The Problem of Unequal Treaties in Contemporary International Law: How the Powerful have Reneged on the Political Compacts within which Five Cornerstone Treaties of Global Governance are Situated

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This article considers a phenomenon common to five cornerstone treaty regimes of global governance: those founded on the Charter of the United Nations (UN Charter),[1] the Treaty on the Non-Proliferation of Nuclear Weapons (NPT),[2] the Third United Nations Convention on the Law of the Sea (LOSC),[3] the General Agreement on Tariffs and Trade and Marrakesh Agreement establishing the World Trade Organization (GATT/WTO),[4] and the United Nations Framework Convention on Climate Change (UNFCCC).[5] The vast majority of States have given their consent to these treaties, begging the question as to why the less powerful have agreed to treaties that in several instances appear to have favoured the interests of the most powerful. It will be seen that in each case the less powerful States agreed to the terms of the treaty as part of what they perceived to be a broader political compact with the most powerful States in that treaty regime. In each case the most powerful have reneged on their side of that compact. Viewing five of the cornerstone treaties of global governance as each situated within a political compact on which the most powerful have reneged can help us better to understand the depth of disappointment which has underpinned accusations of non-compliance in some of these regimes and the difficulty of reaching fresh political accommodations between powerful and less powerful

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[1] *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

[2] *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 U.N.T.S. 169.

[3] *United Nations Convention on the Law of the Sea*, 10 December 1982, 18 U.N.T.S. 3, 21 I.L,M. 1261 (entered into force 16 November 1994).

[4] *General Agreement on Tariffs and Trade*, 30 October 1947, 58 U.N.T.S. 187, Can. T.S. 1994 No. 27 (entered into force 1 January 1948) [GATT 1947].

[5] *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994).

being experienced within other regimes. The article concludes that the dissatisfaction emanating from a perception that the most powerful have consistently reneged on compacts made during the negotiation of treaties central to the emergent system of global governance may well have contributed to a diminishing association of international law with justice and to the 'legitimacy deficit' from which the contemporary system of international law is said to suffer.

International Law in the Emergent System of Global Governance

International law serves as the framework for the emergent system of global governance. It provides the constitutive treaties by which intergovernmental organizations are established and it serves as the vehicle through which States negotiate the means of addressing issues that require a coordinated response. Issues for which multilateral treaties currently embody the principal means of coordinating the international response include the possession of nuclear weapons, climate change, usage of the oceans, and the functioning of a system of world trade. One of the most basic principles of the international law of treaties is that a treaty does not create either obligations or rights for a third State without its consent.[6] The negotiation, conclusion and successful entry into force of the cornerstone treaties of the contemporary international order has therefore been a considerable undertaking and it has been strikingly successful if we consider the participation rates of the five treaties under review. The UN Charter has 191 States Parties; the NPT, 189; LOSC, 149; the UNFCCC, 189; and the WTO, over 150 members.[7] While such high rates of consent might easily be taken for granted, the challenges lying ahead in the production of a post Kyoto treaty on climate change as well as the difficulties that have faced those attempting to bring to a successful conclusion the Doha Round of negotiations in the WTO, serve as a reminder of just how difficult it can be to attain political accommodation amongst members of such a large and diverse group of States.

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[6] *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 34.

[7] Figures taken from Shirley V. Scott, ed., *International Law and Politics: Key Documents* (Boulder, Colorado: Lynne Rienner, 2004) at 831-836 and from World Trade Organization, "Understanding the WTO – members", online: <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

The fact that the less powerful agreed to the UN Charter and the NPT might seem particularly surprising. Both could be labelled 'unequal treaties', in that they each accord very different rights and responsibilities to different sets of States.[8] In both treaties the group accorded special rights represents only a very small minority of the States Parties; even given the smaller number of States at the time, it could be considered surprising that these treaties received the requisite support. The fault lines vary slightly between issue areas. In the case of nuclear weapons, the basic division has been between nuclear weapon States and non-nuclear weapon States members of the non-aligned movement; there is a developing - developed country divide in the WTO, although there is no single developing country coalition;[9] and there were a number of cleavages at the Third United Nations Conference on the Law of the Sea, of which the North-South divide was a particularly important one.[10] Let us begin by briefly reviewing the significance of the UN Charter and NPT to the contemporary international legal order and consider the manner in which the provisions of each could be deemed unequal.

The Charter of the United Nation as an Unequal Treaty

The Charter of the United Nations is the closest we have to an international constitution. It contains a general prohibition on the use of force in inter-State relations,[11] with exceptions for self-defence[12] and use of force when authorized by the Security Council.[13] By article 25 of the UN Charter, States Parties agree to accept and carry out the decisions of the Security Council, and by article 103, obligations under the Charter are to prevail over obligations arising from any other international agreement. The position of power accorded the P5 by the Charter was extraordinary. Substantive decisions of the Security Council are made by an affirmative vote of nine members, including the concurring votes or abstentions of the

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[8] Werner Morvay, "Unequal Treaties" in Rudolf Bernhardt ed., *Encyclopedia of Public International Law*, vol. IV. (New York: North Holland, 2000) 1008 at 1010.

[9] Robert O'Brien & Marc Williams, *Global Political Economy: Evolution and Dynamics*, 2nd ed. (New York: Palgrave Macmillan, 2007) at 160.

[10] Jonathan Charney "Law of the Sea: Breaking the Deadlock" (1977) 55:3 Foreign Affairs 598.

[11] *Charter of the United Nations*, *supra* note 1, art. 2(4).

[12] *Ibid.,* art. 51.

[13] *Ibid.,* arts. 39, 41 and 42.

five permanent members (US, Russia, United Kingdom, France, and China).[14] Their veto in Council decisions on substantive matters is echoed in the provisions on Charter amendment.[15] Even article 109(3), which made it easier to hold a review conference if none had been held within ten years, left any resulting amendment of the Charter subject to the veto.

It is easy to become *blasé* about the enormity of the change in inter-State relations represented by the introduction into international law of a prohibition on the use of force in inter-State relations. Previous to the Covenant of the League of Nations, which had served as a sort of tentative trial run, war had been an acceptable activity for a sovereign State, but equally accepted was the right of third parties to remain neutral. Prohibiting war for national purposes meant that States using force were now readily classifiable as in the right or in the wrong. In contrast to the nineteenth century presumption of a right to remain neutral, the bulk of States were, through their acceptance of article 25 of the UN Charter, effectively accepting a duty to support whoever had been deemed 'in the right'.[16] This was a considerable undertaking for most States.

