may mean that the maintenance of international peace and security is a customary rule of International Law, and the obligations not to endanger international peace and security shall be binding upon third States which are not parties to the United Nations. If they fail to accept this obligation, the United Nations may taken action against a non-member under Chapter VII of the Charter.[2] Further, International Court of Justice in Reservations to Genocide Convention case[3] observed that to respect obligations arising from a treaty of humanitarian character is also a customary rule of International Law, and therefore are binding on those States which are not members to such treaties. Thus, if a treaty declares a customary rule of International Law, it may be applicable to non-parties as well. The Geneva Conventions of 1949, the Geneva Convention on the High Seas of 1958 and other similar treaties are binding on non-parties as well because they declared the customary rule of International Law. However, in wake of the recent development of International Law, it is necessary to lay down as to what precisely constitutes the customary International Law. A study under the auspices of the United Nations is required to be made in near future so that the confusion which might arise as to the application of a treaty to third States on the basis of customary law is removed.

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1. Oppenheim, op. cit., p. 1264.
2. Also See Chapter, 'United Nations Organization'.
3. Op. cit., p. 15.

JUS COGENS :

There are certain principles in International Law which all the States must observe. Their non-observance may affect the very foundation of the legal system to which they belong. They, therefore, cannot be altered by concluding treaties. These rules possess the character of *jus cogens*. If a treaty is concluded which is violative of these principles shall be regarded as invalid. Article 53 of the Vienna Convention lays down that 'A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. For purposes of the Vienna Convention, such a norm is accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general International Law having the same character. If the treaty itself possessed the character required for a norm able to modify the rule of *jus cogens*, it would not be void.[1]

Further, Article 24 of the Vienna Convention provides that 'if a new peremptory norm of general International Law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'. The above provision of the Vienna Convention clearly lays down that it is essential for a treaty to be valid that it should be in conformity with the principles and rules of International Law which are in nature of *jus cogens*, and if a new rule of International Law has emerged which is in nature of *jus cogens*, in that case, all the existing treaties which are contradictory to it, shall become void. According to Article 71 Para 2, termination of the treaty under Article 64 releases the parties from any obligation further to perform the treaty.

A question arises as to which principles and rules of International Law may be regarded as to have possessed the character of *jus cogens*. According to Verdross norms having a character of *jus cogens* can practically be created only by a norm of general customary law or by a general multilateral convention.[2] According to him three types of *jus cogens* rules exist in International Law. Firstly, those exist in the common interest of the whole international community ; secondly, those created for humanitarian purposes ; and thirdly, those introduced by the Charter of the United Nations against the treaties or use of force in the international relations. However, it is difficult to formulate on the above basis as to what are *jus cogens* rule in International Law in the absence of a precise definition of the expressions like 'common interest of the whole international community', 'humanitarian purposes' and 'principles of the Charter'. McNair also admits that although *jus cogens* rule exists in International Law, 'judicial and arbitral sources do not furnish much guidance upon the application of these principles.'[3]

The Vienna Convention under Article 53 lays down that a peremptory norm of general International Law is a norm accepted and recognized by the international community of States as a whole'. But the Convention is silent as to what are the rules which are accepted and recognized by the international community.[4] Therefore, it is difficult to say as to what these

1. Oppenheim, op. cit., p. 1293.
2. 'Jus Dispositive and Jus Cogens in International Law', AJIL Vol. 60 (1966) p. 58.
3. McNair, op. cit., p. 214.
4. International Law Commission gave three reasons for not enumerating the names of *jus cogens*. They are : Firstly, misunderstanding might arise as to the position concerning cases not enumerated in the article ; secondly, enumeration of names would be very lengthy ; and thirdly, the text would be stronger if it is made general. See Year book of International Law Commission (1966) Part II pp. 247-249.

norms are. For some States, sovereignty may be *jus cogens*. For developing countries, unequal treaties may be *jus cogens*. For some States, economic exploitation by developed States may be *jus cogens*. Thus no one can say with certainty as to what are the rules which possess the character of *jus cogens*. Perhaps there would be no difference of opinion if the principles of the United Nations as laid down under Article 2 of the Charter are regarded as *jus cogens* in International Law. Principles stated in the Charter are generally accepted as expressing not merely the obligations of members of the United Nations but the general rules of International Law concerning the use of force. Further, if a treaty contemplates the performance of an act which is criminal under International Law, its object is clearly illegal. In addition to the above, it is a general obligation upon every State to co-operate in the suppression and punishment of certain acts such as slave trade, piracy and genocide. If a treaty contemplating or conniving at their commission must clearly be tainted with illegality. However, these instances are not exhaustive.

