Australian Institute of International Affairs

Australia and the Rules-Based International Order

Editors

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This is an unsettling time for world politics.

One constant in commentary at the moment, here and overseas is the term "rules-based international order" (sometimes "global rules-based order"). The importance of the rules-based order was central to the Australian Government's 2017 Foreign Policy White Paper, 2016 Defence White Paper and 2020 Defence Strategic Update.

It continues to feature prominently in Australian government statements, including prime ministerial speeches.[1] While some past catchcries like "creative middle power" and "top 20

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[1] Scott Morrison, "Tomorrow in the Indo-Pacific", Address to the Aspen Security Forum, 5 August 2020: https://www.pm.gov.au/media/address-aspen-security-forum-tomorrow-indo-pacific

nation" have faded from public statements, "rules-based international order" continues to have its moment in the sun.

One of the best contributions groups like the Australian Institute of International Affairs and universities like the Australian National University can make as we step uncertainly into the future is to is to help policymakers and the community think clearly about the way we frame the world and what we mean by the language we use.

That was our purpose in organising a conference about Australia and the Rules-Based International Order on 18-19 July 2018 and producing a publication to document these discussions.

Our objective in this publication is to clarify what is meant when we talk about the rules-based order. Even in official Australian usage, its meaning is often slippery, encompassing everything from the UN system to an ill-defined status quo, so there is value in building a shared understanding. We want to examine the contribution Australia has made to the development of a rules-based order, and to think about its future.

Structure of book

This book, like the conference it was based on, deliberately brings together both scholars and practitioners. It draws on diverse lenses including intelligence, defence, foreign policy, law and trade to elucidate Australia's role in the rules-based international order.

The structure of the book is as follows. Chapter 1 defines the rules-based international order and looks at the roots of this order. It briefly outlines the development of the rules-based

international order over the last five centuries. It then focuses on the history of Australia's involvement in building international order and international institutions and outlines some of the key challenges for the rules-based international order today. It outlines different ways of thinking about the rules-based international order and discusses issues of power, hegemony, values and international law.

Chapter 2, provided by the then Deputy Secretary of the Department of Foreign Affairs and Trade Richard Maude, shows the significance of the rules-based international order for Australian foreign policy. It gives examples of the strains on the rules-based order, with the current order changing and its liberal character contested and weakening. It then outlines the steps that Australia is taking to influence the international system in response to current trends, including stepping up support for rules and institutions, speaking up for the system, encouraging reform and building partnerships with others in this venture. The chapter discusses the implications for Australia in managing risk, arguing that where it can rely less on the rules-based order to deliver outcomes and protect its interests, other components of Australia's foreign policy must carry the burden.

We then look at specific areas of rule-making and norm-forming to assess Australia's contribution to the rules-based international order been in each area, how solidly established the rules and norms in this area are and what are the challenges to that order. Chapter 3 addresses the rules of war, arms control and disarmament; Chapter 4 the law of the sea and maritime law; Chapter 5 the distinctive regime governing Antarctica and its environment; Chapter 6 the rules of international trade and finance; and Chapter 7 the rules of people movement and human rights law.

The book concludes with two discussion sections. Chapter 8 looks at the institutional structures of the international order, including the United Nations and the formation of the International Criminal Court. It argues that much of the institutional architecture of the international order has proven resilient and is valued by countries large and small. The challenge is to protect what exists and to try and improve it when possible, taking into account the new dynamic of the contested world today.

Finally, chapter 9 looks at where the order is heading and how Australia should respond. It assesses the overall state of the rules-based order, from the rules-based systems that are working pretty well to those that are under serious challenge. In a number of areas – including world trade, immigration, climate change and nuclear disarmament – the order is under threat due to actions of the United States, China and Russia and, more broadly, the geopolitical convergence between the power of Western states and non-Western states.

It concludes that Australia has been a huge beneficiary of the rules-based order since the Second World War. As a middle power with little capacity to impose its will on anybody else, Australia depends on operating in a rules-based environment. Australia needs to protect the existing rules-based order, including using the influence of non-state actors and looking at the impact of emerging technologies. It should be cautious about the national security field becoming the dominant framework.

Narratives around the rules-based international order[2]

Not surprisingly, this publication does not reach a single consensus: as the Australian National University's Kirsten Sellars observes in this volume, the rules-based international order is something "the more we discuss it the more elusive it becomes". However, the discussions that follow do delineate some of the ways the term is being used.

At its base, the narrative around the rules-based international order implies three steps:

1. there was previously something identifiable as a rules-based international order;
2. there is a country or countries that are uniquely or fundamentally challenging this order; and
3. this leads to negative results for Australia.

As you read the contributions that follow and the many perspectives shared, you may want to divide different views of the rules-based international order along three fault lines according to the following questions:

- Do you feel nostalgic?
- Who is the challenger?
- What's the alternative?

The first question is around emotional valence. Some speak of the rules-based international order with a definite hint of nostalgia. The old order suited Australia perfectly (not surprisingly given that many of the rules were made by

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[2] A version of this section was published as Melissa Conley Tyler, "Perspectives on 'rules-based international order'," Lowy Interpreter, 31 July 2018: https://www.lowyinstitute.org/the-interpreter/perspectives-rules-based-international-order

Australia and its friends). This might have looked different to others; for example, to colonised peoples where the order didn't apply.

It is also fair to say that the rules-based international order may be more orderly in memory than it was at the time. Did we have a rules-based order in the sense that all powers signed up and complied? It's important to guard against hypocrisy: maybe the order was not always rules-based to the extent that current nostalgia suggests. There might be an element of yearning for an imagined simpler past.

The second question identifies threats to the order. China? Russia? The United States under Donald Trump? All of these can be painted as challengers.

This divides those that are more focused on the order – the US-led strategic status quo – versus those who are more focused on the rules and the maintenance of orderly relations. The former sees non-Western powers as the threat; the latter are more focused on the US.

We are faced with the paradox of watching China working to maintain various rules – for example, around world trade, the Paris climate agreement and the Iran deal – that Trump Administration walked away from. The question is whether you're more worried about changes in power relativities, or more worried about rules.

The last revealing question is what, to your mind, is the alternative to a rules-based international order? Is it chaos? Is it an order of pure coercion?

For many international lawyers, the alternative is international law. They regret the shift from promoting an order built on

law to one built on rules, which is a more slippery concept. International law specialist Shirley Scott describes sacrificing international law for a "rules-based order" as a capitulation.

One perspective is to see the rules-based international order as a constant. For example, Nick Bisley suggests that we always have an order based on a spectrum of power and rules. So we always have a rules-based international order, and it is always only patchily complied with: the question is who is setting the rules and the process by which they are doing it.

A continuing debate

Australia has a long and rich engagement with building a rules-based order – some of which was on show when the conference was held in the Coral Bell School, in the Hedley Bull building, adjacent to the Coombs lecture theatre and just down the road from the Crawford School and the Sir Roland Wilson building. Each of these people – scholars and practitioners – helped us to understand that order and to shape Australia's role in it. Hedley Bull reminded us that the idea of an international order based on mutually agreed rules is essential to the formation of an international society that can keep chaos at bay. Coral Bell taught us about the role of change, including normative change, in the order. And ANU Chancellor, Gareth Evans, whose conference contribution is below, has so successfully thought about and acted upon that same order.

The continuing discussion of the concept, including through the Lowy Institute's program on Australia's Security and the Rules-Based Order, means that this won't and shouldn't be the last book on this topic. We will be grappling with questions around the rules-based international order for many years to come.

Introduction

Thanks are due to the organisers of the conference: the Australian Institute of International Affairs in conjunction with the Department of Foreign Affairs and Trade, ANU Coral Bell School and Attorney-General's Department. We thank the volunteer interns who helped organise the event and prepare this manuscript for publication, including Cahill Di Donato and Carlie Dodds.

Our hope is that this publication will help identify and delineate different views on this important topic.

Chapter 1: Understanding the Rules-Based International Order

Australia and the Rules-Based Order

Allan Gyngell AO FAIIA
National President, Australian Institute of International
Affairs

It would be a mistake to think that the idea that Australia is
committed to an international order based on rules is a recent
policy innovation. As I argue in my history of Australian
foreign policy, *Fear of Abandonment*,[1] the idea has been
present in the way Australia has thought about the
international system throughout our modern history.

It's obvious why that is so. A state like Australia which is
large enough to have global interests but too small to get what
it wants by throwing its weight around is always going to be
better off in a world where the rules, preferably those we have
played a part in setting, are known and followed. We have
understood that well.

Let's begin by examining the roots of the order.

There are rules everywhere, at all points in human history.
When people interact, they have rules. And you don't need a
doctorate in anthropology to know that's the case. What's
most important is the relation between the rules, norms,
principles, values, laws and power. The key point is figuring
out not just what role rules play, but what is valued in them;
what forms of behaviour they promote and what forms of
behaviour they discourage.

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[1] Allan Gyngell, *Fear of Abandonment: Australia in the World Since
1942* (La Trobe University Press, 2017).

The absence of any form of international order is anarchy or warfare. International orders can emerge not just from agreed rules but from the imposition of force, coercion or powerful cultural impulses.

But in this complex multipolar world it is genuinely hard to see any of these other forms of order as a realistic alternative. Anxiety that China might impose a coercive regional order in which its neighbours fall into some sort of ritualistic obeisance to Beijing on subjects of greatest importance to it seems to me to demand too many unlikely assumptions about the willingness of other big powers like India, Japan and the United States – and indeed Australia – to accept such a regional order. And it is simply implausible to expect a global order based on China's power.

So the central issue Australia is likely to face is the form and reach of the particular rules-based order in which our diplomacy will be operating.

In a recent paper, the RAND Corporation defined a rules-based order as 'the body of the rules, norms and institutions that govern relations among the key players in the international environment'.[2]

Rules-based orders, in other words, are complex. They weave together organisations, laws, rules, principles and procedures. And they exist inside a structure of power, and are shaped by it, as the US-led order since the end of the Second World War has been.

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[2] Michael J Mazarr, Miranda Priebe, Andrew Radin, Astrid Stuth Cevallos, *Understanding the Current International Order* (Rand Corporation, Santa Monica, 2016).

Orders can be built around different sets of values and principles but there must be a general agreement that the rules should be followed. Rules-based orders impose constraints on the capacity of the leading states to act, but those states need to believe that the cooperative behaviour that results within the system is worth that price. An order will only continue to function so long as its key members believe that it benefits them.

Rules are different from laws, and one of the issues we will deal with in the chapters that follow is the relationship between international law and the rules-based order.

The origins of a formal rules-based order, particularly in the West, go back to 1648 and the Peace of Westphalia.

The series of treaties that followed the calamitous religious conflicts of the Thirty Years' War represented the first attempt to institutionalise an international order. Drawing in part on the thinking of the Dutch jurist Hugo Grotius, the participants recognised that agreed rules and limits on power were necessary to avoid mutually destructive war. Familiar concepts such as resident representation, non-interference in another country's internal affairs and recognition of state sovereignty were acknowledged for the first time. At the same time, the way Europeans behaved in the non-European world from the 15th century up until the middle of 19th century involved a whole slew of very different rules from those we observe today.

Other forms of order, like the Concert of Europe and the European balance of power, followed. When they, too, fell apart, Woodrow Wilson and his supporters in the Paris Peace Conference after the First World War tried to implement a

new form of order, drawing on different traditions, dating back to Immanuel Kant in the 18th century.

They hoped that collective security would be maintained by open diplomacy, free trade and navigation and guaranteed by a new League of Nations.

Technological developments in the late 19th century, like the invention of the telegram, were increasing the material interdependence of states, driving the need for new forms of international rule-making. The International Telegraph Convention was signed in Paris in 1865. The Universal Postal Union followed in 1874.

The rules for these organisations didn't need a normative basis. But by 1919, new institutions like the International Labour Organisation (ILO) were being established not just to reduce friction in international transactions but to shape the form of the international order by advancing the idea that peace depended on social justice.

For reasons that are well known – but which we need to remember – no effective order was put in place after 1919. But out of the war that followed came a new order which attempted to reconcile the reality of power with moral force in ways that would avoid the ineffectiveness of the League of Nations and control the economic cycles that led to the Depression.

It was liberal and rules-based but underpinned by the hegemonic power of the United States. The shape and purpose of the order had been outlined in the Atlantic Charter – the war aims of the allies – signed by Roosevelt and Churchill in 1941.

These were the circumstances in which a new Australian foreign policy emerged. Even at the beginning of the Pacific War, Australian policy makers were thinking about what the world would be like when it was over. The Atlantic Charter, said the External Affairs Minister H.V. Evatt, provided Australia with a 'sure and certain guide to future policy'.

A post-hostilities section headed by Paul Hasluck to deal with the diplomacy of reconstruction was set up in the newly professionalised Department of External Affairs in April 1942. Australia became an active participant in the series of conferences on agriculture, labour, security and economic cooperation throughout 1943 and 1944 which began to shape new international institutions.

Evatt's irritation that at the Cairo Conference in November 1943 the great powers had announced decisions about the disposition of Japan's territories after the war without consultation with Australia provided a further catalyst for Australian thinking.

Evatt was determined that Australia should make a mark in the April 1945 conference of forty-six nations in San Francisco to draw up the United Nations Declaration. He recognised that the new organisation needed the support of the great powers, but he insisted that they should not shape the post-war world alone. The responsibility had to be shared with – and this was important – by smaller nations.

Australia's impact on the San Francisco conference was substantial. Evatt didn't succeed in everything, but he was influential in expanding the United Nations' economic and social remit and in increasing the authority of the General Assembly.

He argued strongly for strengthening the United Nations' role in human rights. As president of the General Assembly in December 1948, he presided over the adoption of the Genocide Convention and the Universal Declaration of Human Rights.

The global economy was also being remade. American military and economic support to the allies had come with conditions, including a formal commitment to the 'elimination of tariffs and other trade barriers'.

This represented a revolutionary change in the way Australia thought about its economic interaction with the world. Since Federation this had been based on imperial trade preferences and strong tariff protection of industry.

The suspicion of international finance and free trade ran very deep in the Labor Government's ranks. But a brilliant group of economic advisers, including H.C. Coombs, Roland Wilson and John Crawford, provided the government with a policy solution to its political problem. Influenced by Keynes, they acknowledged the commitments to free and open trade, but insisted that these be placed in the context of broader social obligations to secure full employment, industrial development and rising living standards.

This became known as the 'positive approach', and was a recurrent theme in Australian contributions to the development of the new international institutions. It lay behind Evatt's successful push to have a commitment to higher standards of living and full employment included in the United Nations Charter.