The Treaty on the Non-Proliferation of Nuclear Weapons 1968 as an Unequal Treaty

The NPT is one of the cornerstone treaties of the emergent world polity because it addresses the question of who can possess nuclear weaponry. Some regard the treaty as second in importance to the UN Charter.[17] When the NPT was concluded in 1968, the then non-nuclear weapon States pledged in article II never to become nuclear weapon powers and, by article III (1), to accept International Atomic Energy Agency (IAEA) safeguards to verify their compliance with this obligation. This treaty has functioned to retain, or at least retard change to, the nuclear weapon status quo as it existed in 1968. With but a few exceptions it has been successful in this role. While the contribution of the NPT to restricting the spread of nuclear weaponry may be welcome, it is nevertheless striking that the P5 are allowed

[14] *Ibid.*, art. 27(3).

[15] *Ibid.*, arts. 108 and 109.

[16] See Roderick Ogley, *The Theory and Practice of Neutrality in the Twentieth Century* (London: Routledge & Kegan Paul, 1970) at 98.

[17] Richard Butler, *Fatal Choice: Nuclear Weapons and the Illusion of Missile Defense* (Crows Nest, NSW: Allen & Unwin, 2001) at 52.

nuclear weapons but international law forbids Iran, for example, to enhance its national security through this means. Indeed, the International Court of Justice has subsequently not ruled out the possibility that the threat or use of nuclear weapons might be lawful in an extreme circumstance of self-defence.[18]

How did we come to get Unequal Treaties with Virtually Universal Participation?

The term 'unequal treaty' is usually regarded as of primarily historical interest and used in connection with the treaties imposed on China, Siam and Japan in the nineteenth century.[19] Many were concluded at gunpoint,[20] and typically included provisions on "extraterritoriality, nonreciprocal tariff and most-favoured nation privileges, territorial cessions and leases, the stationing of foreign military units, and many other humiliating restrictions upon sovereignty."[21] By article 52 of the Vienna Convention on the Law of Treaties, a treaty is void "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,"[22] yet the term 'unequal treaty' is not recognized in contemporary international law. In legal terms it does not matter if a treaty is unequal, so long as it was not achieved with coercion. Many might assume that, absent coercion, unequal treaties are unlikely to be concluded.[23] Smaller States have generally occupied the majority in the large-scale post 1945 multilateral negotiations and so it would also be reasonable to assume that this would make it unlikely that the

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[18] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep. 226.

[19] Grotius and Vattel had advocated the transposition of the doctrine from the law of contracts to the law of treaties. Lucius Caflisch, "Unequal Treaties" (1993) 35 German Yearbook of International Law 52 at 52.

[20] Ingrid Detter, "The Problem of Unequal Treaties" (1962) 11 I.C.L.Q. 1069 at 1073.

[21] Jerome Alan Cohen & Hungdah Chiu, *People's China and International Law: A Documentary Study*, vol. 2 (Princeton: Princeton University Press,1974) at 1114. See also Peter Wesley-Smith, *Unequal Treaty 1898-1997: China, Great Britain and Hong Kong's New Territories* (Hong Kong: Oxford University Press, 1980).

[22] Malawer provides an account of the drafting of article 52 in Stuart S. Malawer, "A New Concept of Consent and World Public Order: "Coerced Treaties" and the Convention on the Law of Treaties" (1970-71) 4 Vand. Int'l 1 at 28.

[23] Malawer commented in 1977 that unequal treaties concluded without the threat or use of some form of force have not existed often. Stuart S. Malawer, *Imposed Treaties and International Law* (Buffalo: Hein, 1977) at 9.

requisite proportion of States would have agreed to fundamentally inequitable treaties.[24] Given that we have already identified the UN Charter and NPT as having inequitable provisions, how then are we to understand acceptance of those treaties on the part of the less powerful?

There would seem to be two dimensions to the answer to this question. The first relates to the perceived necessity of order. As World War Two neared an end, the overwhelming need for all States was peace. The great powers presented a united front on the question of the veto, despite considerable opposition from smaller powers. At one stage during the San Francisco conference, divisions - including that in relation to the veto–meant that there was a real possibility that there would be no United Nations.[25] But the world needed peace above all else and, however reluctantly, the 'peoples' opted for order over justice.[26] A second aspect of the answer to the puzzle as to why less powerful States gave their consent to unequal treaties lies in the fact that the inequality was in each case lessened somewhat by a quid pro quo. In the case of the UN Charter, the enormous powers granted the P5 were to some extent balanced by their assuming the burden of the "primary responsibility for maintaining international peace and security."[27] And Article 109, by which it would be easier to hold a conference to review the UN Charter after a decade if no review had been held earlier, can be understood as a provision to appease the less powerful for the impossibility of peacefully amending the Charter without the concurrence of the permanent members.[28]

The quid pro quo extended beyond the treaty text. In relation to the veto, a 'Five Powers' statement' of 7 June 1945 intimated that the permanent members would not use their veto power wilfully to obstruct the operation of the Council.[29] The fact that the smaller

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[24] Onuma Yasuaki, "International Law in and with International Politics: The Functions of International Law in International Society" (2003) 14 E.J.I.L 105 at 117.

[25] See Stanley Meisler, *United Nations: The First Fifty Years* (New York: Atlantic Monthly Press, 1995) at 19.

[26] See Paul Hasluck, *Workshop of Security* (Melbourne and London: R.W. Cheshire, 1948) at 130.

[27] *Charter of the United Nations*, *supra* note 1, art. 24(1).

[28] Shirley V. Scott, "The Question of UN Charter Amendment, 1945-1965: Appeasing 'the Peoples'" (2007) 9 J. Hist. Int'l L. 83.

[29] The statement is reproduced in U.S., Senate Foreign Relations Committee Subcommittee on the United Nations Charter, *Review of the United Nations Charter: a*

powers acquiesced in the P5 gaining their weighty powers over the legitimate use of force because of the perceived need for international order could be said to have been premised on an implicit bargain: that that power be used only for the common good of maintaining international peace and security. It was not to be abused by the waging of aggressive war. While the letter of the law would arguably have been met if the Security Council authorized use of force in the interests of the P5 so long as the Council had passed a resolution identifying a threat to the peace, breach of the peace or act of aggression, this was far from the understanding on which the less powerful gave their consent to the vastly inequitable terms of the Charter.

