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# Global Governance and Multilateralism

**Dr. D.L. Mendis***

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***Dr. D.L. Mendis** is the Executive Director at the Lakshman Kadirgamar Institute of International Relations and Strategic Studies (LKI) in Colombo.The opinions expressed in this piece are the author's own and not the institutional views of LKI, and do not necessarily reflect the position of any other institution or individual with which the author is affiliated.

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Lakshman Kadirgamar Institute of International Relations and
Strategic Studies 24 Horton Place, Colombo 7, Sri Lanka
Email: programmes@lki.lki. Website: www.lki.lk

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*"Everything on earth is changing – bit by bit – right now – in front of our very eyes. We can plan for it, work towards it, and suffer for its sake. We are creating it – that is the whole point of our existence – our so-called happiness."* - *Vershinin in Anton Chekhov's* ***Three Sisters***

# 1. Background

Professor James Rosenau has described "global governance" as governance without a government. He said that the United Nations system and national governments are central to global governance, but they are only part of the full picture. Likewise, many other writers have described global governance in a similar manner.[1]

Multilateralism is an indispensable ingredient for Global Governance. It is inextricably interwoven with the UN System.

In this context, it is possible to identify three legal instruments which impact on global governance. The three legal instruments are multilateral treaties, multilateral non-treaty instruments and implementing legislation.[2]

# 2. The three legal instruments

The UN Charter of 1945 is the most important multilateral treaty dealing with global governance. It outlaws war subject to a few exceptions and recognizes state sovereignty and equality of States. The UN Charter needs amendments to expand the composition of the Security Council with the emergence of new powers in the global order. The UN Security Council has now (December 2022) initiated discussions with a view to drafting a negotiating text for UN reform.

Multilateral treaty norms create binding international rules relating to peace and security, trade and commerce, human rights, international humanitarian law (IHL), protection of the environment, transnational organized crime, cyber-crime, intellectual property rights, international waters, international law of the sea and air transport, trafficking in illicit drugs, trade in arms, corruption, money laundering, terrorism, ozone depletion, climate change, nuclear non-proliferation, etc. These multilateral treaties require the consent of States.

Multilateral treaty norms must be distinguished from multilateral non-treaty instruments. These constitute Resolutions of the United Nations and Specialized Agencies, MOUs, Codes of Conduct, etc. Some of these instruments are considered "hard law" and others "soft law". Hard law is binding on States and soft law is not binding on States. For example, Resolutions of the Security Council or the Resolutions of ICAO or IMO are binding on State Parties. These Resolutions do not require the consent of States.[3]

Implementing legislation gives legal effect to multilateral treaties at national level. Such legislation is also referred to as "enabling", "uniform" or "model" legislation. The way implementing legislation are drafted and interpreted are of capital importance for global governance. In monist States, multilateral treaties constitute law at national level on ratification/accession by states. In dualist states, as treaties do not constitute law at the national level on ratification/accession by States. Hence it is necessary to enact implementation legislation to comply with international obligations.

Multilateral treaties, multilateral non-treaty instruments and implementing legislation provide the best legal framework for global governance and the promotion of the rule of law in the 21st century. These three legal instruments constitute the basis for "rule-based order" in the conduct of international relations and diplomacy. Hence, they have important implications for Foreign Ministers, diplomats, legal advisers, parliamentary counsel and judges in the 21st century, especially as they are involved in the drafting, interpretation and implementation of these legal instruments at the international and national level.

## 3. Importance of these three legal instruments

Multilateral treaties are the most important source of international law. They have grown exponentially since the World War II. The Australian Jurist – Julius Stone said in 1954 that in one single year, more treaties are concluded than in the whole of the 19th century. Hence, as Professor Clive Parry said it is not possible today to understand international law or international relations without the full grasp of multilateral treaties.[4]

Multilateral Treaty is a generic term. It includes conventions, protocols, agreements, concordats, exchanges of letters and *notes verbales*. Treaties can be classified as multilateral, plurilateral, bilateral, law-making or contractual. They can be defined as an agreement between states or between states and inter-governmental organisations (IGOs) or between IGOs.[5]

A treaty is an ancient legal instrument which has been used in the conduct of diplomacy in Mesopotamia (Iraq), Persia (Iran), China and India from about 3rd century BC. However, the modern treaty law starts in Vienna with the 1815 Concert of Europe. In Vienna, almost all European states, whether big or small, met for the first time to determine the future of Europe after the disastrous Napoleonic wars.