The ratification of the legislation bringing Australia into the new Bretton Woods institutions, including the General

Agreement on Tariffs and Trade (GATT), was a major achievement for Curtin and Chifley. As Chifley told Parliament 'Just as political isolation in the world would be an impracticable policy for Australia so do I think that economic isolationism would be disastrous.'

After these foundations, Australia made important contributions to a rules-based order, including through Casey's work on the Antarctic Treaty, the Australian contribution to UN Convention on the Law of the Sea (UNCLOS), our role in the Uruguay Round and the creation of the World Trade Organization (WTO), the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the Chemical Weapon's Convention.

The post-war order suited Australia perfectly. US support for open international trade helped drive unprecedented global growth. Its network of alliances in Europe and Asia provided a stable security framework which enabled this to happen. There was an easy alignment between Australia's principal ally and its main economic partners.

Australia had a voice in the multilateral institutions in which rule-making and norm-setting took place. It could enthusiastically support the rules-based order, because it was essentially set by us and our friends.

But now it is ending – or at least the particular form it has taken has ended. US belief in the underpinning purpose of the system and willingness to invest in it; an effective network of security alliances to back it up; and broadly-based and functioning multilateral institutions are all now in doubt.

And you can see how much we are beginning to miss it.

The Australian Committee of the Council for Security Cooperation in the Asia Pacific (AusCSCAP) recently undertook some useful textual analysis of the use of the phrase 'rules-based order' in Australian government statements. It found no use of the term in an Australian defence or foreign policy White Paper before 2009. Indeed, there was no record of Alexander Downer using the words in any official document during his long tenure as foreign minister.

The phrase came into wider use under Kevin Rudd's prime ministership. But in the 2009 Defence White Paper it was specifically linked to the United Nations:

> "The United Nations and the UN Charter are central to the rules-based global order. This means that where we are able, and within the limits of our military power, we should continue to support the efforts of the United Nations and the international community in dealing with such problems".[3]

It also acknowledged, however, that the strategic underpinning of the order lay in the 'global leadership role played by the United States since the end of World War II'. Rudd used the term 'rules-based order' in more than 20 speeches in 2011, largely in this UN context.

That was still the way the words were being used in the 2013 Defence White Paper: 'The UN and its Charter are central to the rules-based global security order.' Australia's membership of the UN Security Council in 2013-14 would give us, said the Paper, 'additional opportunities to help

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[3] *Defending Australia in the Asia Pacific Century: Force 2030. Defence White Paper 2009*, p. 44

strengthen rules-based institutions and behaviour in the international community'.[4]

By 2014-15, as China became more assertive in its activities in the South China Sea, the rules became more commonly associated with the UN Convention on the Law of the Sea. Russia's 2014 annexation of Crimea was also a direct breach of the rules and long-standing conventions relating to sovereignty. With the election of the Abbott Government, the links between the 'rules-based order' and the specific dimensions of the current US-led order began to be drawn more sharply in Australian policy.

Australia's security and prosperity, the 2016 Defence White Paper stated, 'relies on a stable, rules-based global order which supports the peaceful resolution of disputes, facilitates free and open trade and enables unfettered access to the global commons to support economic development'. That order was underpinned by 'a broad architecture of international governance which has developed since the end of the Second World War…[including] the United Nations, international laws and conventions and regional security architectures'.[5]

Declaring the rules-based order one of the five objectives of 'fundamental importance to Australia's security and prosperity', the Foreign Policy White Paper, which came out in 2017, commits the government to promoting and protecting 'the international rules that support stability and prosperity and enable cooperation to tackle global challenges.'[6]

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[4] *Ibid*, p. 26

[5] *Ibid*, p. 45

[6] Department of Foreign Affairs and Trade, *2017 Foreign Policy White Paper* (Commonwealth of Australia, 2017), available online: https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper/fpwhitepaper/index.html, p. 3

In the period since then, the debate about the rules-based order has intensified as the Trump Administration has challenged the rules of the free and open trading system, including by threatening the survival of the WTO, and dimensions of the environmental order.

With shifting economic and strategic weight in the world, and rising uncertainty about US purpose, Australian policymakers have begun to draw a more direct link between the rules of the order and its values.

The 2017 Foreign Policy White Paper describes an intensifying international competition 'over both power and the principles and values on which the regional order should be based.'[7] It defines Australia's own national values as including 'political, economic and religious freedom, liberal democracy, the rule of law, racial and gender equality and mutual respect'.[8]

In contrast, the two previous Australian foreign policy white papers had little to say about values, emphasising instead the 'hard-headed pursuit of the interests which lie at the core of foreign and trade policy', in the words of the 1997 White Paper.

I want to end with a series of propositions that will be tested and debated in the chapters that follow.

First, the rules-based order has always been intimately connected with global power. The form of the post-war order was, it's not too strong to say, imposed by US power. The diffusion of global power, and the diminishing benefits the US and its citizens feel they derive from the burden of bearing

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[7] *Ibid*, p. 26
[8] *Ibid*, p. 11

some of the costs of the global public goods underpinning the system, lie behind the changes we are now seeing.

Second, the elements of the order have never been fixed but have changed constantly over the past seventy years. Rules like those governing maritime law have been codified and revised; entirely new dimensions of rule-making like the environment have emerged; new values like the rights of Indigenous people have taken hold; and new norms such as the responsibility to protect have fought to gain traction.

In some areas, such as human rights and trade, the liberal dimensions of the order have mattered; in others, like civil aviation, they have been largely irrelevant. Some parts of the order have been driven by laws; other by norms and values. The 'non-interference' norms of the Westphalian system have come under pressure.

Third, Australia's contribution to the development of this order has been significant. It has actively shaped rules, including those relating to human rights, Antarctica and the environment, arms control and free and open trade.

Australia has always accepted that smaller powers have a responsibility to act to support the order rather than simply draw from it. You can trace this from Evatt in San Francisco through Gareth Evans' good international citizenship to Malcolm Turnbull's speech to the Konrad Adenauer Foundation in Berlin in April 2018: 'Rather than retreat to some imagined island of isolation, we must... actively defend,

extend and augment the rules-based structures that have enabled peace and prosperity so far.' [9]

Since Evatt's engagement in the Universal Declaration of Human Rights and the Genocide Convention, Australia has been a reliable (if not always consistent) supporter of the liberal values of the order.

One of Australia's contributions to the development of the rules-based order, increasingly relevant as a commitment to free and open trade comes under pressure, was its insistence as the institutions of the order were being created that economic openness had to be matched by clear benefits to the different sections of the community (the 'positive approach'). The national tradition of planning and acting is one Australia will find it useful to celebrate and draw upon in the difficult period ahead.

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[9] Malcolm Turnbull, "Keynote Speech, Konrad Adenauer Stiftung, Berlin"m 24 April 2018, available online: https://www.malcolmturnbull.com.au/media/keynote-speech-konrad-adenauer-stiftung-berlin

Australia's Rules-Based International Order[10]

Professor Nick Bisley FAIIA
Head of the School of Humanities and Social Sciences and
Professor of International Relations, La Trobe University

Over the past decade or so the "rules-based international order" has become a rhetorical centrepiece of Australian international policy. As Allan Gyngell points out, the term was essentially unused by any government minister during the Howard Government, but began to gather a lexical head of steam under the Rudd and Gillard governments. It reached its apogee in the Defence White Paper of 2016 in which it was not only mentioned 48 times in text but was identified as one of Australia's core strategic interests.

Why Australia has rediscovered its enthusiasm

Many people, both in Australia and abroad, fail to realise how young Australian foreign policy is. The country has only begun to play a properly independent role on the global stage since 1942, with the passing of the Statute of Westminster. The world into which the Commonwealth stepped was one freshly remade by the victorious Allied powers, which had consciously created a rule-governed order institutionalised in the United Nations in an attempt to prevent yet another global conflagration. In many ways the "rules-based international order" — understood as a shorthand for the UN-centred system that imposes limits on what states can do and which provides a wide array of rules governing international

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[10] This edited version of Professor Bisley's remarks was printed by *Australian Outlook* at
http://www.internationalaffairs.org.au/australianoutlook/australias-rules-based-international-order/

economic relations — is the only international environment Australia has known. That order was especially empowering for a country like Australia: it provided the means through which lesser states could not only thrive as the powerful restrained themselves, but were also given the chance to shape their environment.

Just because Australia has been an adept player of the game, one should not neglect the reality that much of the reason it did so well out of the post-war order was because it was so well suited to the country's circumstances. The balance of power on which the order rested was one dominated by our newly-forged ally. Equally, the dominant values and culture of the rules-based order were North Atlantic. As a largely white European colonial settler society, whose culture and values were firmly rooted in the North Atlantic world, Australia could easily find comfort from and a welcoming place in this international context. Not for Canberra were the challenges of a post-colonial existence, struggling to reconcile local traditions, culture, values and race with an unwelcoming international environment.

One of the reasons Australia did not talk about the rules-based international order in the past is that it was not only hard-wired into the policy settings, it was simply there. To discuss it would be like talking about the oxygen content of the air. Australia has begun to realise that things are changing and that the realities of the past cannot be taken for granted or assumed. As American power and purpose wanes, and as newly confident emerging powers seek to shape the international environment, Australia has begun to realise that the constitutional setting of international society rested on a particular constellation of political and economic forces. What had seemed fixed and unlovable may not be there forever and steps need to be taken to defend it. Like an athlete training at

high altitude, we've begun to notice that there's not as much oxygen around as before.

Power, order and values

While the international order that has been so beneficial for Australia has been rules-based, it is not a purely rule-driven system. It sits on top of, and indeed in many respects is dependent upon, a stable and accepted relationship between power and rules. But in both the political use of the notion — particularly as an implicit critique of China — as well as the broader public debate about these circumstances, there has been a tendency to romanticise the idea of a rules-based order. The rules-based order is presented as a value-neutral and technical-legal fact in which we, the Western powers, do the right things and the outliers break the rules.

The reality of course is much more complex — rules are regularly broken by all parties — and even the indiscretions of China and Russia in recent years are more exceptions than they are standard practice. As a political move, invoking rule-following as a gold standard for international behaviour is a problem not only because of the easy criticism of hypocrisy but also because those who are acting in ways of which we don't approve have relatively easy ways to fend off critique because most of the time they are actually following the rules.

The rules-based formulation is also explicitly or implicitly contrasted to a power-based order in which challenges threaten a Hobbesian world where the strong do what they will prevails. This is a false dichotomy. All orders reflect some combination of coercion and consent and processes of rule-making and rule following in which the ideas and norms that underpin rules interact with the distribution of power and

force. The prevailing order is one that rests, especially in East Asia, on the primacy of the United States.

One of the challenges in the current moment is that the rules and principles that were built on the foundation of US primacy are being questioned as power shifts. Any move away from that order would not involve the replacement of US-led order with anarchy and the absence of rules. Rather it would entail different rules serving different interests and a different configuration of power.

International orders of all kinds, whether rules-based or not, reflect values and interests. The current order is being weakened because some emerging powers perceive that the values and interests it serves does not align with their own. But one important point was the significance of the social purpose served by the rules-based order as it was originally conceived. This was referred to by Australian policymakers in the early decades of the order as 'the positive approach' but is also known by the much less appealing term 'embedded liberalism'. The international order created in the 1940s explicitly set out to make liberal capitalist economic relations the global norm. It had a long-term aim of integrating markets via the reduction of tariffs and other barriers to trade, and commerce had a clear domestic function for its member states.

The domestic social purpose of successful international orders

Liberalisation of the global economy served domestic social ends, that is, the creation of welfare states, full-employment goals and other socially progressive purposes. This gave the order a clear domestic social and political anchor in its participating countries. International orders work best when they have such an anchor: this was a key part of the Concert

of Europe's system which sought to establish an international environment that protected the ancient regime and kept the revolutionary ideas of liberalism and revolution at bay. Today that domestic purpose is uncertain as we detached it from economic social functions in the 1980s and 1990s and we have not yet replaced it with anything.

This absence is a notable feature of the 'rules-based order' today and goes some of the way to explaining the gyrations of advanced democracies' political systems. But it can also be a positive focal point for the necessary order-building that needs to occur.

Three Images of the Rules-Based Order[11]

Professor Robert McLaughlin
Director, Australian Centre for the Study of Armed Conflict and Society, UNSW Canberra at the Australian Defence Force Academy

How is the concept of 'rules-based order' currently employed in debates and discussions as to its existence, fragility, nature, and content? In this short piece, I will briefly outline (to borrow a Waltzian conceptualisation) three 'images' of, or ways of thinking about, the rules-based order: as aspiration; as substantive consensus; as a measure of hostility to orthodoxy.

The first image of the rules-based order is as an aspirational phrase that defines either or both an objective – the rules-based order – and/or a mechanism – a rules-based order. Conceptualised as an objective, the rules-based order tends to prioritise the ultimate achievement of a stable, sustainable, generally universal rules-based order as an international good: something to which states and international organisations should and do aspire.

However, the reasons this aspiration should be pursued are varied and depend upon the perspective that the entity in question takes of the second and third images or ways of thinking about the rules-based order. Nevertheless, many of these reasons centre around the aspiration for a settled, predictable, and self-perpetuating stability, leavened by

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[11] This edited version of Professor McLaughlin's remarks was printed by *Australian Outlook* at http://www.internationalaffairs.org.au/australianoutlook/three-images-of-the-rules-based-order/

sufficient freedom of manoeuvre to still allow and facilitate (up to a point) the pursuit of competitive state interests.

When conceptualised as a mechanism, the aspirational image of the rules-based order tends to focus upon its character as a series of norm sets, deconfliction processes, dispute resolution options, and a 'language' of international intercourse (which is often associated with international law, but is broader than international law). A key set of counter-intuitive and often forgotten norms central to the rules-based order as mechanism, however, are the 'identification' norms (to paraphrase Benjamin Zala): that is, the criteria, howsoever expressed and as generally set by the major powers, that describe and define who gets to make the rules, and how they are made and enforced. A previous iteration of this image of the rules-based order was, arguably, the Concert of Europe, which was considered at the time to be both a perfected stabilisation outcome as well as a mechanism for maintaining that outcome.