As with the UN Charter, the NPT goes some way towards incorporating a quid pro quo for the 'second tier' of States. In return for agreeing never to become nuclear weapon States, non-nuclear weapon States were to retain the right to develop research, production and use of nuclear energy for peaceful purposes and to receive assistance to do so.[30] Nuclear weapons States gave both positive assurances of assistance in the event that an NPT party is the victim of an act of, or object of, a threat of aggression in which nuclear weapons are used, and negative assurances that nuclear weapons will not be used against them.[31] From the non-nuclear weapon State perspective the most significant part of the bargain was, however, article VI, by which nuclear-weapon States were to "undertake ... to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control." The United States and Soviet Union would have preferred not to have disarmament mentioned other than in the preamble,[32] but the non-nuclear weapon States were adamant that it be included. In fact, the non-nuclear weapon States would have preferred to include

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Collection of Documents (Washington, D.C.: United States Government Printing Office, 1954) at 562.

[30] *Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* note 2, arts. IV and V.

[31] See Jean DuPreez, "The Role of Security Assurances: Is Any Progress Possible?" (April, 2004) NTI Issue Brief, online: NTI Research Library <http://www.nti.org/e_research/e3_45a.html>.

[32] Nicole Deller, Arjun Makhijani & John Burroughs, eds., *Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties* (New York: Apex, 2003) at 22.

reference to concrete steps leading in the direction of nuclear disarmament–such as a comprehensive test ban and an agreement to cease the production of fissile material for weapons purposes.[33] From the perspective of the non-aligned, non-nuclear weapon States, the incorporation of a definite commitment to disarmament on the part of the existing nuclear weapon States was a question of principle even more than a question of security.[34] In refusing to have the concrete disarmament measures outlined in the treaty, the Soviet delegation argued that such provisions would make agreement on non-proliferation contingent on agreement on measures whose negotiation, experience had shown, would take years to complete.[35] In the end, reference to disarmament was incorporated into the Treaty, but without specific targets that would serve as benchmarks against which to measure compliance on the part of nuclear weapon State Parties.

Does the Existence of the More Equitable Political Compacts Mean that the Contemporary International Legal Order has escaped the 'problem' of unequal treaties?

If the UN Charter and NPT are read at face value, their provisions appear inequitable. If, however, the inbuilt quid pro quos and implicit understandings are taken into account, the degree of inequality does not appear so stark. Does this mean, then, that the UN Charter and NPT have successfully avoided engendering the humiliation and resentment that accompanied the unequal treaties of the colonial era? Unfortunately this question must be answered in the negative. In both these cases there have been allegations of non-compliance with key components of the treaties. In the case of the UN Charter, the most serious recent issue has been that of the use of force on the part of the United States, United Kingdom and Australia against Iraq in 2003. The vast majority of international lawyers believe that that war was illegal–that the US did not abide by the Charter in its use of force.[36]

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[33] E.L.M. Burns, "The Nonproliferation Treaty: Its Negotiation and Prospects" (1969) 23:4 International Organization 788 at 802.

[34] Mohamed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, vol. II (London: Oceana, 1980) at 564.

[35] Burns, *supra* note 35 at 802.

[36] A significant proportion would likely agree with Andrew Byrnes that the justification put forward was 'untenable', falling outside the range of acceptable arguments. See

The depth of opposition to the US invasion of Iraq goes beyond what might be expected from a straightforward case of non-compliance. Viewing opposition to the invasion from the perspective of the US having reneged on the implicit compact that accompanied the consent of the less powerful to an ostensibly inequitable treaty offers a context within which to understand the depth of reaction to that act of illegality. It was, for example, not difficult to see the 2003 invasion of Iraq as a war motivated by self-interest for which the Charter was to be a pretext, a war that has so far given rise to less, rather than more, international order. In waging that war the United States and United Kingdom were reneging on a compact of which the Charter provisions on the use of force were a part. To argue for the legality of the invasion on the basis of the letter of the law did absolutely nothing to improve the legitimacy of the invasion because the invasion had ridden roughshod over the spirit of the law, the political basis on which the 'peoples' had acquiesced with the terms of an unequal treaty. This has given rise to a much more fundamental grievance than simply a failure of the United States and allies to comply with the letter of international law.

The nuclear weapon States were for many years able to capitalize on the more ambiguous wording of their legal obligations in the NPT in maintaining that they were complying fully with the Treaty. At the review and extension conference held in 1995, members of the non-aligned movement again expressed their concern that nuclear weapon States had not fulfilled their article VI obligations and that agreeing to the indefinite extension of the Treaty would "ratify inequality in international relations once and for all, and relegate the non-nuclear countries to second-class status."[37] The matter was addressed through a further deal. The NPT was to be extended indefinitely as part of a package including a resolution on

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Andrew Byrnes, ""The Law was Warful": The Iraq War and the Role of International Lawyers in the Domestic Reception of International Law" in H. Charlesworth *et al.*, *The Fluid State: International Law and National Legal Systems* (Annandale, NSW: Federation Press, 2005) 229 at 247. One who has accepted the legal basis of the invasion as a tenable and defensible one is Dominic McGoldrick. See Dominic McGoldrick, *From '9/11' to the 'Iraq War 2003': International Law in an Age of Complexity* (Oxford: Hart, 2004) at 85.

37 Mr. Ibrahim (Indonesia), *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Final Document Part III. Summary and Recommendations*, UN Doc. NPT/CONF.1995/32(Part III) at 35, online: <http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=NPT/CONF.1995/32(PARTIII)&Lang=E>.

the Middle East, a decision on "Strengthening the Review Process of the Treaty", and a decision entitled "Principles and Objectives for Nuclear Non-Proliferation and Disarmament".[38] States committed, *inter alia*, to complete the negotiation of a Comprehensive Test-Ban Treaty no later than 1996 as well as to the "determined pursuit" on the part of the nuclear-weapon States of "systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of eliminating those weapons, and by all States of general and complete disarmament under strict and effective international control." The text also stated that "further steps should be considered to assure non-nuclear-weapon States party to the Treaty against the use or threat of use of nuclear weapons. These steps could take the form of an internationally legally binding instrument." This deal subsequent to the initial NPT bargain can be understood as having extended the period during which an observer might reasonably expect the nuclear weapon States to live up to their side of the initial non-proliferation-disarmament bargain.