The rule of *jus cogens* exists in International Law. But they are not well defined so far as its contents is concern, mainly because they are necessarily changeable like the content of any group of rules. However, it does not mean that the *jus cogens* do not exist at all. One may expect that the International Court of Justice would find occasion to determine that what are the *jus cogens* in International Law when a question comes before it concerning as to the validity of a treaty or as to the termination of a treaty on the ground of *jus cogens* if and when invoked by a party to a treaty.

PART PERFORMANCE OF A TREATY :

Whether the breach of any or some of the provisions of a treaty by one party entitles the other party to denounce the whole treaty is a question which is difficult to answer. There are certain authors who maintain that it is only the breach of an 'essential' or 'important' or 'material' term of a treaty that entitles the other party to denounce the whole treaty. Others hold that the breach of 'any term' will justify the other in denouncing the whole treaty. McNair is of the view that the balance of common sense, practical convenience, and judicial authority supports the former of these two contrasted views.[1] The Vienna Convention under Article 60 has made the position clear as to the part performance of a treaty and a right of other State to denounce the treaty. It says that "a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part." The material breach of a treaty consists in (a) a repudiation of the treaty not sanctioned by the Convention ; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Thus, a breach of a material provision of the treaty by one State entitles another State either to terminate the treaty, or suspend the operation of a treaty in whole or in part. However, the Vienna Convention does not provide any special provision as to the time which may be taken by a State to terminate the treaty on the ground of a breach of an essential provision of a treaty by another State. The right to cancel a treaty on the ground of violation must be exercised within a reasonable time after the violation has become known. If the State possessing such a right does not exercise it in due time, it must be taken for granted that such has been waived. A mere protest by a State neither constitutes a cancellation nor reserves the right of cancellation.

Non-performance of a treaty or a part performance of the treaty is a breach of the treaty, which may be a cause for the international dispute. But the international legal process for the settlement of international dispute concerning the performance of any international obligation is too weak. There is no court or tribunal including the International Court of Justice to deal with a treaty obligation in all its aspects and to give judgment for its specific performance.

REBUS SIC STANTIBUS :

The maxim *rebus sic stantibus* asserts that a treaty may be terminated if there occurs a fundamental change in the circumstances under which it was concluded. This is a principle which at one time was asserted expressly in many treaties and that is why it is known as '*clasula*'. However, it became a general principle and every treaty implies a condition that, if by an unforeseen change of circumstances an obligation provided for in the treaty cannot be performed by a party, it can invoke it for the termination of the treaty. The doctrine of *rebus sic stantibus* may be regarded as to have a juridical base if it is examined on the analogy to the doctrine of frustration of contract in municipal laws of many countries. The Indian Contract Act under Section 56 also recognizes the doctrine of frustration, which gives a right to a party to terminate a contract if vital change has occurred in the circumstances under which the contract was entered into. Thus, those treaties which are contractual not merely in form but also possess essential judicial character, the doctrine of frustration of contract may be applied without doubt. The doctrine may be applied in cases of law making treaties as well, because if the material change has occurred in political, economic and social conditions of a State, no convincing reason perhaps may be given for the continuation of a treaty as far as that State is concerned.