A second common image of the rules-based order is as the sum of its normative parts: a set of substantive norms that underpin and express something like an international consensus. However, whilst at any given time there is often a mainstream or orthodox rules-based order of this type, it is rare that there is only ever a single such rules-based order. Indeed, perhaps the 'clash' is not of civilisations, but rather of competing conceptions of the rules-based order. Currently, the orthodox or mainstream rules-based order is arguably the liberal-internationalist image: focussed upon the advancement of human rights, radical sovereign equality, the facilitation of trade and investment, democratisation, and peaceful resolution of disputes. However, it is important to note that this is not simply a 'Western' rules-based order. Some of the key

proponents and actors supporting this rules-based order in our region are Japan, South Korea, Singapore, and so on.

But this is not the only image of a rules-based order on offer; indeed it can fairly be said that the liberal-internationalist rules-based order is currently under escalating pressure, and its long-term aim of locking in liberal-internationalist gains and normative values is increasingly contested. One need only refer to the clear and overt alternative conceptions of the rules-based order espoused by Russia and China to see that the contested but incrementally advancing dominance of the liberal-internationalist rules-based order between 1945 and the mid-1980s, and the 30-year, almost-hegemonic dominance of that rules-based order since the late 1980s, is drawing to a close. This means that currently insurgent rules-based orders – such as the nationalist-imperialist, almost Tsarist rules-based order of modern Russia, with its clear disdain of Western human rights 'overreach' and its willingness to reinterpret fundamental rules-based order norms such as non-intervention – will continue to gain credibility with some states unhappy with the liberal-internationalist image of the rules-based order.

The third way that we seem to talk about the rules-based order is in terms of categorising states as compliant or non-compliant with the 'orthodox' image of the rules-based order, or as maintainers or insurgent under-miners of that rules-based order. However, whilst there are undoubtedly some uber-maintainers of the current liberal-internationalist rules-based order (core EU, Nordics, and some others) most states that wish to buttress the liberal-internationalist rules-based order tend to have a 'most of the rules, most of the time' relationship with it. Thus, we could say, for example, that the US is, at core, a maintainer of the orthodox rules-based order, even though that state routinely challenges that rules-based order, and is often challenged by it.

On the other hand, North Korea, one could argue, demonstrably cares little-to-naught for the orthodox rules-based order but is happy to use its mechanisms (gridlock in the United Nations Security Council) and its language (threat of use of force) to achieve its aims. Similarly for Islamic State – a non-state actor that clearly cared not at all for the vast majority of substantive rules within the orthodox image of the rules-based order, but which nevertheless attempted to leverage the central animating entity status (the state) and one of the key normative concepts (sovereignty) enshrined within that rules-based order.

A third type of relationship with the current image of the orthodox rules-based order is the vacillating approach of Russia and China. These states are clearly keen to maintain and support those aspects of the orthodox liberal-internationalist mainstream rules-based order that support their current national interests, particularly trade and investment freedoms. But they are simultaneously in open defiance of other aspects of the liberal-internationalist rules-based order, particularly as regards what they perceive to be overzealous and norm-distorting human rights overreach, and the modern, narrow, territorial confines placed around the older concept of 'sphere of influence'.

Highlights of Discussion

Moderated by Melissa Conley Tyler FAIIA, then National Executive Director, Australian Institute of International Affairs

United States

"There's a lot of concern at the moment about President Trump and the disruption that people feel he's causing to the international rules-based order. Now one could portray him as a some kind of a wacky diversion from standard operating practice by the United States and by the international community. But I wonder if he isn't, perhaps alternatively, some kind of abrupt manifestation of strains: both within the United States, where the domestic order hasn't been doing its job properly in the eyes of many people; and also strains within the international order, where the Chinese, the Russians, maybe even the Europeans, have not been behaving properly and in accordance with the rules. And rather than muddling along and coping with these changes, it could be argued that Trump is very directly challenging the order because of these strains, which have been emerging for quite some time."

Miles Kupa FAIIA
Former Department of Foreign Affairs and Trade
Australian Institute of International Affairs ACT Branch

"To refer to a recent article by Graham Allison in *Foreign Affairs,* he said that the US role in creating the post-World War II order was prompted by considerations of American national interest and fear of the USSR. He portrayed it as very America-centred. If that is the case, and if the US, through

President Trump, sees various bits of the international order no longer serving the US interest – like the WTO or NATO as it's been run in recent years – it's not surprising if the US withdraws its support for what we call a general order."

Geoff Miller AO FAIIA
Former Department of Foreign Affairs and Trade
Australian Institute of International Affairs NSW Branch

"The challenge we are seeing at the moment is that people in powerful countries such as the US – and perhaps in Australia – are not seeing the benefits, they're only seeing the cost of this order. Is there perhaps a failure on behalf of governments to tell stories about how this order works to the benefit of citizens and is not just a cost that they need to bear?"

Dr Kristie Barrow
Australian Civil Military Centre, Department of Defence

Power and Hegemony

"I think we need to be particularly conscious of the fact that when we say 'global rules-based order', we are trying to suggest that it is neutral and that it just exists – but that's very clearly not how it is perceived by many people in many other countries around the world, and not just in countries like China and Russia. The pushback you'll get from many other states is what you have is a system of hegemony and hypocrisy. Whenever you have a great power in a system, that power has the ability to define the rules – which is hegemony – and also to break those rules with impunity – which is hypocrisy. So we start seeing the invocation of the global rules-based order for Russia in Crimea... and to ignore the role of the United States, Australia and others in Iraq, which has been more destabilising. To look at what China is doing in the

South China Sea and to ignore what the United States is doing in the trade sphere. When we put forward a global rules-based order, we can also be accused of wanting to protect hegemony, even if it's not ours; we've ridden on the coat-tails of it, and also engaged in some form of hypocrisy. And if our goal is to convince others who are not like ourselves, then it's not clear that that's quite the way to do it. And so, I think it's something we need to be very conscious about when we use this terminology and when we think about who our audience is."

Professor Anthea Roberts
School of Regulation and Global Governance, The Australian National University

"It's very dangerous to make a sharp dichotomy between a power-based order and a values-based order. We need to get beyond saying that the rules-based global order has European origins and so when non-European countries start to exert more influence, they're going to want something quite different. I think that the UN Charter and the League of Nations is quite a significant moment for much of what was the colonised world... And the values in the UN Charter, particularly the rules around the use of force, I think it have really been taken on... you see them replicated throughout the Asia Pacific. But then we have the "liberal" part, and I think that's where there's been real difficulty. "Liberal" is a very vague term in that it can just mean enlightened, it can mean free, but it also has this other connotation of meaning democratic, and clearly that was not in the UN Charter. Everyone is an equal member in the UN Charter, regardless of whether you're democratic or not. I think the problem we have today – and I think one that will be dangerous for Australia in adopting a discourse around rules-based global order... is that the US has articulated, very

explicitly at times, the idea of liberal hierarchy: the idea that the United States and democracies have a special right to use force and to invoke humanitarian interventions... It's part of US exceptionalism. I think that this part of the rules-based global order is something that non-US allies can't buy into and are very suspicious of. And I think it's a problem for us because we start to look like we are weaponising this rules-based global order against non-democracies."

Dr Greg Raymond
Strategic and Defence Studies Centre, The Australian National University

"The fact is the 'rules based international order' is a highly contested idea, and is not something on which scholars or experts around the world agree, even as a mere framework for international cooperation. The notion attracts criticism from many influential scholars, because it is not the product of consensus; because it is not 'inclusive', indeed many elements are deliberately exclusive; and because it is not universal, meaning its provisions apply to all countries alike, and are able to be put into practice on the basis of equality. A 'rules based international order' is, in reality, a political or even an ideological statement: at best expressing an aspiration; at worst, articulating a basis for future division and disagreement. Some see it not necessarily as a powerful and therefore unifying intellectual concept, but rather as a vehicle to end bipartisanship in foreign policy and national security policy. Moreover, it smacks of a 'knee-jerk', fear-based reaction to the rise of China, rather than 'an idea whose time has come'."

Trevor Wilson

Visiting Fellow, Coral Bell School of Asia Pacific Affairs, The Australian National University and former Ambassador, Department of Foreign Affairs and Trade

Order, Rules and Law

"As I understand international order and rules, they are closely linked, but they are different because, as I see international order, it involves not just the rules, but also the different regimes or different architectures. Of course the order is evolving, changing and updating. The audience is also evolving. When we talk about rules, I think what's important is the clarity of the rules, the understanding of what kind of rules are referred to in the UN Charter. When we talk about rules, it's important that we're talking about rules that are universally accepted, or more or less shared, and that we have a clear understanding about these rules. The last point is, I think, when we talk about the rules, it is important the rules should be followed consistently, not selectively: that is, not with different standards."

His Excellency Cheng Jingye
Ambassador of the People's Republic of China to Australia

"I draw a distinction – which I think there is – between rules and laws. Some of the dimensions of the international order are more law-driven with signed treaties. In other areas, the rules are more normative; we assume that we should follow the rules. One of the things for me, looking back 70 years, is how much change there has been. The norms and values on the environment, for example, are really not there in 1945, but a whole group of assumptions about the way in which we should think about the environment has emerged over that period. Or Indigenous rights, for example: all except a few people hadn't thought about in 1945, but it's now much more

central to the way we think about the way we should operate in the world."

Professor Shirley Scott FAIIA
Head of the School of Humanities and Social Sciences, UNSW Canberra

"Why diminish the ultimate status and role of international law? Why not encourage a rising China to aspire to the highest standards of international accountability and transparency? Why not encourage a declining United States to quietly embrace a system that protects US interests without demanding additional cost/burden sharing?"

Trevor Wilson
Visiting Fellow, Coral Bell School of Asia Pacific Affairs, The Australian National University
Former Ambassador to Myanmar, Department of Foreign Affairs and Trade

"We need to acknowledge that there is a contestation of ideas and values around the system that is now more sharply at play and it will not endure exactly as it is. We need to identify the aspects that we want to preserve and what we are prepared to give up. That for me is ultimately the question, not just as an international lawyer, but also more importantly as somebody invested in the system. What do we have to give up in order to keep it?"

Dr Suzanne Akila
The Australian National University

Chapter 2:
The Rules-Based International Order and the Foreign Policy White Paper

The Rules-Based International Order and the Foreign Policy White Paper

Richard Maude
Deputy Secretary, Department of Foreign Affairs and Trade

For Australian foreign policy, there are few issues of greater significance than the continued success – indeed the future – of the rules-based international order, the global environment in which we operate.

I will structure my observations around three propositions:

- First, to recognise the significance of the strains on the rules-based order. The current order is changing and its liberal character is contested and weakening.
- Second, to argue that while it is difficult for a middle power like Australia to influence an international system predominantly shaped by the actions of much larger nations, there are things we can and should do in response to current trends. The Government is stepping up its support for rules and institutions. The prime minister, foreign minister and trade minister, among others, are leading these efforts. They are speaking up for the system, encouraging reform and driving positive agendas. Importantly, although it may feel so at times, we are not alone in this venture.
- Third, in a more contested and competitive world, we need to manage risk through a diversified foreign policy portfolio. Where we can rely less on the rules-based order to deliver outcomes that matter to us and to protect our interests, other components of Australia's foreign policy must carry the burden.

Challenges to the Rules-Based Order

As Allan Gyngell noted in the previous chapter, Australia benefits from the rules-based order because we will never be powerful enough to impose our will on the world. We support strong rules and institutions where these can constrain the exercise of coercive power that might hurt our interests and erode our sovereignty.

The rules-based order plays an important role in managing security challenges, such as weapons proliferation and terrorism. It provides the framework for our effort to support universal human rights. A rules-based trading system centred on the World Trading Organization (WTO) strongly advances Australia's prosperity. We also support rules and institutions where these promote responses to global challenges like climate change or health security.

This is important because many of the challenges we face in a globalised and interdependent world can only be solved through collective action. They cannot be managed by countries acting alone nor by applying only the narrowest conceptions of national interest. In short, a rules-based world often requires a bit of give and take.

None of this is to be naive about the flaws of many global institutions nor the ability and willingness of great powers to be selective in their adherence to rules. Nor is it to deny, even in a world with many more international actors, that sovereign states and the power they wield remain the bedrock of global order.

Still, the simple proposition which sits at the heart of the discussion on rules and institutions in the Foreign Policy

White Paper[1] remains that – to the extent we can achieve this – Australia and Australians "will be more secure and more prosperous in a global order based on agreed rules rather than one based on the exercise of power alone".

The Government is therefore deeply concerned by current pressures on the rules and institutions that underpin global cooperation. These strains reflect fundamental and permanent shifts in the broader global order.

While the United States is still the most powerful nation, it can no longer dominate in the way it used to. The White Paper's GDP forecasts out to 2030, which attracted considerable attention at the time of publication, demonstrate this powerfully. We live in a world where more great powers have the resources and the will to shape global order to suit their interests, and we should not be surprised that they seek to do so.

Indeed, the future of the global order and its rules-based component will be determined as much as anything by how the major powers – particularly the United States and China – manage strategic competition and to what extent they can find agreement on the rules and arrangements that should guide responses to shared challenges.

The White Paper chronicles other forces challenging rules-based order, including anti-globalisation, protectionism, populism and growing nationalism. In some countries in the West, including in the United States, elements of the current order are no longer seen as supporting key national interests.

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[1] Department of Foreign Affairs and Trade, *2017 Foreign Policy White Paper* (Commonwealth of Australia, 2017), available online: https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper/fpwhitepaper/index.html

I won't elaborate on all this since these trends are covered in the White Paper. I will say that there is no doubt that since the White Paper's publication events have continued to move in directions that challenge Australia's national interests.

The pace of change had quickened and there are days when we all feel that palpably. Consensus on some rules and norms has become weaker. Some institutions have become less effective. Cooperation on some major global challenges has become harder. Power and unilateralism, rather than rules-based processes, are being used to try to shape outcomes, solve grievances and pursue national interests.

No wonder at times we are no longer sure of a world we thought we knew or that things that seemed solid and true now elude our grasp.

Responding to Change

So, how do we respond? We must of course acknowledge and respond to the significance of the shifts we are seeing. Equally, we should recognise that, even as the global order changes, not all rules are contested. Much of the institutional architecture of the international system has proven resilient and is valued by many countries large and small.

United Nations agencies continue to play a vital role in health security and disease control, and provide support to refugees in Africa, the Middle East and elsewhere. This in turn reduces the level of instability transported across borders. UN Security Council authorised sanctions have been central to global efforts to curtail North Korea's nuclear ambitions.

Most of us barely notice the rules that help keep maritime shipping safe or the vast global aviation industry running smoothly.

The strains on the World Trade Organization are evident for all to see but even its fiercest critics tend to agree that if it did not exist we would have to invent it. The Trans-Pacific Partnership trade agreement survived US withdrawal and if the US leaves the Paris climate change accords they also will endure.