The Comprehensive Nuclear Test-Ban Treaty was concluded in 1996,[39] but to date China has not ratified it, and the US has made clear that it does not intend to do so. It is not of course illegal to refrain from ratifying a treaty, but in failing to do so, the US and China have reneged on the political bargain by which the NPT was extended. The 1996 ICJ Advisory Opinion on the Legality of Nuclear Weapons confirmed that article VI required more than talks; the Court found unanimously that "there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control."[40] At the 2000 Review Conference all States Parties to the NPT agreed to a 'Thirteen Steps' Plan of Action on Nuclear Disarmament.[41] Practically every speech at the 2005 Review Conference mentioned the importance of early entry into force of the

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[38] *Principles and Objectives for Nuclear Non-Proliferation and Disarmament: Proceedings of the Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, New York, 11 May 1995* (New York: United Nations, Dept. for Disarmament Affairs, 1995), (Part I), Annex.

[39] *Comprehensive Nuclear Test Ban Treaty*, 24 September 1996, 35 I.L.M. 1439.

[40] *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 20.

[41] Online: <http://www.reachingcriticalwill.org/legal/npt/13point.html>.

CTBT,[42] but the US refused even to mention the CTBT,[43] and the conference failed to adopt a consensus final declaration; the president of the 2005 conference concluded that the present crisis is the worst in the 34-year history of the NPT.[44] Other than China, all nuclear weapon States are opposed to making negative security assurances legally-binding. The US stated: "[w]e fail to see any justification for expanding NSAs [negative security assurances] to encompass global-legally binding assurances. This proposal has no relation to contemporary threats to the NPT."[45] In contrast, the representative of Iran to the 2005 review conference referred to "the unfulfilled commitments and promises on a legally binding instrument on Negative Security Assurances in the framework of...the 2000 Final document."[46]

It seems that in respect of both the UN Charter and the NPT, the consent of the less powerful States to the treaty inclusive of unequal provisions was premised on the most powerful fulfilling their side of an implicit compact broader and more equitable than the treaty text. This makes intuitive sense for it helps explain why so many sovereign States should have agreed to inequitable treaty provisions not imposed through coercion.

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42 Rebecca Johnson "Politics and Protection: Why the 2005 NPT Conference Failed" (2005) 80 Disarmament Diplomacy, online: <http://www.acronym.org.uk/dd/dd80/80npt.htm>.

43 The Hon. Douglas Roche, OC,. "Deadly Deadlock:. A Political Analysis of the Seventh Review Conference of the Non-Proliferation Treaty" (Paper presented to the 2005 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, 2-27 May 2005) at 2, online: Global Security Institute Middle Power Initiative <http://www.gsinstitute.org/mpi/docs/2005NPTpoliticalanalysis.pdf>.

44 J. Dhanapala & R. Rydell, *Multilateral Diplomacy and the NPT: An Insider's Account* (Geneva: United Nations, 2005) at 98.

45 *Preparatory Committee for the 2005 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: United States statement*, 3d Sess., UN Doc. NPT/CONF.2005/PC.III/WP.28 (2004), online: < http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=NPT/CONF.2005/PC.III/WP.28&Lang=E >.

46 H.E. Dr Karnai Kharrazi, Minister of Foreign Affairs of the Islamic Republic of Iran, to the Seventh NPT Review Conference (3 May 2005), online: <http://www.un.org/events/npt2005/statements/npt03iran.pdf>.

Other Cornerstone Treaty Regimes Situated within broader Political Compacts

Let us now look to some other cornerstone treaties of global governance: the LOSC, the GATT/WTO, and the UNFCCC, to briefly review their significance to the emergent global polity and to see if they can similarly be understood to be situated within broader political compacts.

The Third United Nations Convention on the Law of the Sea

This treaty is regarded as having established a constitution for the oceans. When the negotiations for the Third United Nations Law of the Sea Convention (LOSC) commenced in 1973, the law of the sea was in a state of uncertainty. The issue was often presented in terms of establishing order. US Ambassador Richardson stated at the 1977 negotiations: "[r]arely has any generation had so clear a choice to make between order and anarchy."[47] It was believed that, without a treaty, the world would witness "the biggest smash and grab" since the Berlin Conference.[48] The US and USSR were 'prime movers' for the Convention, motivated largely by concerns that the new offshore claims of coastal states to twelve nautical miles threatened to overlap and possibly close some 134 straits.[49] States of the Third World were, however, seeking to have the deep seabed outside national jurisdiction declared the 'common heritage of mankind' (CHM). Although there was no precise definition of the CHM concept, it was understood to incorporate the ideas that neither the CHM area nor its resources can be owned or subject to appropriation of any kind, that the CHM must be managed in common by all humankind, that there must be an active sharing of benefits derived from exploration and exploitation of the CHM, and that the CHM area must be used solely for peaceful purposes.[50]

Negotiations for the Convention proceeded by way of consensus on the overall package as opposed to on an issue-by-issue

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[47] Cited in Richard G. Darman, "The Law of the Sea: Rethinking U.S. Interests" (1978) 56 Foreign Affairs 373 at 381.

[48] Lord Ritchie Calder, quoted in John Temple Swing, "Who Will Own the Oceans?" (1976) 54 Foreign Affairs 546.

[49] David L. Larson, "The Reagan Rejection of the UN Convention" (1985) 14 Ocean Devel. & Int'l L. 337 at 338.

[50] Annica Carlsson, "The US and UNCLOS III – The Death of the Common Heritage of Humankind Concept?" (1997) 95 Maritime Studies 27 at 28.

basis. Once again, the most powerful made what could be described as a political compact with the other negotiating States. As David Larson describes it:

> After several years of negotiation, the United States was able to achieve in May 1975 what was essentially unimpeded transit passage through international straits and territorial waters, including the passage of submerged SSBNs, in several articles noted for their constructive ambiguity. In return for this concession by the LOS Group of 77 (G-77), Henry Kissinger in August 1975 made an implied concession to go along with the international regulation and control of deep seabed mining, and the 200 nautical mile "Exclusive Economic Zone". This understanding became one of the central trade-offs, or compromises reflected in the "package deal" of the Revised Single Negotiating Text . . .[51]

Part XI of the LOSC, which dealt with the deep seabed as the common heritage of mankind, represented for many, "that great aspiration of the less fortunate in the international community."[52] Negotiations, inclusive of the trade-off, had been virtually completed by the end of 1980. In March 1981 the new Reagan Administration began a review of the draft treaty, the outcome of which was that US negotiators returned to the table with a hard-line negotiating position inclusive of 'frontier' seabed mining provisions by which the first company to stake a claim owns the resources.[53] When negotiations reached a conclusion in 1982, the US broke with the consensus method that had been used throughout the long negotiations and called for a vote on the text. The United States was the only Western industrialized country to vote against the treaty, the outcome being 130 in favour, four against, and 17 abstentions. The 'trade-off/package deal' worked out between the United States and the Group of 77 from 1970 to 1976 had broken apart.[54] Few developed

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[51] Larson, *supra* note 51 at 338-339.