The former US Secretary of State, Dr. Henry Kissinger, wrote his doctoral dissertation on the 1815 Concert of Europe and observed its importance to international relations and diplomacy. In his book, he illustrated the relevance of the Vienna spirit of "give and take" as an indispensable requirement for the negotiation and conclusion of treaties. From these humble beginnings, modern treaty law and practice has grown exponentially to deal with important global issues, threats and challenges.[6]

Drafting of multilateral treaties is an important tool in global governance. In the negotiation and conclusion of treaties, States must compromise with other States to arrive at a consensus.[7] Drafting multilateral treaty is different from drafting legislation and includes actors such as inter-governmental organizations (IGOs), non-governmental organizations (NGOs) and the International Law Commission.

Drafting of multilateral treaties is a protracted process in which the "rolling text" undergoes many changes. A diplomat or a legal practitioner involved in treaty drafting must have a good knowledge of the legal character of treaties and the widely differing functions of treaty provisions. A treaty drafter must have an interdisciplinary knowledge of the subject matter of the draft treaty and the form and structure of treaties, including the final clauses.[8]

Interpretation of multilateral treaties is another important aspect of global governance. Interpretation is undertaken by state parties, legal counsel, the executive branch of government and international and national courts and tribunals by reference to the Vienna Rules enshrined in articles 31 and 32 of the VCLT, 1969.[9]

The interpretation of multilateral treaties has raised complex issues as to whether Article 51 of the UN Charter allows pre-emptive self-defence (Bush doctrine) and the right to protection. It is a moot point whether the use of drones is legal in the fight against terrorism vis-à-vis international humanitarian law principles. It is also a moot point whether enhanced interrogation techniques fall within the definition of "torture". The interpretation of these treaties has become complex as the global order is threatened by abominable acts terrorism, aggression, money-laundering and other transnational organised crimes.

Implementation of multilateral treaties is another important tool for global governance at national and international levels. At the national level, all three organs of the State (Legislature, Executive and Judiciary) must play a pro-active role regarding implementation of treaties as illustrated by Lord McNair in his monumental work *Law of Treaties.* At the international level, state parties, international organisations and international courts and tribunals play an important role in the implementation process.[10]

Multilateral treaties empower international organisations to make recommendations, impose sanctions or even engage in use of force if diplomacy fails (for example, in the first Iraq war). Unfortunately, sanctions have been imposed or concessions have been withdrawn on some states selectively and at times for geo-political reasons.

Multilateral non-treaty instruments are as important as multilateral treaties, as they fill gaps in the multilateral treaties and keep such treaties up to date with changing times. However, some of the multilateral non-treaty instruments can create problems for State Parties in relation to human rights obligations or environmental obligations.

Resolutions of the UN Human Rights Council fall into this category. They are binding on States. Sri Lanka has had difficulties regarding Geneva Resolution 30/1 of 2015 and 40/1 of 2021. These Resolutions deal with the establishment of a hybrid court to investigate accountability during the North-East armed conflict which ended in 2009. These Resolutions have raised constitutional and legal issues regarding their implementation.[11]

It is difficult to prosecute for any violations of IHL and HR in relation to North- East Armed conflict after twelve years, as most of the alleged offenders are dead or live overseas. However, it is possible to establish a Truth and Reconciliation Commission to prevent the recurrence of such an armed conflict. An Amnesty can also be given all offenders who committed violations of human rights or humanitarian law under Protocol II of the Geneva Conventions of 1949 since the North-East armed conflict is recognized by legal scholars as a non-international armed conflict.

Implementing legislation contributes immensely to the global governance at the national level. It requires (a) Drafting of implementing legislation, (b) Interpretation of implementing legislation, and (c) Enforcement of implementing legislation.

Drafting of implementing legislation is a specialised branch of legislative drafting. According to Francis Bennion, treaties are transformed *directly* by incorporating the treaty in a Schedule or *indirectly* by re-drafting/re-phrasing the treaty in a manner consistent with the style and form of national legislation.[12]

These two legislative techniques have many variants. These variants can be of value to legislative counsel in the transformation of treaties into national legislation. Hence, it is important for legislative counsel to select the best legislative technique or a combination of techniques which can mirror the globalised law at national level in an effective and efficient manner.[13]

Interpretation of implementing legislation is another important aspect of global governance at the national level. Literal interpretation is not suitable for the interpretation of implementing legislation as there is a need to harmonise the legislative provisions with treaty norms and standards in the interpretation of implementing legislation. Various Interpretation Acts across the world have been amended to enable the courts and tribunals to consult extrinsic material in the interpretation of implementing legislation. This paradigm shift in the interpretative technique augurs well for global governance.[14]

Implementation of implementing legislation is also very important for the global governance. Any serious "implementation deficiencies" or "gaps" can undermine global governance. International compliance and control measures have been established by various treaty regimes. These treaty regimes provide for submission of reports, establish verification processes and review mechanisms and engage in diplomatic efforts to ensure compliance. Any intervention by state parties or international organisations with respect to the implementation requirements must not be construed as an infringement of state sovereignty.