In our own region, however imperfectly, ASEAN continues to promote consensus and international law and to develop parts of the rules-based order, including the most important diplomatic forums in which the great powers of the Indo-Pacific meet.

There are many other examples. My point here is not to create a laundry list but to be clear that even in these challenging times we have something to work with. There will always be some kind of rules-based component of the broader global order. I think we can be confident of that, even if we can't be certain now how effective and extensive it will be in the future and whose interests and values it will predominantly reflect.

Australia's national interests therefore remain strongly served by seeking to protect and promote rules and institutions which support our prosperity and security. The Government is doing just that, and in several important ways.

First, the Government is speaking up in defence of rules-based order. In launching the White Paper in 2017, Prime Minister Turnbull was clear that it was manifestly in Australia's

interests to defend an international system of norms, rules and institutions.

In the Indo-Pacific, Prime Minister Turnbull has been a vigorous defender of a region in which the rule of law protects all nations and open markets facilitate the free flow of trade, capital and ideas. Minister for Foreign Affairs Julie Bishop has made promoting and defending rules-based order one of her highest-priorities. Minister for Trade, Tourism and Investment Steve Ciobo has been equally firm in resisting the global mood of protectionism. As Mr Ciobo puts it, the system of international rules and regulations that makes up our rules-based international system is a virtue because "in the global system, the alternative to rules is anarchy."

This committed defence of rules-based order means Australia is at times at odds with even our most important bilateral partners. We prosecute these differences respectfully but with a clear sense of the Australian national interest.

Second, Australia has been firm in its commitment to stay engaged in the rules-based order. If we don't continue to help shape responses to global issues then others will, potentially in ways that diverge from our interests and values.

Australia has been clear, for example, that we will not follow the United States out of the Human Rights Council. Minister Bishop has reiterated Australia's commitment to a strong multilateral human rights system and to advancing human rights globally saying, "It is in our national interest to shape the work of the Council and uphold the international rules-based order".

Minister Bishop has also been clear that Australia will continue to support the Joint Comprehensive Plan of Action to

limit Iran's nuclear capabilities, while Iran remains in compliance with the agreement. She led the international push to have Russia accept state responsibility under international law for the shooting down of MH17.

Together with Japan, Australia led the successful efforts to revive the TPP trade agreement after US withdrawal. We remain committed to the Paris climate accords.

And we demonstrated the power of international law to resolve disputes peacefully through the United Nations Convention on the Law of the Sea (UNCLOS) conciliation process which reached an agreement on new maritime boundaries with East Timor.

Third, the Government is promoting and supporting the reform and modernisation of multilateral institutions and processes. There is no doubt that in some areas the multilateral system needs renovating and adapting to meet contemporary circumstances. Finding consensus on reform is often exceptionally hard but progress is possible.

For example, Australia is working to sustain the World Trade Organization. We are pursuing opportunities to demonstrate the value of the WTO's negotiating function including, for example, by leading efforts to initiate negotiations on new rules for digital trade in the WTO.

Australia is committed to reform to strengthen the Human Rights Council's credibility and effectiveness. We need stronger processes to ensure HRC members uphold the highest human rights standards. We should also strengthen civil society engagement, and reduce the number of resolutions and proliferation of mandates so that the

organisation can focus on the most important human rights situations.

Australia also supports UN Secretary-General Guterres' reform agenda, which spans development, peace and security, and management. In 2018, the UN General Assembly adopted a resolution on a package of reforms for the UN development system. While far from perfect, the package reflects a balance of Member State demands. Australia was involved in negotiations every step of the way.

Australia was also a strong supporter of the World Bank's recent US$13 billion capital increase, the largest in the 64-year history of the Bank. With this fresh injection of capital, the Bank will be able to lend an additional US$190 billion over the next decade and continue its vital role in promoting high standards and norms on issues such as government procurement and environmental and social safeguards for infrastructure.

Reform also means recognising the greater weight of China and other new and emerging powers in the system. We've done that in supporting International Monetary Fund quota reform, and in participating in the Asian Infrastructure Investment Bank, an institution whose development reflects the profound changes that have taken place in the past decade in China's economic and strategic influence.

An effective rules-based order must be able to accommodate different forms of government. But it is also true that the liberal character of the order has long been important to Australia. As the White Paper puts it, our national interests will be best served by an evolution of the system that remains anchored in international law, support for the rights and freedoms in the UN declaration and the principles of good

governance, transparency and accountability. Here, of course we seek as much as possible to align our interests with our values.

Fourth, the Government is working with like-minded partners to support rules-based order. The coalitions within which we work tend to change depending on the issue and institution. But the key point is that many nations, large and small, remain vested in the idea and practice of rules-based order.

We are supporting the development of a Ministerial-level dialogue on WTO reform, for example. We work with a range of countries to protect the credibility and effectiveness of the United Nations. For example, we have worked with like-minded partners to defeat efforts in the United Nations to counter efforts to challenge well-established human rights norms.

In the Indo-Pacific, we have supported joint efforts to ensure the effective implementation of sanctions against North Korea and to uphold maritime law and freedom of navigation and overflight.

Spreading Risk

My third proposition is about spreading risk. Even as we step up efforts to promote and protect the rules and institutions that support Australia's national interests, the Government recognises that uncertain times require balance in our foreign policy. To be sovereign, not reliant, to quote Prime Minister Turnbull in his foreword to the White Paper, is not to give up the rules-based order. Rather it is to recognise that where rules and institutions are not able to advance our national interests, Australia has to take responsibility for its own security and prosperity.

In truth, this is not an entirely new proposition for Australia. We have never, for example, relied solely on the rules-based order for our security. Our Alliance with the United States, other key bilateral partnerships and our own defence and national security capabilities are essential to keeping Australia and Australians safe, secure and free.

Similarly, it has been a long time since anyone had any expectations of a comprehensive trade liberalisation deal in the WTO. We have responded, as many other countries have done, by pursuing bilateral and plurilateral deals that have boosted trade and successfully opened new markets for Australian exporters. In 2013, free trade agreements covered 26.4 per cent of Australia's two-way trade. Today, FTAs currently in-force or concluded cover 68.7 per cent of our trade. And once Australia has concluded negotiations currently underway, 88 per cent of our trade will be covered by free trade rules and mutual commitments.

While it is not and cannot be the last word on this subject given the pace of current change, the White Paper's framework enhances Australia's ability to support a rules-based order while also pursuing policies that help hedge against a more competitive and contested future.

For example, the Government is:

- Strengthening Australia's bilateral partnerships, particularly but not exclusively in the Indo-Pacific
- supporting ASEAN and ASEAN-centred regional architecture
- using minilateralism, notably our quadrilateral and trilateral partnerships, to support security and prosperity in the region

- advancing regional trade integration through the Trans-Pacfic Partnership-11 agreement and our leading role in the Regional Comprehensive Economic Partnership negotiations
- seeking global economic opportunity and diversified markets, for example through the free trade agreement with the European Union
- stepping up our engagement in the Pacific
- expanding Australia's diplomatic network
- investing significantly in our defence force and broader national security capabilities.

Our domestic policy settings are also critical to our ability to navigate a changing world. The White Paper's first substantive chapter emphasises this point strongly and underlines the Government's commitment to a strong competitive economy, a resilient society and effective, transparent institutions free from foreign interference. The Government is also committed to keeping Australia's economy open to ideas, technology, trade, investment and skilled labour, even as protectionist pressures rise.

Conclusion

The White Paper recognises that if current trends persist, Australia will be making its way in an even tougher world: more fragmented, contested and competitive. A world based on narrow conceptions of self-interest with fewer issues on which we can find a sense of common purpose. In such a world, Australia's foreign policy choices will be harder. Our engagement with the world might become narrower and more transactional.

That future is not however pre-determined. We should be neither pessimistic nor fatalistic. Analysis and understanding

are important but we can't in the end just admire the problem; we have to get on and make our way in the world we have rather than the one we might want. We should do so with a measure of confidence, recognising the many advantages we still enjoy.

As the White Paper puts it, an active, determined and agile foreign policy built on our strong domestic foundations, and with regular reviews of our settings, will help sustain our influence and secure our interests in this challenging period.

Chapter 3: Australia and the Law of Armed Conflict and Arms Control

Active and Creative Multilateral Engagement serving Australian National Interests

John Quinn
Former Ambassador and Permanent Representative to the United Nations and Ambassador for Disarmament in Geneva

I am pleased to have been invited to share some observations on the two inter-related tracks of the rules-based global order – disarmament and international humanitarian law (IHL) – as well as to discuss Australia's role in their past, current and future evolution.

My perspective is that of a diplomatic practitioner and generalist, conditioned by my experience from 2014 to 2017 as Australia's UN Permanent Representative and Ambassador for Disarmament in Geneva. However, having retired recently, the views in this chapter are my own personal ones, not those of the Australian Government.

I am not an historian, so my focus in this presentation will be more on policy options for the future. Nor am I an international lawyer or a disarmament specialist. Australia can boast a number of such real experts who have played an important role over recent decades in their fields. Now more than ever we need their creative ideas as we seek to chart our course for the next 5-10 years on both disarmament and IHL. Finally, this is a vast topic so I have necessarily had to be selective.

Before taking a "health check" on the rules-based global order which relates to both disarmament and to IHL, it is necessary to unpack what is now a complex, sprawling and loosely interlocking "ecosystem". These issues cut across two of the three pillars of the Charter of the United Nations – peace and

security, and human rights – but are also relevant to the third pillar, development. I have taken the liberty of addressing IHL in parallel with disarmament because the substantive and institutional development of these two fields has been closely inter-related. However, they are not routinely addressed together and are worthy of further analysis through the prism of their inter-connection. I shall use the term "disarmament" as short-hand for "disarmament, arms control and non-proliferation" as this longer formulation is a more accurate description of the subject matter of relevant multilateral arrangements. I also appreciate that, in using the term "IHL", I will sometimes be glossing over conceptual issues, including how IHL relates to international human rights and other bodies of international law.

Multilateral Disarmament and IHL: Institutional Aspects

The UN remains at the centre of the "ecosystem" which deals with disarmament and IHL. It could also be said that multilateral engagement on these two themes has contributed to the UN "brand" generally maintaining its unique standing and credibility, despite the UN's manifest failures and deficiencies. Underpinning this ecosystem is a range of binding international treaties, as well as softer norms and arrangements, including transparency and confidence building measures, mostly developed since the Second World War.

Not surprisingly, most media, academic and other commentary focuses on specific, high-profile disarmament initiatives. However, the prosaic reality is that the main day-to-day action in these fields, including in relation to international oversight and assistance with implementation of relevant treaties, lies within a complex network of multilateral meetings, secretariats, reports and other relatively routine processes. Keeping this ponderous machinery running

effectively requires sustained and significant diplomatic, administrative and financial effort. Much of this vital work takes place under the radar, but if it falters, this machinery risks fraying and unravelling.

One current challenge particularly affecting the conventional disarmament field is the failure of states parties to pay their dues under the relevant treaties. For most countries relatively modest amounts of money are involved. Funding shortfalls have resulted in the threatened cancellation and truncation of recent meetings, such as the important annual conferences of states parties to the Mine Ban Treaty and the Convention on Certain Conventional Weapons (CCW) as well as the Biological Weapons Convention. This problem is ongoing.

Geneva takes the multilateral lead on disarmament as the seat of the Conference on Disarmament (CD) and regular host to many meetings of states parties and secretariats of relevant treaties. It is also at the forefront on IHL and humanitarian affairs where the International Committee of the Red Cross (ICRC) and International Federation of Red Cross and Red Crescent Societies (IFRC), both headquartered in Geneva, continue to play a central and highly respected role. Geneva also hosts many non-government organisations working on disarmament, human rights and humanitarian issues.

New York is the seat of the UN General Assembly, notably its First, Third and Sixth Committees, the UN Disarmament Commission and the Special Session on Disarmament (SSOD). The International Atomic Energy Agency (IAEA) – the key UN agency dealing with safeguards and verification, nuclear safety and security, and peaceful uses of nuclear energy – is based in Vienna. This city hosts other relevant mechanisms such as the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). The Organisation for the

Prohibition of Chemical Weapons (OPCW) is based in The Hague.

The UN has by no means a monopoly in pursuing these agendas. A range of regional, plurilateral, bilateral and national arrangements – mostly at intergovernmental level – have also been established.

Particular mention should be made of the major contribution to non-proliferation and arms control which has been made by various export control regimes. Probably the most familiar is the Australia Group, an informal forum which seeks, through the harmonisation of export controls, to ensure that exports do not contribute to the development of chemical and biological weapons. But four others – the Nuclear Suppliers Group (NSG), the Missile Technology Control Regime, the Zangger Committee and the Wassenaar Arrangement (the last two basically dealing with conventional weapons) also do crucial work.

A striking feature of both disarmament and IHL is the central contribution of players outside governments including non-government organisations, other civil society groups, jurists and academics.

Some History Relating to IHL and Disarmament

IHL has a long pedigree. By way of brief history, the celebrated First Geneva Convention of 1864, inspired by International Red Cross founder Henry Dunant's searing experiences of the Solferino battlefield in Northern Italy in 1859, was a first serious attempt to codify through a humanitarian prism how armed conflict should be conducted.

Before and after the First World War there was considerable focus on seeking curbs on inhumane weapons, notably the use of chemical weapons. Experience in the Second World War also led to a push to renovate international law relating to armed conflict which produced the universally-ratified 1949 Geneva Conventions. In the mid-1970s a series of diplomatic conferences in Geneva "restated" and "developed" the laws of war into the broader concept of IHL. This exercise drew on international human rights principles and produced important additional protocols to the Geneva Conventions.

The invaluable historical and ongoing contribution made by the ICRC and national Red Cross and Red Crescent societies to promoting understanding of and respect for IHL is unique. Every four years, an International Conference of the Red Cross and Red Crescent convenes in Geneva. A key agenda item at the December 2015 Conference was "Challenges in IHL relating to contemporary armed conflicts". The ICRC's report on this subject provides an excellent survey covering subjects including: the increasing complexity of armed conflicts, characterised, for example, by the proliferation and fragmentation of non-state armed groups, urban warfare and broader geographical scope; pressure points such as the protection of humanitarian workers; and the application of IHL to cyberspace and to weapons systems integrating artificial intelligence.[1]

Turning to disarmament, the League of Nations had this subject firmly on its agenda, but mainly through the lens of trying to avoid a repeat of the arms race that fuelled the

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[1] 'IHL and the challenges of contemporary armed conflicts', considered by the 32nd International Conference of the Red Cross and Red Crescent in Geneva. Conference document 32IC/15/11, 31 October 2015. These subjects were also considered at the 33rd Conference in December 2019.

carnage of the First World War. League members explicitly committed to "the reduction of national armaments …to the lowest point consistent with national safety."[2] The League even hosted forums on this subject to engage civil society. However, it did not make much headway.