[52] Kenneth Rattray, "Assuring Universality: Balancing the Views of the Industrialized and Developing Worlds" in Myron H. Nordquist & John Norton Moore, eds., *Entry Into Force of the Law of the Sea Convention* (The Hague: Martinus Nijhoff, 1995) 55 at 55.

[53] Leigh S. Ratiner, "The Law of the Sea: A Crossroads for American Foreign Policy" (1982) 60 Foreign Affairs 1006 at 1012.

[54] Larson, *supra* note 51 at 354.

States ratified the Convention within the first decade of its being open for signature.[55]

On 1 September 1989, the Chairman of the Group of 77, Mumba Kapumpa of Zambia, declared that the Group of 77 was "ready to talk" with any delegation or group of delegations "because the universality of the Convention has always been the objective of the Group of 77."[56] The UN Secretary-General conducted consultations between 1990 and 1993; the resulting 1994 Implementing Agreement effectively amended the Convention so as to remove the application of the Common Heritage principle.[57] LOSC entered into force on 16 November 1994. Although the area of the deep seabed beyond national jurisdiction is still called and declared the common heritage of mankind, "the term has lost its original meaning and substance when it symbolized the interests, needs, hopes and aspirations of a large number of poor peoples. The principle has lost its lustre and soul."[58] And yet, the US has still not ratified the LOSC, meaning that the treaty has bound the world at large to the provisions the US wanted while the US itself, preferring to rely on customary international law of the sea,[59] has effectively reneged on the initial deal.

The United Nations Framework Convention on Climate Change

One of the key tasks of global governance has been to tackle environmental problems of a global nature. Climate change is the quintessential global environmental issue. As with other environmental issues, there are economic dimensions to the issue and to its mitigation. There was some agreement as early as the 1972 United Nations Stockholm Conference on the Human Environment that developed and developing countries would have different roles to play in the amelioration of environmental problems and this

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[55] Of the sixty States required to ratify LOSC before it could enter into force, 58 were developing States. D.H. Anderson, "Further Efforts to Ensure Universal Participation in the United Nations Convention on the Law of the Sea" (1994) 43 I.C.L.Q. 886 at 889, n. 10.

[56] Quoted by Rattray, *supra* note 54 at 57.

[57] *Agreement Relating to the Implementation of Part XI of the United Nations Convention of the Law of the Sea of 10 December 1982*, 28 July 1984, 33 I.L.M. 1309 (entered into force 28 July 1996). Carlsson, *supra* note 52 at 28.

[58] R.P. Anand, *Studies in International Law and History* (Leiden: Martinus Nijhoff, 2004) at 196.

[59] Ratiner, *supra* note 55 at 1012.

approach was successfully trialled in the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.[60] The 1992 UN Conference on Environment and Development formalized the principle of 'common but differentiated responsibilities' (CDR), stating in principle 7 of the Rio Declaration on Environment and Development:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[61]

Climate change came on to the international agenda in the late 1980s. The nature of global warming meant that a convention to contain the phenomenon could have wide-ranging economic implications; "a climate convention could constitute a major multilateral economic agreement. The sharing of costs and benefits implied in the convention could significantly alter the economic destinies of individual countries."[62] The CDR principle was incorporated into the Framework Convention on Climate Change. This treaty, which sought the "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system," stated in article 3(1) that the Parties would protect the climate system "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof." The principle of common but differentiated responsibilities thus embodied a deal between developed and developing countries: while all countries in the world would need to cooperate to mitigate environmental degradation, the developed countries would take the lead, both because of their greater responsibility for the environmental degradation and because of their economic capacity to

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[60] *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 26 ILM 1550.

[61] Reproduced in Patricia W. Birnie & Alan Boyle, eds., *Basic Documents on International Law and the Environment* (Oxford: Clarendon, 1995) at 9-14.

[62] Chandrashekhar Dasgupta, "The Climate Change Negotiations" in Irving M. Mintzer and J. Amber Leonard, *Negotiating Climate Change: The Inside Story of the Rio Convention* (Cambridge: CUP, 1994) 129 at 131.

take action.

In not ratifying the Kyoto Protocol,[63] the United States could be seen as having reneged on the political deal of which the details of the Kyoto Protocol were a part, and indeed on a broader ethical compact embodied in the legal concept of CDR.[64] Despite accepting as a legal obligation the application of the CDR principle to climate change, leading industrialized countries had already signalled their reluctance to proceed on that basis, even ahead of the Kyoto meeting to set legally binding reduction targets. The Protocol therefore contained concessions to developed countries: that carbon 'sinks' such as forests as well as sources of greenhouse gases could be counted toward meeting a country's obligations and that countries could trade their emissions targets so that the rich could buy credits in order to emit more than their initial allotment.[65] The Kyoto Protocol, designed to operationalize the Framework Convention, is now frequently referred to as a failure, for this, the major treaty addressing arguably the greatest security threat facing humankind, does not commit the world's two top greenhouse gas emitters to any legally binding reductions. At the Bali Conference in December 2007, the United States came under attack for its failure to provide leadership on climate change. While the US did not prevent a 'Roadmap' being secured by consensus, this was not before developing countries had indicated their preparedness to take on measurable, reportable and verifiable actions to reduce emissions if supported by technological and financial capacity building. It is not an exaggeration to say that the 'world is waiting' to see if the United States shows a preparedness to act decisively to achieve a dramatic drop in its emissions levels and thereby assume a leadership role in the issue area as required by the principle of CDM.

The World Trade Organization

The WTO had its origins in the 1947 General Agreement on Tariffs and Trade (GATT). The American and British post war governments,

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[63] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 16 March 1998, 37 I.L.M. 22 (entered into force 16 February 2005).