The principle of *rebus sic stantibus* has been invoked as a ground for the termination of the treaty by many States in the statements submitted to the courts. In the Nationality Decrees case the French Government contended that "perpetual" treaties were always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French Treaties.[1] The British Government observed that the argument advanced by France was that of *rebus sic stantibus*.[2] In the case concerning the Denunciation of the Sino-Belgian Treaty of 1865, China invoked, changes of circumstances as a justification of its denunciation of a sixty year old treaty.[3] In the case of Free Zones of Upper Savoy and the District of Gex, the doctrine was invoked by France.[4] Although the Court did not reject the doctrine in principle, it refused to admit that it could be applied in this particular case. In Fisheries cases, the International Court of Justice recognized the principle of *rebus sic stantibus* by stating that 'International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligation imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty'. The Court stated that the principle of *rebus sic stantibus* is a customary rule of International Law.[5]

1. PCIJ Series No. 2, pp. 187-188.
2. *Ibid* pp. 288-289.
3. PCIJ Series C No 16 I p. 52

The Vienna Convention has also dealt the principle under Article 62. It stipulates as follows :—

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless :

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty ; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty :

(a) if the treaty establishes a boundary ; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

Paragraph 1 of Article 62 has been interpreted by Starke as 'it involves a combination of two tests', the subjective test and objective test'. While the existence of circumstances which constituted an essential basis of the consent of the parties to be bound by the treaty is a subjective criterion, the change must be so fundamental as radically to alter the obligations of the parties is an objective test.[1] However, problems may sometimes arise as to what would constitute fundamental change of circumstances. The question can best be decided by the courts after taking into various considerations differently in each case.

Paragraph 2 of the Article 62 asserts the limitation on the application of the doctrine. The doctrine in accordance with the provision cannot be invoked firstly, if the treaty establishes a boundary, because boundary agreements[2] create rights *in rem*, and secondly, if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty, or of only other international obligation owed to any other party to the treaty. The party to a treaty cannot take advantage of its own wrong is a well established principle.[3] It is to be noted that the fundamental change in the circumstances itself does not terminate a treaty. If it occurs it has to be invoked by a party to the treaty in accordance with the procedure laid down under Articles 65 and 66 of the Vienna Convention which is followed in all the cases with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty.

INVALIDITY OF TREATIES :

A treaty concluded by the parties may on various grounds subsequently be invalidated. A treaty could become invalid under customary International Law was well established. Article 42 of the Vienna Convention also provides that the validity of a treaty or the consent of a State to be bound by a treaty may be impeached only the application of the present Convention. The Convention then lists, in Articles 46-53, various grounds of invalidity which are follows :—

(1) **Lack of Proper Authority of the Representatives.**—Article 47 of

1. Op. cit. p. 474.
2. In the Temple of Preah Vihear, the International Court of Justice stated that one of the purposes of a treaty establishing a frontier between States is to secure stability and finality. ICJ Reports (1962) p. 34.

the Vienna Convention lays down that if the authority of a representative has been given subject to a specific restriction, his omission to observe that restriction may make the treaty invalid, if the restriction was notified to the other negotiating States. The question of invalidity of a treaty on the ground of lack of proper authority of the representative arises only in those cases where a treaty becomes binding upon signature and the representative signing the treaty lacks the authority. Where a treaty does not become binding without subsequent ratification, any excess of authority by a representative will automatically be ironed out at the subsequent stage of ratification. The State in question in such cases will have the clear choice either of repudiating the text established by its representative or of ratifying the treaty. In latter case, it will be regarded that unauthorized act of its representative has been endorsed by it, and by doing so, it has cured the original defect of authority.

(2) **Error.**—A treaty may be invalidated if there is an error in the treaty in accordance with Article 48 of the Vienna Convention. A State may invoke an error in a treaty as invalidity if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded, and formed an essential basis of its consent to be bound by the treaty. For instance, if a boundary treaty is concluded on the basis of an incorrect map, it may become invalid subsequently as the error is factual. However, if an error has taken place by the conduct of the party invoking it the error would not make the treaty invalid. In Temple of Preah Vihear Case,[1] the International Court of Justice said that "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error'. Further, an error relating only to the wording of the text of a treaty does not affect its validity.[2]

(3) **Fraud.**—Article 49 of the Vienna Convention lays down that if a State has been induced to conclude a treaty by fraud committed by another party, the treaty becomes invalid.

(4) **Corruption of the Representative.**—Article 50 of the Vienna Convention stipulates that a treaty becomes invalid if the consent of a State has been obtained through the corruption of its representative directly or indirectly by another party. Corruption involves something calculated to exercise a substantial influence on the representative, and does not cover every small courtesy or favour shown to him.[3]

(5) **Coercion of a Representative.**—If the representative of a State has been coerced for giving its consent through acts or threats directed against him, the treaty would become invalid in accordance with Article 51 of the Vienna Convention.