After the Second World War, the first resolution of the UN General Assembly in 1946 was a call for global elimination of nuclear weapons and other weapons of mass destruction. However, the multilateral system was slow to move on this front, primarily due to Cold War divisions.

One significant breakthrough was negotiation of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which entered into force in 1970. A series of treaties followed which dealt with biological and then chemical weapons, as well as nuclear testing. Conventional disarmament treaties have also been negotiated and have entered into force with broad levels of signature and ratification or accession, including treaties on land mines and cluster munitions and, most recently, trade in conventional weapons through the Arms Trade Treaty (ATT).

Australia's Contribution: a Proud Record

Much has been written about the leadership role played by Australia on multilateral arms control and disarmament, especially over the two decades from the mid-1980s. A good survey can be found in Matthew Jordan's chapter in *Australia and the United Nations*.[3] Australia's engagement on this

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[2] Article VIII, Covenant of the League of Nations.
[3] James Cotton and David Lee (Eds.), *Australia and the United Nations* (Longueville Books, 2012).

agenda picked up momentum from the 1970s after Australia became a party to the NPT.[4]

Underpinning Australia's major diplomatic investment in global disarmament was a recognition on the part of successive governments of two key inter-related propositions. The first was that Australia should curb proliferation of Weapons of Mass Destruction (WMD) in the Asia-Pacific region as a strategic priority and national security objective. A second was that the multilateral "tool kit" would be useful and relevant in this regard. These propositions are now often contested or forgotten, but they still hold true. Australia's regional and global agendas are not "zero sum".

Other Australian national concerns, such as ending atmospheric nuclear testing in the Pacific and managing Australia's then new role as a significant uranium exporter were also in the mix, along with humanitarian considerations.

A good way to illustrate Australia's sustained and significant contribution is to highlight a few notable examples:

- Under the Hawke Government, Australia took a lead role in creating a nuclear-weapons-free zone in the South Pacific under the Treaty of Rarotonga.
- In 1984, Australia took the initiative to establish and chair the Australia Group export control regime.
- The Australian delegation helped secure the adoption in 1992 of the landmark Chemical Weapons Convention

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[4] For a comprehensive survey of the negotiation from Australia's perspective see Wayne Reynolds and David Lee (Eds.), *Australia and the Nuclear Non-Proliferation Treaty 1945-1974* (Department of Foreign Affairs and Trade, 2013).

which it had redrafted to include crucial verification provisions and unequivocal language on prohibition.

- In 1995, Australia and others successfully backed the indefinite extension of the NPT.
- In 1996, Australia broke a log-jam by successfully pushing to have the General Assembly adopt the Comprehensive Nuclear-Test-Ban Treaty (CTBT) which had been languishing in the Conference of Disarmament.
- In 1997, Australia was the first country to adopt the Additional Protocol which strengthens IAEA safeguards, another key piece of the nuclear non-proliferation puzzle.

Australian governments have also recognised the need for the injection of new thinking on disarmament and arms control, and developing approaches which lend renewed momentum, especially on the nuclear disarmament front.

In 1996, the Keating Government launched the Canberra Commission on the Elimination of Nuclear Weapons which brought together prominent international experts who recommended a blueprint for further action. This was followed up in 2009 by the International Commission on Nuclear Non-Proliferation and Disarmament (ICNND) initiative, co-chaired by former Australian and Japanese foreign ministers Gareth Evans and Yoriko Kawaguchi. Their substantive report is still widely seen as a key point of reference.[5]

Australia has also recorded significant achievements on the conventional weapons disarmament ledger. A relatively recent

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[5] Gareth Evans and Yoriko Kawaguchi, *Eliminating Nuclear Threats - A Practical Agenda for Global Policymakers* (International Commission on Nuclear Non-proliferation and Disarmament, 2009).

highlight was Australia's instrumental role in securing adoption by the UN General Assembly of the Arms Trade Treaty in 2014, which included supporting its early entry into force and contributing to the establishment of institutional arrangements to promote global adherence and implementation.

Consistent with its Indo-Pacific security and other priorities, Australia has taken the lead in practical promotion of multilateral disarmament and arms control instruments and other relevant action among Pacific Island Countries, with ASEAN members, and with other regional powers, including through the ASEAN Regional Forum. This engagement has embraced capacity-building and training workshops, conferences, seminars, simulation exercises and diplomatic representations.

Turning to international humanitarian law, Australia also has a long and proud history of productive engagement in the evolution of IHL, both by governments – including by diplomatic, legal and defence representatives – as well as civil society, notably the Australian Red Cross, prominent Australian jurists and academics. James Cotton and David Lee flag in their book that, curiously, the task of preparing a consolidated history of this collective Australian effort on IHL remains to be undertaken.[6]

The horrors of the First World War not surprisingly galvanised focus in Australia on the conduct of war, including the imperative of delivering medical and other assistance to combatants, as well as of avoiding a repeat of gas attacks, such as in Flanders Fields. Australia's experience in the

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[6] James Cotton and David Lee (Eds), 'Australia and the United Nations', Longueville Books, 2012

Second World War, particularly in the Pacific theatre, generated particular attention to better protection of prisoners of war, and accountability for war crimes. After the Second World War, a much wider agenda unfolded.

To this day, considerable Australian governmental and civil society effort continues to be sustained with regard to enhancing understanding, compliance with, and implementation of IHL. This effort also focuses on *how* IHL applies to various new international developments. Another priority is examining where more legal precision is required, such as on detention, particularly in relation to Non-International Armed Conflict (NIAC). A good illustration of ongoing leadership was Australia's role chairing the Commission on Contemporary Challenges to IHL at the 2015 International Red Cross Red Crescent Conference.

As with disarmament, Australia – both at governmental and civil society levels – has played a lead role in promoting IHL in its region, particularly among Pacific Island Countries but also in the broader Indo-Pacific.

Looking Forward: Time for Consolidation and a Change of Tack: The UN as a Clearing House Rather than Treaty "Factory"?

There will always be work to be done in relation to norm setting, especially in response to new developments, such as technological innovation. A case in point is the current international interest in developing international "rules of the road" in relation to security in cyberspace and to lethal autonomous weapons systems (LAWS). Such work should continue with rigour and determination, taking fully into account established international law and the need to find practical solutions to real-world problems.

Setting globally-agreed new soft and hard norms to address such issues is of course challenging and time-consuming. At this time of unprecedented stress on the multilateral system, it is particularly important to avoid judging the rules-based IHL and disarmament systems primarily by their ability and speed in developing new treaties. It is arguable that we have now reached a stage where the well-entrenched multilateral instinct of rushing to negotiate new binding multilateral instruments is no longer appropriate.

In many cases, the required investment of diplomatic capital would be better made elsewhere, notably in strengthening compliance with and implementation of established treaties and other norms. Indeed, the UN could now be more useful as a clearing house for international exchange on better implementation of existing norms, including sharing experience of obstacles and challenges to compliance, as well as success stories.

In dealing with new issues, rather than opting for the default setting of further formal treaty negotiations, the UN could facilitate exchange between member states and other stakeholders: comparing assessments, seeking common understandings and, importantly, focusing on existing applicable legal and political commitments, such as IHL. There are several good arguments for such a change of tack.

First, it is increasingly difficult to secure the required consensus to achieve outcomes in multinational negotiations on thorny global issues. This is not only a function of diffusion of global power, but also of the rigid bloc system and other factors that continue to impede multilateral diplomacy.

Second, developments in technology and society are moving so quickly that the necessarily protracted process of traditional multilateral negotiations cannot keep pace with what is happening or about to happen in the real world.

Third, and in a related vein, multilateral consideration of topical security and humanitarian questions needs to engage more effectively with the business community and other stakeholders – whether this be in relation to disarmament and arms control, cyber, security in outer space or IHL. The imperative of so-called "multi-stakeholder" approaches is beginning to gain wider multilateral acceptance, especially in relation to cyber. However, there is still much to be done in this field, including how this model should best work in practice in different contexts. Nor should it be forgotten that the core business of the UN remains interaction between sovereign nation states which are jealous of their prerogatives, especially if national security interests are in the mix. This is the case for both disarmament and IHL. Moreover, the private sector is not monolithic. Different businesses – arms manufacturers, satellite operators, internet service providers or insurance companies – have different equities in relation to say multilateral consideration of small arms, cyber, or security in outer space.

One key positive dimension of multi-stakeholder approaches is the significant contribution non-government organisations (NGOs), academics and other civil society representatives can make on disarmament, IHL and other fields, including protecting and promoting human rights and undertaking humanitarian action. Australia has been a committed supporter of such engagement and has joined NGOs and others in expressing concerns about shrinking civil society space in a range of countries. The proliferation of social media has given NGOs huge new opportunities for influence

but has also placed them in an even more competitive environment for attention and funding. While some tensions are inevitable between governments and NGOs, multilateral processes work best when officials and NGO representatives work professionally together, understanding their respective differences.

Fourth, and most importantly, the major challenge facing both multilateral disarmament and IHL is lack of effective implementation or ignorance of existing treaties and other norms, and sometimes even blatant contempt of them.

For all these reasons, there is a good case to be made for UN member states and other multilateral stakeholders to give less emphasis to developing new binding treaties, and put more effort into effective implementation of existing ones, information exchange, and to identifying softer norms and agreed principles in order to address emerging issues.[7]

The Core and Interconnected Challenges of Implementation and Accountability

The overall effectiveness of multilateral outcomes on disarmament and IHL is a function of the degree of constructive engagement of all participants. Notably, implementation of and compliance with treaty and other relevant obligations are primarily a function of the political will of UN member states. It is too often forgotten that binding international legal obligations under treaties are voluntarily undertaken by ratifying or acceding states.

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[7] The COVID-19 pandemic has disrupted multilateral processes, including treaty negotiations and development of softer norms. It is to be hoped that it will also generate some new, creative approaches to multilateralism, including use of technology to engage more effectively a wider range of stakeholders.

In the field of nuclear disarmament, the designated Nuclear Weapons States (NWS) under the NPT, which are also Permanent Members of the UN Security Council, have special responsibilities, including under Article VI of the NPT.

It is to be hoped that the Trump Administration, despite its broad reservations about the UN, will recognise the valuable contribution to global peace and security which continues to be made to core US national security interests, and those of US allies, by the multilateral arms control, non-proliferation and disarmament machinery which has been developed over decades of strenuous diplomatic effort. US disengagement would seriously set back these processes.[8]

Russia, with its large nuclear arsenal, remains a key, robust and skilful player on disarmament and other strands of multilateral consideration of international security, including cyber and outer space. Russia should do more to discharge its special responsibilities, notably in relation to nuclear transparency and reporting. It has also blocked UN action on non-compliance of established norms, notably on the use of chemical weapons in Syria, which has done real damage to the multilateral system.

China has made clear that it wants to increase its multilateral engagement. This is appropriate given China's major global strategic, economic and political weight. At the same time, Australia and others should continue to encourage China's constructive multilateral engagement which strengthens rather

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[8] The longer term impact of the Trump Administration's policies in this field remains to be seen. Much will also depend on the Biden Administration's ability to reassert more orthodox US approaches which recognise the value of multilateral approaches, rebuild US diplomatic credibility and better manage a more multipolar world, especially Russia and a rising China.

than undercuts the rules-based global order. China is, for example, particularly active in cyber and outer space negotiations, but closely collaborating with Russia in promoting unhelpfully state-centric conceptions of these issues. China is also reluctant to provide greater transparency in relation to its growing nuclear arsenal, as required under the NPT Review process.

Other major powers also have major responsibilities in relation to disarmament, arms control and IHL. While formally outside the NPT framework, India's role is increasingly important on nuclear and other multilateral strands of international security. Japan has been a critical partner of Australia in these fields, especially on nuclear disarmament, and remains so. Other countries in the region, notably Indonesia – which is the long-standing Non-Aligned Movement coordinator within the UN on disarmament – are also active.

At the apex of the accountability system for implementation of disarmament and IHL obligations giving rise to grave threats to international peace and security is the UN Security Council. The Council's difficulties in responding to serial contempt of binding UN Security resolutions are all too well-known.

Development of nuclear weapons and ballistic missile programs by the Democratic People's Republic of Korea (North Korea) is a case in point. Nevertheless, it should be recalled that North Korea has in fact been the subject of several waves of increasingly tough sanctions under international authority which have played at least some role in encouraging Kim Jong-un to return to the negotiating table. The international community is watching with keen interest

what progress might be achieved through US-North Korea diplomacy.[9]

If real momentum develops on North Korean denuclearisation, a strong and independent verification regime would be required. The IAEA and other relevant multilateral mechanisms would have a major role to play, providing a huge opportunity and challenge. Another significant piece of this puzzle would be dismantling North Korea's ballistic missiles, and effectively verifying that this had been done.

The UN Security Council's inaction in the face of use of chemical weapons in Syria – as well as other flagrant abuses of international law such as shelling of civilian apartment buildings – is another example cited by those arguing that the rules-based global order is crumbling.

The international community also continues to wrestle with how to curb extreme terrorist violence and other atrocities committed by non-state actors, such as the Islamic State of Iraq and the Levant (also known as ISIS and Daesh), that seem to make a point of thumbing their noses at IHL. Barbarous attacks against unarmed and neutral medical and other humanitarian workers represent further calculated attempts to erode longstanding IHL protections.

Such events have raised fatalistic voices of those who despair that previously accepted norms are now a dead letter in many

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[9] At the end of the Trump Administration, this diplomacy seems to have yielded little of substance. UN Security Council-mandated and other reports suggest that, despite the COVID-19 pandemic and a struggling domestic economy, North Korea has continued to fund development of its ballistic missile and nuclear arsenals through international criminal activity, including cyber hacking.

parts of the world, by virtue both of the attitudes of the transgressors and the lack of effective enforcement.

I would argue, however, that fundamental norms such as the unacceptability of nuclear weapons proliferation, the prohibition of use of chemical weapons, and the core tenets of IHL – humanity, necessity, proportionality and distinction – are not in themselves in crisis. Rather the real challenge is to ensure effective implementation and application, including in evolving armed conflict scenarios such as in cyberspace**.**

On the nuclear weapons front, the widespread expectation after negotiation of the NPT in the 1960s was that around 10-20 countries would develop such weapons in defiance of this treaty. In fact, this breakout has not occurred.