[64] Australia also failed to ratify the Protocol but did so on 12 December 2007 after a new Labor government had taken office.

[65] Stephen Gardiner, "The Global Warming Tragedy and the Dangerous Illusion of the Kyoto Protocol" (2004) 18 Ethics and International Affairs 23, describing this as a "deal".

which were largely responsible for planning the post War trading order, argued that, despite the fact that the North had benefited from protection during its development, freer trade would now be to the benefit of all.[66] While in this instance the provisions are in a formal sense equal, in practice this has translated into a lack of equality. Developing countries long argued for special and differential treatment in international trade on the basis that the application of the same rules to the developed and the developing would put the developing countries at a great disadvantage. Despite the fact that GATT 1947 covered trade in all goods, the free trade principles were initially applied to goods and services of most interest to the industrialized countries, rather than to agriculture, which for developing countries represents up to 40% of GDP and 35% of exports, and as much as 70% of employment.[67] During the 1980s agricultural trade protectionism in the US, EU and Japan increased significantly.[68]

Many developing countries recognized that they would be at a disadvantage in GATT negotiations and chose not to join or participate in its international trade negotiations other than as observers.[69] But, from the end of the Tokyo Round in 1978 to 1987, 44 countries acceded to the GATT, 43 of them developing countries.[70] For the first time in the history of free trade negotiations, developing countries participated in the 1986-94 Uruguay Round of negotiations as full-scale members.[71] GATT was transformed by the Uruguay Round into the World Trade Organization, which has been described as "the most prominent, powerful, and controversial institution of

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[66] Joan Edelman Spero, *The Politics of International Economic Relations*, 3rd ed. (London: George Allen & Unwin, 1985) at 221-225.

[67] Patrick Messerlin, "Agricultural Liberalization in the Doha Round" (2005) 5:4 Global Economy Journal, online: The Berkeley Electronic Press <http://www.bepress.com/gej/vol5/iss4/2>.

[68] Jennifer Clapp, "WTO Agriculture Negotiations: Implications for the Global South" (2006) 27 Third World Quarterly 563 at 564.

[69] Spero, *supra* note 68 at 224.

[70] J. Michael Finger, "Implementing the Uruguay Round Agreements: Problems for Developing Countries" (2001) 24 The World Economy 1097 at 1098, n. 1.

[71] Ramesh Adhikari & Prema-chandra Athukorala, "Developing Countries in the World Trading System: an Overview" in Ramesh Adhikari & Prema-chandra Athukorala, eds., *Developing Countries in the World Trading System: The Uruguay Round and Beyond* (Cheltenham, UK: Edward Elgar, 2002) 1 at 2.

global economic governance."[72] By the end of 2000, developing countries made up four fifths of WTO membership.[73]

The life of the General Agreement on Tariffs and Trade proceeded by way of negotiating 'rounds'. The Uruguay Round, held from 1986 to 1995, was the largest trade negotiation ever held. By what Sylvia Ostry has referred to as the 'Grand Bargain', developing countries came to the Uruguay Round prepared to take on significant commitments on 'new issues' including intellectual property and services, in return for developed countries opening up in areas of export interest to developing countries: agriculture and textiles/clothing.[74] From a developing country perspective the implicit deal all along was that if the richer countries really meant what they had since 1945 preached about the wonders of free trade, the agricultural interests of developing countries would surely one day be accorded treatment comparable to that of manufactures. Developing countries were now prepared to make reciprocal concessions in order to realize the promised benefits.

The Uruguay outcomes were disappointing for developing countries; indeed, they have sometimes been referred to as a betrayal.[75] The Uruguay Round gave rise to the 1994 Agreement on Agriculture,[76] but in practice the agricultural sector remained highly distorted after the Agreement. "In general, the commitments developing countries have undertaken to reduce trade barriers and to reform trade procedures and regulations far outweigh the gains from market access commitments given by the industrial countries in areas where developing countries have a comparative advantage, particularly agriculture, textiles and clothing."[77] Added to this, the obligations developing countries took on in 'new areas' such as intellectual property and services meant costly new implementation

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[72] Sol Picciotto, "The WTO"s Appellate Body: Legal Formalism as a Legitimation of Global Governance" (2005) 18 Governance: An International Journal of Policy, Administration and Institutions 477 at 477.

[73] Adhikari & Athukorala, *supra* note 73 at 2-3.

[74] S. Ostry, "The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations" (Paper presented to the The Political Economy of International Trade Law Conference, 15-16 September 2000), online: Centre for International Studies <http://www.utoronto.ca/cis/Minnesota.pdf>.

[75] Donald McRae, "Developing Countries and 'The Future of the WTO'" (2005) 8 J. Int'l Econ. L. 603 at 603.

[76] 15 April 1994, 1867 U.N.T.S. 410.

[77] Adhikari & Athukorala, *supra* note 73 at 8.

burdens because the regulation was to apply not so much to trade but to the structure of the domestic economy.[78] Aware of weaknesses of the Agreement, developing country negotiators of the 1994 Agreement ensured the inclusion of a provision by which the Agreement was to be renegotiated starting in 2000. The negotiations on the modalities were to be completed by March 2003 for adoption at the Fifth Ministerial meeting to be held in Cancun in September 2003. This timetable was not met.[79]

The first major round of multilateral trade negotiations since the Uruguay Round was launched at the Doha Ministerial Meeting of the WTO in November 2001. Although this was touted as a 'development round' and agricultural trade liberalization was a central concern of developing countries, progress in the negotiations was tortuous and the promises of the Grand Bargain remain unfulfilled.[80] On 24 July 2006 the negotiations were suspended indefinitely, due in large part to the difficulty in finding any way forward on the issue of agricultural liberalization. The treatment of textiles and clothing remained another subject of particular contention. While the developing world was still demanding that the industrialized fulfil the bargain to ensure greater market access for their agricultural products, the perspective of the North was that, whether fair or not, the deal had been done and any concessions from developed countries would have to be matched by new concessions on the part of developing countries.[81]

Here we have the context within which to understand the intractable nature of the Doha stalemate. With the GATT/WTO institution having been in place several decades and compliance with its rules being enforceable via its dispute resolution system, the Doha Round negotiations on farm trade subsequent to the 1994 Agreement on Agriculture effectively stalled. The developed world, including the US, Japan and the EU sought to broker further deals by which reform to their agricultural sector would depend upon reciprocal measures by developing countries on non-agricultural market access and

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[78] Finger, *supra* note 72 at 1098.