(6) **Coercion of a State.**—Article 52 of the Vienna Convention lays down that a treaty shall become invalid if its conclusion has been procured by the threat or use of force in violation of the principles of International Law embodied in the Charter of the United Nations. The above rule implies that economic and political coercion will not invalidate a treaty. It is so presumably because the operation of political and economic pressures is part of the normal working of the relations between States. Further, it is

1. ICJ Reports 1962, p. 26. The effect of error on treaties was also discussed in the Eastern Greenland case (PCIJ, Series A/B, No. 53, pp. 71 and 79).

difficult to distinguish between the legitimate and illegitimate uses of such form of pressure as a means of securing consent to treaties. Thus, only treaties resulting from an illegal use or threat of force shall become illegal.

(7) **Jus Cogens** —Article 53 of the Vienna Convention States that a treaty shall be invalid if it conflicts with the general principles of International Law.[1]

The above grounds make a treaty invalid but they all do not make a treaty automatically void. In most cases the treaty is only voidable. In that a party has the right to invoke the ground in question as a basis for impeaching the validity of the treaty, but is under no obligation to do so, and may expressly or by implication acquiesie in the continuation of the treaty.[2] Under the Vienna Convention, it is only in cases of coercion or conflict with *jus cogens* that the treaty is stated to be automatically void.[3] The provisions of an invalid, or void treaty have no legal force.

TERMINATION OF TREATIES :

When a treaty comes to an end it is regarded as to that of termination of a treaty. But the term 'termination' may have a different meaning. Termination does not necessarily mean termination of treaties in all the cases. While it is true in the case of bilateral treaties, where the defection of one party terminates the treaty, in the case of multilateral treaty position is different. In a multilateral treaty, the defection of one party does not involve the end of the treaty as between other parties to it. The treaty may continue to exist as before except that it shall not have binding effect in the State which has defected from it. In fact, it is a case of withdrawal of a State from a treaty. Thus the term termination in a strict sense should be used in those cases where a treaty comes to an end and not in those cases where a party withdraws from a treaty. However, in a broader sense termination covers both the cases because in the case of a bilateral treaty, it comes to an end and in a multilateral treaty it comes to an end with regard to one party. The term termination as used in the Vienna Convention covers both in cases.[4] Section 3 of Part V of the Convention lays down the different ways by which a treaty comes to an end. They are as follows :—

(1) **By Consent of the Parties.**—A treaty may be terminated at any time by the consent of all the parties after consultation with the other contracting States. It is provided under Article 54(b) of the Convention.

(2) **By Denunciation.**—Many treaties are concluded for a specified period of years or until a particular date or event. In such cases the treaty comes to an end automatically upon the expiry of the period or the passing of the date or the occurrence of the event prescribed in the treaty. However, in those treaties where such an expression is not laid down, a party may terminate the treaty by denunciation. Some treaties provide for the denunciation, and therefore denunciation takes place in accordance with the provisions of the treaty. In those treaties where denunciation is not provided, a treaty may denunciate in accordance with Article 56 of the Vienna Convention which lays down that if a treaty does not provide for termination and which does not provide for denunciation or withdrawal, it cannot be denounced unless the 'parties intended to admit the possibility of denunciation or withdrawal' or it is 'implied by the nature of the treaty'.

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1. Jus cogens has been dealt separately in this chapter.
2. Oppenheim, op. cit., p. 1294.
3. *Ibid.*, p. 1274.
4. S.E. Nahlik, The Ground of Invalidity and Termination of Treaties, AJIL Vol. 65 (1971) p. 749.

Para 2 of Article 56 lays down that a party to the treaty shall give not less than twelve months notice of its intention to denounce or withdrawal from the treaty.