With regard to chemical weapons, Syria's Assad Regime is now basically an international pariah as a function of its recourse to chemical weapons as part of its brutal campaign of military and wider oppression of opposition elements. While the UN Security Council has struggled to address Syria's contempt for this fundamental norm, Organisation for the Prohibition of Chemical Weapons states parties met at a special session in June 2018 to condemn the use of chemical weapons in Iraq, Malaysia, Syria and the UK (the Skripal military grade nerve agent attack in Salisbury). They also voted convincingly to strengthen the powers of the OPCW to attribute responsibility for use of chemical weapons in Syria, and to task the OPCW Director-General to propose options for a universal attribution mechanism for consideration at the Conference of the States Parties to the Chemical Weapons Convention. These initiatives are an attempt to give this key treaty oversight body real teeth in relation to accountability in way that Russia or others cannot veto. It demonstrates that

multilateral processes are capable of evolving to meet relevant challenges, despite resistance from powerful players.[10]

IHL is also a complicated story. On the one hand, there is cause for pessimism in the brutality of conflicts in places like Syria, Iraq and Yemen and in acts of terrorism across the globe. On the other, these cases have certainly raised international awareness of IHL and fundamental humanitarian principles, albeit through a fuzzy lens. There is scope to build on this, both on the part of governments and, perhaps even more importantly, with regard to civil society.

A major challenge recognised by states parties to the Geneva Conventions is how to promote more effective compliance with IHL. While the 2015 International Red Cross Red Crescent Conference achieved productive consensus on priority issues, such as curbing sexual and gender-based violence, it was only able to adopt a modest resolution on compliance. This resolution commended continued discussion "to find agreement on features and functions of a potential forum of states and to find ways to enhance the implementation using the potential of the international conference and IHL regional forums". Finding consensus on the nature of such a proposed forum continues to prove difficult.[11]

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[10] The decision of the 4th Special Session of the Conference of the States Parties to the Chemical Weapons Convention is contained in OPWC Document C-SS-4/DEC.3 of 27 June 2018. OPCW Fact Finding Missions have continued to investigate allegations of chemical weapons use in Syria, and OPCW's Executive Council has also adopted decisions on this subject, such as EC-94/DEC.2 of 9 July 2020

[11] The minimalist compliance resolution adopted at the 2019 International Red Cross Red Crescent Conference, which "requested

IHL is now embedded not only in the core Geneva Conventions, but also in their supplementary protocols, and in several other conventional arms control and disarmament treaties. This provides opportunities as it mainstreams IHL as integral to the treaties in question, but it also poses challenges as it tends to shroud the profile of IHL. A good example is Article 36 of Amended Protocol 1 of the Geneva Convention which obliges states parties to conduct legal reviews of all new weapons, methods and means of warfare to ensure compliance with IHL. Australia rigorously conducts weapons review processes and urges others to do so, for example in dealing with issues such as lethal autonomous weapons systems (LAWS). Another illustration is the Convention on Certain Conventional Weapons (CCW), the mandate of which is to protect civilians from the indiscriminate effects of certain conventional weapons and to protect combatants from weapons that cause unnecessary suffering.

Looking more broadly, the international community is now much more focused on accountability and bringing an end to impunity, especially for grave breaches of IHL and international human rights through the UN Human Rights Council (HRC) and its related processes. Again the Syria case is instructive. The HRC has adopted a series of robust resolutions over the course of this conflict, also setting up a Commission of Inquiry to compile information on breaches of international law for future legal action. In 2016 the HRC also established a new International, Impartial and Independent Mechanism (IIIM) which began preparing dossiers for

states to commit to adopting legislative, administrative and practical measures to implement IHL within their own countries", confirms this conclusion. Progress on other thorny questions, such as the application of IHL to new and emerging technologies and in some aspects of armed conflict, particularly in non-international armed conflict (NIAC), also remains elusive.

subsequent prosecutions for war crimes and other grave breaches of international law in Syria. Australia has strongly supported these HRC initiatives, including contributing voluntary funding to this IIIM. As an elected member of HRC from 2018-2020, Australia has the opportunity to support further development of such accountability mechanisms even more strongly.[12]

Another relevant track is the Responsibility to Protect (R2P) principle, a global political commitment endorsed by all UN member states at the 2005 World Summit to prevent genocide, war crimes, ethnic cleansing and crimes against humanity, and subsequently reaffirmed in numerous UN Security Council resolutions. While not going into detail, I should highlight Australia's active diplomatic engagement on this subject over the last 10 years. The focus of R2P has generally been New York. However, this topic is also firmly on the agenda in Geneva where Australia has chaired the R2P Core Group and has been an active contributor to the Friends of R2P Group, co-chaired by Rwanda and the Netherlands. Australia organised an initiative to relaunch R2P in Geneva in 2015 with a constructive and interactive panel discussion of case studies of a diverse series of countries which had moved from conflict to peace. The focus of the lively discussion – which attracted a full house in the large HRC Chamber – was squarely on the prevention pillar of R2P.

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[12] Australia also supported the establishment of a second Independent Investigative Mechanism – in this case for Myanmar – through adoption of HRC Resolution 39/2 on 27 September 2018. A striking feature of Australia's Human Rights Council membership term was its consistent focus on holding HRC members to a higher standard of accountability for their human rights performance. This included developing and launching in 2018 a pledge by incoming members to commit to constructive engagement with the Council.

A particularly difficult issue is engaging non-state actors, like insurgent groups and terrorists, to promote respect for IHL. Non-government organisations can also help alleviate such critical gaps. A notable contributor in this regard is Geneva Call, established in 2000 with the specific mandate to undertake such work. This organisation is strongly supported by Australia and other like-minded countries.

Protecting Hard-Won Gains While Promoting Much-Needed Reform

A major current challenge for Australia, and its like-minded partners from all regions of the world, is to resist precipitate erosion or even demolition of arrangements and institutions that have generally served us well. It is hard to see the complex web of multilateral disarmament treaties established since the landmark NPT entered into force being successfully renegotiated if it were to be dismantled. Similarly, revisiting the Geneva Conventions in current circumstances could well take us backwards.

At the same time, "business as usual" is just not going to cut it over the coming decade. In particular, the multilateral system must become more responsive to member states' national security and humanitarian concerns, including in relation to impunity, as well as reflecting better the new multipolar global strategic order. Another priority should be to streamline meetings that are currently process-heavy in order to facilitate real dialogue and practical problem solving, to give more attention to prevention, and to better reflect multi-stakeholder realities.

Change and adjustment to the multilateral "ecosystem" of disarmament and IHL tend to be gradual. Everything has to be negotiated, usually through to a consensus. Considerable

vested interests are also in play: among member states, within secretariats, and even with regard to NGO and expert/academic engagement. These two dynamics lead to an inherent conservatism which can be helpful in protecting valuable multilateral processes built up over decades. At the same time, such conservatism generates resistance to and slows sensible and necessary reforms. It also means that significant diplomatic investments are usually required to achieve meaningful change.

An example is the 20-year sclerosis of the Conference on Disarmament (CD) which has defied numerous waves of determined diplomatic effort to make it function properly. There is now lively debate about where multilateral action on disarmament should predominantly lie, given the CD's inability to discharge its role as the sole forum for multilateral disarmament negotiations. Some critics of the CD argue that the UN General Assembly – with universal membership and greater legitimacy – should now supplant the CD. Such arguments have weight and have prompted many UN member states to reduce their investment of time and energy in the CD. However, this body does in fact still have the advantage of a broad and diverse, if not universal, membership, including key players such as the nuclear weapons states (NWS) designated in the NPT and other states possessing nuclear weapons, notably North Korea. It also offers a platform for thoughtful debate about priority international security issues which would be difficult, if not impossible, in the crowded agenda of UN General Assembly's First Committee. If the CD were to be dissolved, a similar but more effective body could not be recreated in current or foreseeable circumstances.

Breaking Down Silos Within the UN System

A striking feature of multilateral work is its siloed character. Different tracks of the rules-based global order have different dynamics, but their interconnections are all too often under-appreciated and under-exploited. Australia has been active in promoting these inter-connections.

By way of example, overarching principles such as IHL can assist in linking action across the UN system, given their strong resonance across the various multilateral tracks such as disarmament, human rights, refugee protection, humanitarian assistance and health. The women, peace and security agenda launched under the auspices of UN Security Council Resolution 1325 in 2000 has also provided a useful platform and organizing principle to promote gender perspectives across disarmament and other relevant multilateral fields. Another such framework is the 2016 Sustainable Development Goals (SDGs), the negotiation of which was a notable UN achievement. The SDGs require all UN member states, whatever their stages of economic development, to account for SDG implementation. They also specifically recognise the significant responsibility of the private sector and other stakeholders outside government for their delivery.

In September 2017, Australia, as Vice President of the Arms Trade Treaty Conference of States Parties, candidate for Human Rights Council membership and Geneva Chair of the R2P Core Group, organised and hosted a successful panel discussion on *The prevention agenda, illicit arms flows and the SDGs – How do they connect?* at the Graduate Institute in Geneva. This event, timed to coincide with the third Conference of States Parties to the Arms Trade Treaty and the HRC's September 2017 session, productively brought

together arms control, human rights, international legal, prevention/ R2P, development and other experts.

Australia has also strongly supported development of common approaches to victim assistance in disarmament, consistent with the view that victims have similar needs, whether their injuries were caused by cluster munitions, anti-personnel mines or explosive remnants of war. Australia has also promoted connections with related multilateral endeavours under the UN's human rights pillar to assist and support people with disabilities.

In other fields, such synergies are not being fully exploited. For example, the 1972 Biological Weapons Convention (BWC) continues to languish for a variety of reasons, including ongoing difficulties with regard to verification. This is despite growing international recognition of new threats arising from advances in biotechnology and the activities of terrorists and other non-state actors. It also flies in the face of rising appreciation of global health security interdependence, reinforced by the 2014-15 Ebola crisis and earlier pandemic threats.[13]

Australia remains actively engaged on these issues. Australia supported involvement of World Health Organization and other health experts in discussions in the margins of the BWC Review Conference in November 2016. Australia's five-year $300m regional health security initiative announced in 2017 is consistent with implementation of its BWC Article X obligations relating to assistance and cooperation with other states.

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[13] For similar reasons, the COVID-19 pandemic should also help intensify international focus on the BWC.

Sustaining Investment in Multilateral Disarmament Machinery

Australia, led by DFAT with support from Defence and other agencies such as the Attorney-General's Department, has maintained a significant diplomatic investment in multilateral disarmament. At the same time, available resources have been shrinking as other priorities have loomed larger for Australia in the current century, notably counter-terrorism, irregular maritime arrivals and, more recently cyber. The same could be said of many of Australia's like-minded partners.

While Australian delegations have continued to be creative, their engagement on disarmament has necessarily been oriented more towards "care and maintenance" than new initiatives. However, given current pressures on the established multilateral architecture, there are expectations that Australia could be doing more to contribute new thinking on the way forward. This would in turn require some extra human and financial resources, as well as a greater appetite for dealing with risk.[14]

One proposal worthy of further consideration would be to appoint a dedicated, Canberra-based ambassador for arms control, non-proliferation and disarmament who could attend relevant international meetings in Geneva, New York, Vienna and other locations, while spearheading inter-agency and multi-stakeholder outreach work in Australia from Canberra.[15]

[14] The advent of the Biden Administration should offer new opportunities to advance practical multilateral disarmament, non-proliferation and arms control activities which would serve not only Australian national security interests, but also those of its US ally.
[15] Amanda Gorely was appointed Australia's inaugural Canberra-based Ambassador for Arms Control and Counter-Proliferation on

This would mirror arrangements in place for counter-terrorism and cyber and send a strong signal of continuing strong Australian commitment to these long-standing agendas.

Where to Next with Multilateral Disarmament and Arms Control

Given the vastness of this topic, I shall focus on four areas of current high interest: nuclear disarmament; the broader conventional disarmament narrative, especially the Arms Trade Treaty and Lethal Autonomous Weapons ; cyber; and outer space. These fit under the disarmament and arms control rubric of the United Nations, while also engaging fundamental principles of international law, including IHL.

Nuclear Disarmament

Frustration at the slowing pace of nuclear disarmament led to a concerted multilateral push for a new convention to ban nuclear weapons. The Treaty on the Prohibition of Nuclear Weapons (Nuclear Ban Treaty) was negotiated swiftly in 2017 and opened for signature and ratification in September 2017.[16]

The long-term effects of this divisive initiative are unclear, particularly as it fails to take due account of the realities of international security. Given current and foreseeable geo-strategic conditions, further significant reductions in nuclear weapons are not in early prospect. Nor are the NPT Nuclear Weapons States (NWS), which must deliver on nuclear disarmament, engaged. The Nuclear Ban Treaty thus looks

18 December 2019:
https://www.foreignminister.gov.au/minister/marise-payne/media-release/ambassador-australia-arms-control-and-counter-proliferation
[16] Entry into force on 22 January 2021:
https://www.un.org/disarmament/wmd/nuclear/tpnw/

unlikely to result in the elimination of any nuclear weapons in the foreseeable future. Moreover, it also risks undercutting the NPT, the cornerstone of the global regime on nuclear disarmament, non-proliferation and peaceful uses.[17]

Despite this, there are still opportunities to maintain forward momentum on nuclear disarmament and non-proliferation. Some positive factors are now in play. Proponents of the Nuclear Ban Treaty usefully acknowledge the need to refocus on progressing the well-established practical and essential steps required for effective nuclear disarmament. These "building blocks" include better addressing verification challenges, starting negotiations on a Fissile Material Cut-off Treaty, promoting the CTBT, and encouraging the NWS to improve transparency by better reporting on implementation of their NPT obligations. This window of opportunity is already being taken up, such as through the Norwegian initiative to establish a Group of Governmental Experts on verification, and Canada's reprise of its long-standing leadership of efforts to launch Fissile Material Cut-Off Treaty negotiations. Transparency and reporting under the NPT should now be a particular priority and will require some heavy lifting with regard to the NWS.[18]

It will be important to the success of the next NPT Review Conference that further steady progress is sustained on this

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[17] See John Tilemann's useful article, "Banning Nuclear Weapons: Don't Be Deceived", *Australian Outlook*, 22 January 2021: https://www.internationalaffairs.org.au/australianoutlook/banning-nuclear-weapons-dont-be-deceived/
[18] Nuclear risk reduction is another important practical step towards nuclear disarmament which appears to have regained useful momentum since 2018.

suite of practical issues.[19] These inter-related initiatives should also be seen and promoted as much needed confidence building measures – between NWS themselves, and between NWS and Non-Nuclear Weapons States. Nor should NPT member states be held hostage again, as occurred at the NPT RevCon in 2015, over issues where consensus is likely to be difficult or elude us completely. Avoiding such a failure will require careful planning and preparation. One way forward might be to pursue a strategy of multiple outcomes documents at the RevCon rather than relying on achieving consensus on one long text which can be manipulated by those voicing the mantra that "nothing is agreed until all is agreed". Proposals for a possible high-level political declaration at the next RevCon to mark the NPT's 50th Anniversary could be helpful in this regard.