[79] Clapp, *supra* note 70 at 566.

[80] Amrita Narlikar, "Fairness in International Trade Negotiations: Developing Countries in the GATT and WTO" (2006) 29 The World Economy 1005 at 1022.

[81] Arvind Panagariya, "Developing Countries at Doha: A Political Economy Analysis" (2002) 25 The World Economy 1205 at 1225.

services,[82] but leaders of the developing world reiterated their position that they would not accept disproportionate demands to reduce their own industrial tariffs.[83] A ministerial meeting held in July 2008 broke down without achieving a breakthrough on agriculture. Developing countries claim that they have kept their end of the Uruguay Round bargain, whereas developed countries have not done so. The more powerful countries have been looking to make fresh bargains but the less powerful want the initial deal to be fulfilled before entering into a further compact.

The Place of International Law within the Political Deals

If indeed the less powerful accepted several of the foundational treaties of the international order as part of broader political bargains, it may be tempting to conclude that international law equates with politics, to agree with John Bolton that international law is not law but merely "a series of political and moral arrangements that stand or fall on their own merits."[84] This would be to miss the point. The legal texts do not equate with the political compacts. Most basically, it is apparent that only part of the political deal has typically been written into the legal document. In some cases the obligations of the less powerful States were written in very explicit terms into hard law, while the obligations of the most powerful and corresponding benefits for the less powerful tend to have been couched in more ambiguous terms. Hence, despite a general perception that the NPT contains provisions on disarmament, article VI required only that nuclear weapon States 'pursue negotiations in good faith'. The original GATT did apply to both industrial and agricultural trade but it permitted countries to use some non-tariff measures and subsidies that would not normally have been allowed for industrial products. In this there is continuity with the unequal

[82] Surya P. Subedi, "Levelling the Playing Field: Is the GATT/WTO System up to it?" (The Ingram Lecture, delivered at the University of New South Wales, Sydney, Australia, 24 August 2005), online: University of New South Wales Faculty of Law <http://www.law.unsw.edu.au/news_and_events/News.asp?type=&name=658&year=2005>.

[83] International Centre for Trade and Sustainable Development, "G-20, G-33 Ministers Underline Priorities Before 'Decisive Phase' in Doha Talks" *Bridges Weekly Trade News Digest* 11:21 (13 June 2007), online: International Centre for Trade and Sustainable Development <http://ictsd.net/i/news/bridgesweekly/7602/>

[84] John R. Bolton, "Is There Really 'Law' in International Affairs?" (2000) 10 Transnat'l L. & Contemp. Probs. 1 at 48.

treaties of the colonial era, which generally conferred nearly all rights upon the Western powers and imposed all corresponding duties on the other party.[85]

In the more recent of the treaties considered, the obligations of the most powerful and corresponding benefits for the less powerful have been written more explicitly into the treaty but this has not meant in practice that the powerful have become bound by provisions that might go any way towards tipping the scales in favour of the less powerful. The US agreement to accept the common heritage of mankind principle in relation to the deep seabed in exchange for its interests in navigation *was* written clearly into the text but when the time came the US simply refused to sign the Convention, leaving its preferred provisions to become custom and the treaty to be effectively amended so as to exclude the common heritage principle. In the UN Framework Convention on Climate Change the US accepted the application to climate change of the principle of common but differentiated responsibilities and even went on to sign the Kyoto Protocol in which it was operationalized, but never proceeded to ratification.

Not only have the legal obligations of the less powerful generally been written as very clear legal obligations while those of the most powerful have generally been left in looser terms (or expressed tightly in treaties that the powerful never ratified), the obligations of the less powerful are typically legally enforceable against them in a way that is not true vice versa. Sometimes this has been blatant. The non-nuclear weapon States were, for example, to be subject to IAEA inspections to which there is no equivalent for the most powerful.[86] It is more often the case, however, that the enforcement provisions are ostensibly equal for all; it is just that for one reason or other they advantage the powerful. The general prohibition on the use of force, of which the flip side could be a requirement to use force if called upon by the Security Council to do so, is clearly enforceable by the Security Council. But while article 2(4) is in legal terms equally applicable to all States, it is far less likely to be enforced against the most powerful because of the impossibility of doing so. International law served as a mechanism by which to halt

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[85] Matthew Craven, "What Happened to Unequal Treaties? The Continuities of Informal Empire" (2005) 74 Nordic J. Int'l L. 335 at 350-1.

[86] *Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* note 2, art. III.

the invasion of Kuwait by Iraq but it was not able to prevent the invasion of Iraq by the US, UK and Australia.

This sheds light on the depth of the reaction to the 2003 invasion of Iraq. Despite the less powerful acquiescing in a series of often inequitable treaty relations for the sake of global order, the most powerful have since reneged on their side of the political bargains of which the treaties were a part, while using the treaties to enforce the obligations of the less powerful. The basis for the US' argument in favour of the invasion was, after all, the need to 'enforce' resolutions of the Security Council.[87] International law has thus had a very particular role to play within some core political bargains of contemporary global governance. International law has served to reinforce the power differential between the most powerful and the rest, between developed and developing, rich and poor. This is a very different image of international law to the idealized notion of a law whose main purpose is "to achieve a fundamentally depoliticized global order of equality among States and universal respect for the individual."[88]

Conclusions

International law has expanded rapidly in the years since 1945. Several of the cornerstone treaties of the emergent system of global governance concluded during this period could be regarded as unequal treaties. That the less powerful gave their consent to those treaties reflected in part an acceptance of the need for order over justice. In each case, however, that consent can best be understood as having been conditional, premised on the most powerful living up to their side of a compact of which the treaty was a part. The bargains were arguably necessary in the interests of global order and it may well be the case that the effectiveness of these cornerstone treaties has depended on the inequality built into their provisions.[89] But it is also a fact that, even with bargains being in their favour, the most powerful countries have by now proven their unwillingness to fulfil

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[87] See George W. Bush, Address (Lecture presented to the UN General Assembly, Sept. 12, 2002), online: The White House <http://www.whitehouse.gov/news/releases/2002/09/20020912-1.html>.

[88] Paul Kahn, "Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order" (2000) 1 Chicago Journal of International Law 1 at 9.