# 4. Impact of Multilateral Treaties on State Sovereignty

State sovereignty is a rule of international law**.** The Charter of the United Nations recognizes the principle of the sovereignty and equality of States. It also recognizes non-intervention in the internal affairs of States except as provided in the UN Charter.

However, the ratification or accession to multilateral treaties impact on state sovereignty as states are bound by multilateral treaties to which they have become state parties and bound to implement them (*pacta sunt servanda*). State sovereignty and multilateralism collide at times

In monist states, ratification/accession to multilateral treaties requires consent of Parliament, Congress or the Senate. In the US, the consent of two-thirds of the Senate is necessary for ratification of treaties. It is a difficult process. President Obama was unable to obtain its consent for the ratification of the United Nations Convention on the Law of the Sea, 1982. Likewise, President Woodrow Wilson in 1919 was unable to obtain its consent to ratify the Covenant of the League of Nations as the US Senate was bent on "isolationism". Perhaps, the history of the world would have been very different in 20th century if the US Senate had provided its consent. This clearly demonstrates that the Executive in the US is unable to ratify a multilateral treaty without the consent of the Senate.

In dualist States, multilateral treaties require implementing legislation. However, there is an emerging constitutional and parliamentary practice to enact implementing legislation before the ratification of important treaties. The former Minister of State (UK), Earl Ferrers in moving the Second Reading of the bill to enact the *Criminal Justice International Cooperation Act 1989* said:

The United Kingdom takes the view that there is no point of ratifying the convention until there is in place all the legislation and procedures which are necessary to implement it fully.[15]

Similarly, Malta and Antigua and Barbuda have enacted a *Ratification of Treaties Act 1983* and *Ratification of Treaties Act 1987* respectively to require the approval of Parliament prior to ratification of treaties which affect the sovereignty of the State. These legislative measures go beyond the traditional Ponsonby Rule which require that treaties be laid before Parliament at least 21 days before they are ratified.

It must be emphasised that implementing legislation must be enacted at the national level in conformity with constitutional provisions. It becomes complicated if international human rights norms are incorporated as fundamental rights in the Constitutional document, and if so, implementing legislation needs to comply with human rights and constitutional standards and norms.

In the Canadian Case of **R. v. Finta**, the accused was charged with war crimes and crimes against humanity based on the amendments made to the Canadian *Criminal Code*. The accused argued that the *ex post facto* retroactive offences contravened the *Canadian Charter of Rights and Freedoms*, but the Supreme Court of Canada held that under international law, this was a justifiable exception to the rule against retroactivity.

In the Sri Lankan Case of **AG v. Sepala Ekanayake**, the *Offences Against Aircraft Act 1982* gave effect to the Tokyo (1963), Hague (1970) and Montreal (1971) Conventions. The accused argued that these offences were *ex post facto and* retroactive and therefore inconsistent with fundamental rights. The Supreme Court held that the above legislation was *intra vires* the Constitution, as the offences were criminal at that time according to general principles of law as provided under Article 13(b) of the Constitution of Sri Lanka.[16]

In the UK and Ireland, the European Convention on Human Rights is transformed into national legislation by the *Human Rights Act of 1998* (UK) and the *European Convention Human Rights Act of 2003* (Ireland), but the UK and Irish Parliaments did not grant primacy to human rights standards over any other legislation so that the traditional rule of legislative supremacy is preserved. Instead, the Courts are authorised to interpret the legislation as far as possible in conformity with Strasbourg jurisprudence and to make declarations of incompatibility if any legislation is inconsistent with the human right standards.[17]

# 5. Conclusion and Recommendations

Multilateral treaties and implementing legislation are important legal instruments for global governance and rule-based order in the 21st century. If major multilateral treaties relating to global governance are ratified or acceded by majority of states, it might be possible to co-exist in this world without a violent confrontation.

However, "US and Russian Exceptionalism" to certain international standards and norms create difficulties for states in the emerging global order. In a multipolar world, it is up to and essential for middle powers to create a balance between global interest and national interest if these two interests are to co-exist in the emerging world order.

Some States are encountering tremendous difficulties in adjusting to neo-liberal economic policies enshrined in the multilateral trading system. They are unable to compete on a level playing field due to various factors peculiar to such States. Hence, there has been a rejection of "Reaganomics" at the global level.[19] (Reagan and Thatcher economic policies on globalisation, liberalisation of trade and de-regulation).

Today, multilateral treaties and implementing legislation are increasing in volume and in subject matter. According to Ambassador Kohona, almost 500 multilateral treaties have been registered with the UN Secretary General at the UN Treaty Office.[18] At least one-fourth of the Legislative Agenda of Parliaments in developed and developing countries relates in one way or another to treaties. Hence, these two legal instruments are indispensable for international cooperation, international coordination and inter-dependence.