Australia is well positioned to play again its traditional bridge-building role at the next RevCon, including as a key player in two platforms which are proving surprisingly useful in relation to advancing nuclear disarmament. The Non-Proliferation and Disarmament Initiative (NPDI), a diverse cross-regional grouping of 12 middle powers, was launched in 2010 by Australia and Japan.[20] NPDI is committed to the

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[19] The NPT was to mark the 50th anniversary of its entry into force at an NPT Review Conference in New York in 2020, but this major meeting was postponed to 2021 due to the COVID-19 pandemic. Prospects for the required consensus outcome at the next RevCon remain clouded, notably by divisions over nuclear disarmament, including the Nuclear Weapons Prohibition Treaty. Handling of the proposed WMD Free Zone in the Middle East, foreseen by the 1995 NPT Review outcome documents, has also proved problematic at previous RevCons.
[20] NPDI's members are Australia, Canada, Chile, Germany, Japan, Mexico, the Netherlands, Nigeria, the Philippines, Poland, Turkey and the United Arab Emirates.

success of the NPT Review process and has provided an invaluable platform for preparation of working papers on priority topics, such as reporting and transparency, strengthening the NPT Review process, negative security assurances and de-alerting. While the 2015 NPT RevCon draft outcomes document could not, unfortunately, secure final consensus support, a significant proportion of it was basically agreed, and much of its language reflected formulations contained in the 18 NPDI working papers submitted to the Conference. NPDI has also provided a useful channel for dialogue with the five NWS, and with other relevant multilateral groupings, such as the New Agenda Coalition (NAC) and the Non-Aligned Movement (NAM).

NPDI could again play a unique role in the lead-up to the next NPT RevCon and during the conference itself, including through its working papers and other efforts to bridge sharp differences between NPT states parties. Further intensified outreach, such as to the NWS, the New Agenda Coalition (NAC) and the NAM, should be part of this effort. Australia assumed the NPDI coordinator role from Germany in 2018, giving it an even more significant role.[21]

A second, less well-known and loose multilateral caucus –- which Australia co-leads with Canada and the Netherlands – is referred to as the Broadly Likeminded Group. It initially came into being in response to the nuclear disarmament humanitarian consequences initiative, gathering momentum as the subsequent push to develop the Nuclear Ban Treaty picked up speed. This diverse group of countries, mostly US allies, share several fundamental views: commitment to effectively verified and irreversible nuclear disarmament; concern about both security and humanitarian dimensions of nuclear

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[21] The Netherlands has now assumed this responsibility.

weapons; recognition of the need for nuclear disarmament to be inclusive and realistic, effectively engaging the NWS; and firm commitment to advance the parallel practical steps – the "building blocks" – required to achieve disarmament. These countries remain well-placed to continue to bring out the complexity of nuclear disarmament, reflecting their distinctive national security and other perspectives. Their input should thus contribute to more sophisticated and realistic and less polarised multilateral discourse.

Another persistent challenge outside the formal framework of the NPT is how best to engage states possessing nuclear weapons which are not parties this treaty. Seeking their greater input on and commitment to practical building blocks required to achieve nuclear disarmament would be a useful first step. In this context, India's constructive participation in the Fissile Material Cut-off Treaty (FMCT) 2014-15 Group of Governmental Experts and the 2017-18 High Level FMCT Expert Preparatory Group should be welcomed.

Conventional Disarmament: The Need for a More Powerful Overarching Narrative

Entry into force of the Arms Trade Treaty (ATT) in December 2014 marked an international milestone in several respects. In particular, it reflected a new, multi-dimensional approach to responding to widely-held but diverse concerns across the world about the need for better regulation of conventional weapons. Small arms and light weapons have been famously described as "Africa's weapons of mass destruction" given their devastating humanitarian and other impacts in that part of the world.

A key principle embedded in the preamble of the ATT is the obligation of each state party to respect and ensure respect for

IHL, thus providing a solid legal framework for responsible arms transfers. Other relevant ATT provisions include an absolute prohibition in Article 6 of arms transfers if the state has knowledge that the arms would be used to violate IHL and the requirement in Article 7 for "an objective and non-discriminatory" assessment of "the potential" for the arms to be transferred "to contribute to or undermine peace and security", and whether they "could be used to commit or facilitate a serious violation of IHL."

A priority challenge for Australia has been to encourage more states, especially in its region, to accede to the ATT. The Indo-Pacific has been lagging well behind other parts of the world, notably Africa.[22] In pursuing this goal, it became clear that no comprehensive guide was available to explain the value of accession to UN member states and to "bust myths" that might be preventing such states taking this step. Accordingly, the Department of Foreign Affairs and Trade commissioned work on a document called the *Reinvigorating the Narrative – the Broader Benefits of the Arms Trade Treaty* which was finalised and circulated in time for the Third Conference of States Parties in Geneva in September 2017.

The positive reaction to this document prompts some wider reflections on the need to refresh the broader narrative on conventional disarmament and arms control. The ATT experience might provide a useful precedents for clearer messages on why the Mine Ban Treaty, Convention on Cluster Munitions, Chemical Weapons Convention (CCW) and other treaties warrant wider adherence and stronger

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[22] As of the start of 2021, there were 110 ATT ratifications and accessions globally, including only six from Asia and four from Oceania. There are 31 signatories, including 12 from Asia and 4 from Oceania. 54 states have not yet joined the treaty, including 30 from Asia and 6 from Oceania.

implementation given their practical benefits. Much more could also usefully be done to explain and draw out linkages and synergies between various UN conventional disarmament treaties and activities, as well as their cross-over into other UN agendas, including IHL, broader humanitarian endeavours, human rights and development, including the SDGs.

More attention could usefully be given to success stories achieved under the rubric of these conventions. A notable example is the UN's continuing excellent work to clear landmines from a range of countries previously afflicted by conflict. Another illustration would be useful work done under the CCW to address the menace posed by improvised explosive devices (IEDs) in many countries.

Growing international interest in multilateral consideration of lethal autonomous weapons systems (LAWS) under the rubric of the CCW should help to attract more attention to other equally important but neglected strands of conventional disarmament. It also has the potential to generate positive spin-offs for awareness of and respect for IHL. The Group of Governmental Experts' (GGE's) preparatory work on LAWS in 2017 and 2018 has helped to encourage creative and flexible approaches that also bring together multiple relevant stakeholders, including technical and academic experts, the military, the private sector and key NGOs.[23] Resisting

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[23] The Group of Governmental Experts on LAWS was established by decision of the 5th CCW Review Conference in 2016 and met in Geneva from 13-17 November, 9-13 April 2018 and 27-21 August 2018. Its final report is contained in UN document CCW/GGE.1/2018/3 of 23 October 2018. The creative approach taken by its chairperson, Ambassador Amandeep Singh Gill of India, is noteworthy, especially his focus on engaging a range of key

pressures to move precipitately to formal negotiations on a binding treaty that bans LAWS will, however, be a challenge.[24]

Outer Space

Outer space is governed by five major treaties negotiated in the 1960s, 1970s and 1980s. This realm is increasingly contested and congested as more space-faring nations and other players, notably the private sector, take advantage of the boom in smaller, cheaper satellites to exploit relevant economic and national development opportunities. Such satellites are now vital to global security and development as enablers of communication, navigation, environmental monitoring and other critical services.

Multilateral consideration of security in outer space is currently dominated by problematic proposals, notably for a treaty ostensibly to prevent militarisation of outer space, and commitments against first placement of weapons in outer space.[25] While plausible at first glance, such proposals lack key detail, especially in relation to crucial verification, and fail to address key definitional and other complexities such as dual civilian and military use. Differences over this broad

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stakeholders, especially experts in technology, other relevant cross-cutting issues, and the private sector.

[24] At their November 2019 Meeting, the CCW High Contracting Parties agreed that the GGE on LAWS should meet again in 2020 and 2021 and decided to endorse eleven "guiding principles" on LAWS affirmed by the GGE which are contained in Annex III of their report: CCW/MSP/2019/9.

[25] The governments of Russia and China have proposed adoption of a draft Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Objects (PPWT).

theme of preventing an arms race in outer space (PAROS) have been part of the 20-year log-jam in the Conference on Disarmament's program of negotiations.

In contrast, other pressing problems have not received much multilateral attention, notably the proliferation of space debris which threatens critical satellite-enabled global infrastructure. It is thus timely to look more actively at possible initiatives to address this potentially catastrophic problem. One useful step could be to seek international agreement to a moratorium on testing of anti-satellite weapons which generate additional space debris. Another would be to look in a more rigorous way at how best to manage technologies that could reduce space debris, while recognising that these could also pose the potential risk of being used as weapons in space.

Given the current multilateral impasse on space security, more attention should also be given to advancing transparency and confidence building measures, such as those outlined in the consensus Group of Governmental Experts report on this subject presented to the UN General Assembly in 2016.[26]

Turning to IHL, the five existing outer space treaties are silent on this subject. However, academic experts have been examining how IHL should apply to armed conflict in outer

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[26] In this connection, adoption on 7 December 2020 by the UN General Assembly's First Committee of resolution A/RES/75/36 encouraging the development of norms of responsible behaviour in space is welcome. The resolution, entitled "Reducing space threat though norms, rules and principles of responsible behaviours", and co-sponsored by Australia, was adopted convincingly with 150 yes votes, 12 no votes, and 8 abstentions.

space.[27] Any such conflict could, for example, have serious humanitarian impacts as satellite-enabled critical infrastructure is disabled.

Cyber

The multilateral focal point for consideration of norms for security in cyberspace has been through successive UN Groups of Governmental Experts (GGEs) of limited but geographically diverse membership that have reported to UNGA's First Committee. Australia was an active member of two of these GGEs, including chairing the second GGE in 2012-13 which concluded in its landmark consensus report that international law applies to cyberspace. The 2015 GGE went further, agreeing that the IHL principles of humanity, necessity, proportionality and distinction apply to state conduct in cyberspace. The third GGE in 2017 failed to come to agreement, with a key stumbling block being differences over *how* international law, including IHL, should apply to cyberspace. One option to take forward this work would be promotion of confidence building measures. Notably, there needs to be more rigorous consideration of how IHL should apply to cyberspace.

More states should be encouraged to make public statements regarding their relevant doctrines. Australia has always maintained that IHL applies to state behaviour in cyberspace, and that it will act in cyberspace in accordance with its obligations under international law. This, and Australia's commitment to protect and promote human rights online just as it does outside the internet, are set out in Australia's 2017

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[27] See, for example, the MILAMOS Project (https://www.mcgill.ca/milamos/) and the Woomera Project (https://law.adelaide.edu.au/woomera/)

International Cyber Engagement Strategy.[28] This document contained an Annex which, for the first time, enunciated publicly Australia's position that international law applies to state conduct in cyberspace.

Conclusion

An extensive framework of legal and political commitments and supporting institutional arrangements has developed around the closely interconnected tracks of IHL and disarmament.

This framework has proved resilient and adaptable over the decades. It has served us relatively well – the broad international community, and Australia in particular – both in relation to national security, but also with regard to humanitarian, development and other interests. As in other fields, multilateral approaches to disarmament and IHL have proved to be "force multipliers" for Australian engagement. Australians have thus been active, constructive and creative contributors to these arrangements. Now, more than ever, Australia's strong but not uncritical support is needed, as well as an injection of creative thinking. In this endeavour, governments will need inspired input from wider civil society.

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[28] Department of Foreign Affairs and Trade, *Australia's International Cyber Strategy*, October 2017.

Response: Defending Values and Reforming the Institutions of the International Liberal Order

Dr Cecilia Jacob
Fellow in the Department of International Relations, Coral Bell School of Asia and the Pacific, The Australian National University

It is important to acknowledge that we are living in really remarkable times. I had a conversation with a colleague recently about Donald Trump using the word "foe" in relation to European Union, and I saw his eyes light up when he said, "International Relations has just become interesting again."

We are starting to see a duality in international relations where we've made significant gains in the development of extensive bodies of international law, mechanisms and institutions and the norms and values that underpin those – but at the same time, we're living in this historic moment where there islack of unity between historic allies while a diverse group of rising powers are emboldened by this new geopolitical context. This is a tangible challenge to the rules-based international order.

There is a real sense of a battle that's taking place, particularly in the areas of human rights and the rule of law. These are areas where the competition of this changing geopolitical dynamic is playing out, including in the reforms of the peace and security mechanisms of the United Nations.

I do think that the ideological challenges presented by the shifting geopolitics is quite remarkable. This incredible normative development, quite rapid and substantial, and is a culmination of events such as those in Libya and then Syria,

and the kind of entrenched conflicts across the world that are internally driven, but with major powers that have vested interest in them. And it is this kind of return to geopolitics that has really given confidence to powers like Russia and China at a time that the West is so disunified.

John Quinn's paper provides a very rich overview of Australia's involvement in the development of international norms and standards in the area of disarmament and non-proliferation, and also international humanitarian law (IHL). We can see that Australia has been a committed and influential player. It is a very constructive exercise to take stock of how much the Australian government has done and how much diplomats have contributed to substantively creating and constituting many of the rules that underpinned this order. There's an incredible history to acknowledge, but it also gives us a pathway moving forward.

John's paper makes the connections between a series of complex global issue areas that are often compartmentalised and treated in silos. Transcending silos and fragmentation is needed at the diplomatic level to be able to respond effectively to global threats that we know are interconnected. So how we can take this established framework moving forward on implementation?

This is a paradox of the UN system. The UN seems to be very dysfunctional and incapable of responding to many of the world's major humanitarian crises, such as in Syria. But at the same time it's indispensable because it provides a forum where states can get together to articulate agendas, to contest and settle these norms and to try to implement them. It's important that we think long and hard about the effective functioning of this organisation and that we have a vested

interest in it being successful in going through these challenges.