[89] See e.g. Joseph S. Nye, Jr., "NPT: The Logic of Inequality" (1985) 9 Foreign Policy 123.

their side of the compacts while using the language of international law enforcement against the less powerful. This may well have contributed to a weakened perceived association of international law with justice,[90] as well as to international law's perceived legitimacy deficit.[91]

Each of these cornerstone multilateral treaty regimes has run into roadblocks from which the way out and forward is not obvious. It has been said that with the 2003 invasion of Iraq, the "grand attempt" to subject the use of force to the rule of law via article 2(4) of the UN Charter has failed.[92] Following the disappointment of the 2005 world summit, the related Charter provisions on Security Council membership and voting appear virtually impossible to amend to any significant degree without a cataclysmic event such as world war. Negotiations in the current round of World Trade Organization (WTO) trade negotiations have broken down and analysts are debating whether the central treaty addressing the control of nuclear weapons has any future.[93] While in each case the issue is in one sense particular to the regime in question, on closer inspection it appears that there is a commonality to the blockages facing these key regimes: each is in need of some new accommodation between the most powerful and others, and this is proving very difficult to achieve.

Understanding the role of international law within core political bargains of global governance provides a better explanation of both the paralysis in, and disenchantment with, international law than does an explanation in terms only of the inequity of treaty

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[90] Terry Nardin, *Law, Morality, and the Relations of States* (Princeton: Princeton University Press, 1983) at 255.

[91] See, *inter alia*, Daniel Bodansky, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?" (1999) 93 A.J.I.L. 596; Thomas M. Franck, "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" (2006) 100 A.J.I.L. 88; Nico Krisch & Benedict Kingsbury, "Introduction: Global Governance and Global Administrative Law in the International Legal Order" (2006) 17 E.J.I.L. 1; Daniel Esty, "The World Trade Organization's Legitimacy Crisis" (2002) 1 World Trade Review 7; Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: a Crisis of Legitimacy" (2001) 27 Review of International Studies 133.

[92] Michael J. Glennon, "Why the Security Council Failed" (2003) 82 Foreign Affairs 16 at 16.

[93] See *inter alia*, John Freeman, "Is Arms Control in Crisis?" (2004) 9 J. Confl. & Sec. L. 303; Chamundeeswari Kuppuswamy, "Is the Nuclear Non-Proliferation Treaty Shaking At its Foundations? Stocktaking after the 2005 NPT Review Conference" (2006) 11 J. Confl. & Sec. L. 141.

provisions or the lack of compliance on the part of the powerful. For one thing, the political bargains do not appear to have been as inequitable as the treaties within those compacts, helping to explain the preparedness of the bulk of States to become a part of the treaty regimes in the first place. It is the failure of the most powerful to fulfil their side of the political bargains that is the source of so much anger and humiliation. To argue that the P5 have not complied with article VI of the NPT is to sterilize the grievance; it goes no way towards capturing the depth of anger that comes from feeling cheated on such a fundamental issue as national security. With "China just 'modernizing', France 'upgrading', the United Kingdom 'replacing' and the United States and Russia 'modernizing' their nuclear capabilities",[94] how can the non-nuclear weapon States believe that the nuclear weapon States are fulfilling their disarmament obligations in good faith?

While talk of inequitable treaty provisions and non-compliance of the powerful conjures up a sense that the issue is stable, understanding the issue in terms of deals not yet fulfilled emphasizes the temporal dimension–why the issue has got worse and why recent attempts at new deals have stalled. Creative ambiguity can be a useful tool in order to achieve agreement on a negotiated text, but it may also serve to delay rather than prevent confrontation over divergent positions. In the case of the Law of the Sea, the lack of preparedness of the United States to stand by its side of the bargain became clear as long ago as the conference at which the negotiations were concluded. That developing countries lent their support to the subsequent Implementing Agreement could be regarded as a North-South deal subsequent to the one done during the negotiations for the initial treaty, which had the effect of extending the time period during which the US could live up to at least some part of the initial bargain. And yet the US has still not even ratified the LOSC. In the case of Security Council reform the prospect of change at the 2005 Summit of Heads of State and Government kept the possibility alive until only recently.

Does this mean that the most powerful States should not have entered into bargains that they were never going to, and perhaps from a realist perspective never could, fulfil? It is difficult to argue that the world would have been better off without the UN Charter or the NPT. It is even more difficult to think that the world would have

[94] Kuppuswamy, *ibid.*

been better off if the most powerful had complied with their side of the relevant bargains. This would have deprived the US and the UK, though not necessarily others, of the power to enable humanity to resist the imposition of governmental forms that do not respect human rights, should that prove necessary. Similarly, for the P5 to have assumed responsibility for maintaining international peace and security but to have permitted Charter amendments such that their power might at any time be diluted through the inclusion of additional permanent members is perhaps expecting a little much. Nor is it necessarily even the case that a larger and more democratic Security Council would be in any way more effective in maintaining international peace and security.

Inequality may not in itself be a basis for treaty termination,[95] but it is difficult to see how the cornerstone treaties of our emergent global polity can last indefinitely. Particularly in the case of the UN Charter and NPT, it is as if each contains a sunset clause, written in invisible ink. Ultimately, however, the danger may be less that the cornerstone treaties will collapse through discontent but simply that it becomes impossible to further expand global governance via multilateral treaty processes. The lack of progress at a multilateral level in the WTO is being overtaken by the proliferation of bilateral free trade agreements. Many ocean governance and WMD (weapons of mass destruction) issues are being addressed via non-treaty arrangements such as the Proliferation Security Initiative and through resolutions of the Security Council. It is nevertheless in relation to climate change that the repercussions of the inability to 'do a deal' may be most keenly felt. Efforts are currently focused on the Kyoto Plus agenda, but how will it be possible to bring the leading developing countries into the necessary compact if the US has never delivered on its previous undertaking?[96] It would not seem fair that, if the world fails to accommodate the interests of both rich and poor in a new climate change bargain, the brunt of the human security crisis caused by changes in the earth's climate is likely to be most keenly

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[95] By article 62 of the *Vienna Convention on the Law of Treaties*, *supra* note 7, a fundamental change of circumstances does constitute grounds for termination or withdrawing from treaties where "the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."

[96] Paul G. Harris, "The European Union and Environmental Change: Sharing the Burdens of Global Warming" (2005-06) 17 Colo. J. Int'l Envtl. L. & Pol'y 309 at 317.

felt by those countries with the least capacity to adapt to rising sea levels and extreme weather conditions.