In the 21st century, everything is changing – bit by bit- in front of our very eyes through multilateral treaties and implementing legislation. In another 20 years or so, it is likely that the laws of the world will be fully globalized through multilateral treaties and implementing legislation

## 6. Notes

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2. Sir Franklin Berman, QC, "International Treaties and British Statutes" [2005] Statute Law Review 26(1)1. Martin Eaton, "Enacting Treaties" (2005), 26 Statute Law Review13; K.J. Keith, "Treaties and Legislation" [1970] 19 ICLQ 5,

3. Professor Dinah Shelton, **Commitment and Compliance: The Rôle of Non-Binding Norms in the International Legal System**, Oxford University Press, 2002.

4. Julius Stone, **Legal Control of International Conflicts**, (Rinehart: New York, 1954) at 23. In the 1970s Professor Clive Parry at Trinity Hall, University of Cambridge used to tell his students that it was possible to study international law a few years ago without reading a single treaty, but today it is impossible to do so.

5. Vienna Convention on the Law of Treaties, 1969 and Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, 1986 (hereinafter referred to as VCLT, 1969 and VCLT, 1986).

6. Henry A. Kissinger, **A World Restored: Metternich, Castlereagh and the Problems of Peace 1812-1822** (Literary Licensing, LLC, 2011).

7. Anthony Aust, **Modern Treaty Law and Practice**, (Cambridge University Press: Cambridge, 2000); Jan Klabbers, *The Concept of Treaty in International Law* (Martinus Nijhoff Publishers: The Hague, 1996). Treaties also apply to individuals as provided in ICSID, ITLOS, Rome Statute and WTO Agreements. See also **Trinidad Cement Ltd. (TCL) v Republic of Guyana** (2009, CCJ, IOJ).

8. Roy S. Lee, "Multilateral Treaty Making and Negotiation Techniques: An Appraisal, Contemporary Problems of International Law" in *Essays in honour of Georg Schwarzenberger on his 80th birthday*, (Stevens & Sons: London, 1998); Jose E. Alvarez, *International Organizations as Law-makers*, (Oxford University Press: Oxford, 2006).

9. Lord McNair, *Law of Treaties*, (Clarendon Press: Oxford, 1961).

10. Above note 9 (McNair).

11. G. C. Thornton , *Legislative Drafting* 4th ed. (Butterworths: London, 1996) at 308-314; F.A.R. Bennion, *Statutory Interpretation*, 2nd ed. (Butterworths, 1992); F.A. Mann, *Foreign Affairs in English Courts*, (OUP, 1986) at 84-101; John Mark Keyes and Ruth Sullivan, "Legislative Perspective on the Interaction of Domestic and International Law" in *The Relationship between International Law and Domestic Law*, (Irwin Law: Toronto,2006); D.L. Mendis, "Legislative Transformation of Treaties" (1992) 13, *Statute Law Review* 216.

12. Bennion, ibid. at 460. He said: "The internationally agreed words cannot be suited to the legal systems of every participating state, and difficulties of interpretation must follow from indirect enactment." However, he concluded that the direct method does not serve the need for uniformity in the interpretation of implementing legislation.

13. Law Commission (UK), T*he Interpretation of Statutes, Report No. 21*, (HM Stationery Office: London, 1969, available at http://www.bailii.org/ew/other/ EWLC/1969/ 21.html. According to this report, the interpretation of implementing legislation is dependent on the way in which treaties are transformed into national legislation. See also *Ellerman v Murray* [1931] AC 236 and *Saloman v Customs and Excise Commissioner* [1967] 2QB 116. Lord Diplock said in the latter case, "If the terms of the legislation are clear, they must be given effect to whether or not they carry out Her Majesty's treaty obligations." See also the new trend in *James Buchanan & Co. v Babco* [1978] AC 141 at 152, where Lord Wilberforce said "I think the correct approach is to interpret the English Statute ... in a manner appropriate for the interpretation of an international convention."

14. HL Debates – Vol.513, Col.1217, 12th December 1989. See also Charles Carstairs and Richard Ware, *Parliament and International Relations* (Open University Press, 1991).

15. (1988), 1 SLR 47. See also Averbuck, "Sri Lanka Courts Incorporate Human Rights: Sepala Ekanayake v AG", (1989) 1 Sri Lanka JIL 1.

16. Paul Brady, "Convention Compatible Statutory Interpretation: A Comparison of British and Irish Approaches", (2012), 33 *Statute Law Review* 224.

17. Dr. Palitha T.B. Kohona, former Chief, Treaty Section, UN, "The United Nations Treaty Collection - A Legal Framework for a Better World" (2002), 14 Sri Lanka Journal of International Law.

18. See Tennyson S.D. Joseph, *Decolonization in St. Lucia - Politics and Global Neoliberalism* ( University Press Mississippi: 2011); Julian Ku , *Taming Globalization: International Law, the US Constitution and the New World Order*, (Oxford University Press: New York, 2012).

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