(3) By Concluding another Treaty.—Article 59(1) of the Vienna Convention lays down that 'a treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter'. An earlier treaty shall be considered as terminated if it appears from the subsequent treaty that the parties intended that the matter should be governed by the subsequent treaty. The parties may intend to supplement the earlier treaty or to revise it or they may intend that the subsequent treaty should replace it completely. However, in those cases intention of the parties cannot be inferred from the conclusion of the subsequent treaty that the earlier treaty should be terminated, an earlier treaty is deemed to have terminated if the provisions of the subsequent treaty are incompatible with those of the earlier treaty. Judge Anzilotti in the Electric Company of Sofia case[1] stated that : "There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforth governed by the new provisions." Vienna Convention under Article 59(1)(b) also provides that a treaty shall be considered as terminated if the provisions of the later treaty are so incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

(4) By Material Breach.—Breach of a bilateral treaty by one of the parties does not *ipso facto* put an end to the treaty, but only (apart from any questions of international responsibility which arise) entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operation.[2] However, where the breach is a material breach or breach of an essential provision of a treaty takes place by one party, it gives right to the other party to abrogate the treaty. Article 60 of the Vienna Convention also provides that a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty. The term material breach is defined under Article 60 Para 3 of the Convention as a repudiation of the treaty not sanctioned by the Convention, or the violation of a provision essential to the accomplishment of the object or purpose of the treaty. Article 45 of the Convention provides that a party may lose its right to invoke the breach if, after becoming aware of the facts, it expressly agrees that the treaty remains in force or continues in operation, or must by reason of its conduct be considered to have acquiesced in the maintenance in or force or in operation of the treaty.

(5) Impossibility of Performance.—A treaty may be terminated by reason of events or developments occurring outside the treaty subsequent to its conclusion, if the events or development make the performance of the treaty impossible. The permanent destruction or disappearance of a party is a ground for the automatic dissolution of a treaty in case succession does not take place. Further, a treaty is terminated where a treaty provides for a joint project on an island which subsequently disappears. Where the impossibility of performance is temporary, or to say, the permanency of which is doubtful, the treaty may only be suspended if invoked by a party. For instance, existence of an emergency in a State might prevent a State to comply with its treaty obligations temporarily but it cannot be a ground for

[1] PCIJ Series A/B No. 77, p. 92.

the termination of the treaty. Article 61 of the Vienna Convention provides for termination of the treaty on the ground of impossibility of performance.

(6) **According to provisions of the treaty.**—A treaty may be terminated in conformity with the provisions of the treaty. For instance, if a treaty has been concluded for a fixed period, it comes to an end after the expiry of that period, or if a treaty has been concluded for a particular object, it comes to an end after fulfilment of the object. Article 54(a) of the Vienna Convention provides for termination of a treaty in conformity with the provisions of the treaty.

(7) **By emergence of Jus Cogens.**—A treaty may be terminated if a new peremptory norm of general International Law has emerged and the existing treaty is in conflict with that norm. The termination of a treaty on the emergence of *jus cogens* is laid down under Article 64 of the Vienna Convention.[1]

(8) **By Fundamental Change of Circumstances.**—Article 62 of the Vienna Convention laid down that the occurrence of the fundamental change in the circumstances, i.e., *rebus sic stantibus* may terminate a treaty.[2]

It may be noted that many of the above grounds are based on long established rules of customary International Law. However, some of them have been formulated with great cautious in order to clarify the customary rules of International Law.

Procedure for Invalidating or Terminating a Treaty :

Procedure for terminating or invalidating a treaty has been stipulated in the Vienna Convention under Articles 65 to 68. Article 65 states that a party which wants to terminate a treaty must notify the other parties of its claim. Making statements in Parliament or in the press for the termination of a treaty is not enough. They cannot substitute the formal legal act. The notification must be made in writing through an instrument. It should be signed either by the Head of the State or by the Head of the Government, or by the Minister for Foreign Affairs. It may be signed by the representative of the State after producing full powers. If the other party of the treaty wants to raise any objection, it must do within three months after the receipt of the notification. If the other party has raised an objection, the parties shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations. If no solution has been reached within a period of twelve months following the date on which the objection was raised, any one of the parties to a dispute may submit it to the International Court of Justice for a decision unless the parties by common consent agree to submit the dispute to arbitration. Further, any one of the parties to a dispute may also set in motion the procedure specified in the Annex to the Vienna Convention by submitting a request to the Secretary-General of the United Nations.