At the very heart of the rules-based international order is the capacity to recognise responsibilities and duties. Responsibilities are the flip side of accountability. The question is not just the importance of accountability, but what those accountability mechanisms should look like, and what kind of corresponding responsibilities these entail. There are many levels and types of accountability that need to be brought into this complex ecosystem.

A key takeaway is that we have to harness the gains already established, rather than attempting to recreate them at a time where unacceptable compromise cannot be made. If we start to look at the imperfect institutions that we have and allow the erosion of these norms, which are contested, to try to recreate something better, it comes at a time where the compromise will be too great and we're not likely to come up with something better or stronger. It means that our reality is to deal with imperfect systems and institutions. This balance between conservatism – maintaining the status quo and protecting what we have – and idealism - figuring out how we can make incremental changes and adaptation moving forward - is a challenge to achieving the levels of verification, accountability and transparency that we so desperately need if we are to move forward on implementation. Accountability in strengthening international criminal law is very different from accountability in international humanitarian law and human rights.

The UN Security Council is definitely an area that we have to be talking a lot more about; inactivity by the UN Security Council leads to a lack of legitimacy, and overarching norms are then brought into question when we try to implement them

at lower levels. We need to be looking at state level accountability, both in terms of actions towards other states and domestic implementation. These are the different levels where legitimacy and hypocrisy can reinforce each other. The discussion to be brought out is looking again at the influence of norms. It's an artificial distinction to separate laws and norms; they work in tandem. The Responsibility to Protect (R2P) is a good example: R2P as a political principle and as a normative or moral principle has its legitimacy backed in IHL, international human rights law, the Convention on the Prevention and Punishment of Genocide and international criminal law. Without these undermining legal mechanisms, moving forward on political and nominative principles is a lot harder to achieve. There needs to be greater acknowledgement of how these reinforce each other, and they need to be strengthened.

When I was in New York in April 2018, I spent quite a lot of time talking to people about where R2P is at in the UN and diplomatic efforts. I was looking at the Secretary General's agenda on prevention and how that's going to materialise in the UN reforms, but I was also interested in where R2P sits within this big picture of prevention. In humananitarian crises, the UN Security Council will consistently remind states of their responsibility to protect. That language is there, it's part of the system, but there is still ideological contestation. The parties have rehearsed the same script, which is a little bit dull after so many years. I don't think R2P is going away, but I think that there have to be very clear strategies, ways of articulating, and coordination among coalitions of like-minded states to ensure that we still fight for the values that we believe in.

What it is that we are trying to achieve when we are reforming and adapting these institutions of the international liberal

order? When we look back historically to the creation of the United Nations and the fundamental architecture of the international liberal order, there was a clear end goal. It was very apparent to the international community that the core values nonesuch as preventing the-rise of fascism, territorial succession and genocide had to be built into mechanisms to redress the failures of the League of Nations. The end goal was clear in the institutional design and the rules of the system.

Looking at the adaptation of core institutions throughout the Cold War, a good example is peacekeeping: peacekeeping is not part of the UN Charter, but it holds to the spirit of the UN Charter. But today we'd say there's no singular global crisis or starting point around which we can formulate international institutions or agree on the core values and norms that unify international order, even as we lament is under crisis or being threatened. The changing character of conflict, technological changes, automated weapons systems, cyber and space all throw out new ethical and practical challenges for global security governance; charting this new territory requires new ideas and new modes of regulation to respond to these challenges.

When we look at the constitution of the international order, we talk a lot about the role of power. We know that the fundamental character of the international order is defined by major powers and the shifting relationships between them. But we can't underestimate the role of diplomatic work in articulating normative agendas, in strategising advocacy, in forming coalitions of likeminded states and generating consensus, in drafting resolutions and in doing the hard work of negotiating consensus and agreement to have those passed. Here we have the substantive contribution that countries like Australia have made in constituting the order that we have.

Australia has been strong in identifying and articulating which values it will defend and it is a very respected player in this field. That gives us plenty of optimism and scope that we'll continue to do so.

Highlights of Discussion

Moderated by Professor Robert McLaughlin, Director of the Australian Centre for the Study of Armed Conflict and Society, UNSW Canberra at the Australian Defence Force Academy

Arms Control

"One of the key arms control disarmament issues currently facing the world is the lack of strategic nuclear discussions between America and Russia...The New START agreement is going to expire in February 2021. It will expire, by the way, three weeks after whomsoever is to be the new President is sworn in, with all of that implies, and we could extend it to 2026. And I will put it to you that this is in the world's interest, not only Australia's.... Overall, compared with the Cold War, where we had very detailed capacities for looking, counting and monitoring – including in Australia with regard even to joint facilities at Pine Gap – we're not having those discussions anymore.... Both sides are going ahead with very expensive and ambitious nuclear modernisation programs.... And finally, there's the issue of increasingly precise conventional weapons systems".

Emeritus Professor Paul Dibb AM
Strategic & Defence Studies Centre, The Australian National University

"It is of critical importance to sustain New START to further reduce deployment. However you count it – with maybe 6,000 or 7,000 actively deployed and many other weapons in reserve in both Russia and the United States – seriously reducing the numbers that are actually deployed would be a big contribution to nuclear stability."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for
Foreign Affairs

"There's a very strong focus on controlling and eliminating weapons of mass destruction within Australian foreign policy, which of course is very useful. But even if all of those WMD treaties were successful – 100% adherence to them all – the situation in Syria wouldn't be very different; in Syria, less than 5,000 people have been victims of chemical weapons, whereas more than half a million Syrian people in the current conflict have died from the effects of high explosive weapons. We need to go beyond looking at WMD to consider the broader challenges of conventional weapons because, when push comes to shove, they can be really damaging. The fact that you can't destroy the world within a millisecond with conventional weapons, doesn't mean that you can't destroy massive parts of the world within several days."

Associate Professor Robert Mathews OAM
University of Melbourne and former Department of Defence

Nuclear Disarmament

"The Nuclear Ban Treaty is not a goer in terms of a credibly working, operational document that we could reasonably expect any of the existing nuclear arms states to buy into. This is because it lacks any verification and enforcement mechanisms: it does not recognise that states are going to disarm – if at all – at different phases, and would feel themselves vulnerable during that process, and even after universal disarmament feel themselves at risk of rogue-state breakout. Equally, however, we should not underestimate the normative utility of having a ban up there in lights in a way it

was never previously. We must recognise that we do need to somehow change the momentum, the dynamics out there, to try and find some common ground, and the Ban Treaty may help that process."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for
Foreign Affairs

Responsibility to Protect (R2P)

"The basic principles are understood and they're acceded to by all but a tiny handful of would-be spoilers, as is evident in the annual debates at the General Assembly. There is a lot of buy-in to the basic principle and the inherent limitation on sovereignty associated with that.... R2P has been a catalyst for institutional preparedness... and for effective preventive responses to atrocity situations. Its failure has obviously been in effective reaction to some of the most ugly actually occurring mass atrocity crimes. We didn't do too badly up until mid-2011.... The tragedy is that the mandate that was given and initially successfully applied in the first response to Libya was misused by the P3 [France, the UK and the US]. This generated a huge backlash by the P2 [China and Russia] and that backlash continues."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for
Foreign Affairs

Non-State Actors and Civil Society

"There's been a lot of NGO involvement.... Of course, ICAN won the Nobel Prize... for its role in achieving a nuclear ban treaty. Australia is not just a state, it's a civil society as well."

Associate Professor Savitri Taylor
College of Arts, Social Sciences and Commerce, La Trobe University

"On civil society, in terms of international humanitarian law we can't underestimate at all the role that civil society has had in framing and articulating issues. Everything that has protection of civilian agenda – from small arms and light weapons, to the ban on landmines, optional protocol on child soldiers and the peace and security agenda – has a grounding in international humanitarian law that is much more proactive in terms of creating positive duties on human rights. So you cannot separate out the role of civil society in advocating these agendas to become institutionalised."

Dr Cecilia Jacob
Fellow in the Department of International Relations, Coral Bell School of Asia and the Pacific, The Australian National University

*"*What are the challenges by non-state actors to these rules? After 9/11, there was a very panicky moment with a lot of wanting to rewrite rules."

Professor Penelope Mathew
Dean of Griffith Law School, Griffith University

Power and the Rules-Based Order

"On the rules of war, arms control and disarmament, I'm struck by how similar the issues are to the things we would've been talking about 10 years ago or 15 years ago. In contrast to other parts of the rules-based order, the issues seem remarkably similar. Dogged, difficult and grinding

negotiations continue to go on about all sorts of important issues. Is that because power in this particular part of the rules-based order is remarkably similar to how power was and has been for most of the past 30 years, in contrast to the rules of trade and the rules of the environment? Has it not been changed by the structural changes in the international order?"

Allan Gyngell AO FAIIA
National President, Australian Institute of International Affairs

"The multilateral disarmament debate is still very much US-Russia dominated, but the global agenda has moved on, so there's a certain disconnect between that conversation and what's going on in the real world. I think that's a problem because it's making that multilateral conversation more marginal... there's probably a 10-year job for us to reboot that conversation to reflect a multipolar world. The fact that India is now getting more actively involved in a productive way on some of these practical disarmament initiatives is very useful... We need to pitch our arguments to China about its responsibilities as a major power... I think we do need to think very carefully about how we manage this balance of sustaining the structures, not doing violence to what's been very carefully negotiated, but also refreshing this conversation".

John McCarthy AO FAIIA
Former National President, Australian Institute of International Affairs and former Ambassador, Department of Foreign Affairs and Trade

Chapter 4:
Australia and the Law of the Sea and Maritime Law

Australia and the International Rules-Based Order of the Oceans

Professor Robin Warner
Australian National Centre for Ocean Resources and Security, University of Wollongong

Australia, with its lengthy coastline, vast maritime jurisdiction and multiple offshore territories, undoubtedly fits the description of a maritime nation with an important stake in developing the law of the sea and maintaining the rules-based international order on the oceans. It is surrounded on all sides by oceans and seas including the world's largest ocean –the Pacific Ocean – and the Indian Ocean, the Southern Ocean, the Tasman Sea, the Coral Sea, the Timor Sea and the Arafura Sea. There are abundant living and non-living resources in Australia's coastal and marine areas many of which are largely untapped. Maritime security is a prominent concern for Australia given its geographic position to the south of major international shipping routes and the rising incidence of transnational criminal activities such as illegal fishing and people smuggling in its northern approaches.

Australia has engaged with the global oceans agenda through ratifying and implementing in its national law and policy key international law instruments such as the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[1], the United Nations Fish Stocks Agreement[2], multiple regional fisheries

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[1] 1982 United Nations Convention on the Law of the Sea (UNCLOS) 1833 UNTS 3.
[2] 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation of Straddling Fish Stocks and Highly Migratory Fish Stocks (UN Fish Stocks Agreement) 2167 UNTS 3.

management agreements and regional seas agreements as well as the majority of International Maritime Organization (IMO) agreements related to shipping. It is also an active supporter of global and regional initiatives to conserve and sustainably use marine biodiversity such as the Biodiversity Beyond National Jurisdiction Process – now in its intergovernmental conference phase[3] – Sustainable Development Goal (SDG) Goal 14 on the oceans[4], Conservation International's Pacific Oceanscape initiative[5] and the multilateral Coral Triangle Initiative.[6]

This chapter will highlight some key elements of the rules-based international order as it relates to the oceans focusing primarily on the UNCLOS. Looking through the prism of the 1998 Oceans Policy[7], the first and only comprehensive statement of Australia's ocean governance challenges and priorities, it will evaluate how Australia has implemented and advanced the rules-based international order on oceans in some key areas. Finally, it will discuss some future challenges related to the rules-based international order on oceans and potential Australian approaches to addressing them.

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[3] For the current status of negotiations see https://www.un.org/bbnj/.
[4] "Conserve and sustainably use the oceans, seas and marine resources for sustainable development": available online https://sdgs.un.org/goals/goal14
[5] For more information, see https://www.conservation.org/places/pacific-oceanscape
[6] Australia is one of the partners supporting the initiative: https://www.environment.gov.au/marine/international-activities/coral-triangle-initiative
[7] Commonwealth of Australia, *Australia's Oceans Policy* (Canberra: Environment Australia, 1998), available online https://library.dbca.wa.gov.au/static/FullTextFiles/018882.pdf

The Rules-Based International Order of the Oceans

The pivotal international law instrument on oceans is UNCLOS. Often acknowledged as the fundamental constitution of the oceans, UNCLOS sets out in its preamble to provide "a legal order for the seas and oceans which will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources and the study, protection and preservation of the marine environment."
Traditionally there have been two competing interests in the law of the sea: control over the sea by coastal states and freedom of the seas for user states. UNCLOS represents a compromise reached between those interests at the time it was adopted on 10 December 1982. One of the most ambitious international law-making efforts ever undertaken, it can lay claim to multiple achievements including:

- Universally-agreed limits for maritime zones including territorial seas, contiguous zone, exclusive economic zone and continental shelf
- Established navigational regimes
- A new framework for protection and preservation of the marine environment
- New rules of marine scientific research reflecting an equitable balance between coastal state and foreign research scientists
- A mandatory system of dispute settlement
- A system for exploring and exploiting the non-living resources of the deep seabed which are characterised as the common heritage of mankind

The intrinsic value of UNCLOS for Australia and the international community is that it creates a more predictable and stable maritime environment for trade, transport and

communication through the creation of more precise maritime zones, navigational regimes and systems for conservation and sustainable use of ocean resources. In addition to UNCLOS, the International Maritime Organisation (IMO) has played a very proactive role in developing multiple conventions which regulate shipping activities, including safety of life at sea and marine pollution.

Australia and the Rules-Based International Order on Oceans

It was not until the release of Australia's Oceans Policy in 1998 that a comprehensive statement of Australia's ocean governance challenges and priorities emerged at the federal government level. The Oceans Policy articulated a wide array of challenges and priorities relating to Australia's maritime interests including the conservation of marine biodiversity, the maintenance of ecologically sustainable fisheries, the prevention of marine pollution, the development of the offshore petroleum and minerals industry, the definition of Australia's maritime jurisdiction and the protection of Australia's national interests both within and beyond Australian maritime jurisdiction.[8]

Many of these priorities and challenges correlate with elements of the current global oceans agenda including the conservation and sustainable use of marine resources and biodiversity, integrated and ecosystem based oceans management and the maintenance of global and regional maritime security. To tackle all these challenges and priorities in a balanced and effective manner, the Oceans Policy identified the need for integrated ocean planning and

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[8] Commonwealth of Australia, *Australia's Oceans Policy* (Canberra: Environment Australia, 1998), available online https://library.dbca.wa.gov.au/static/FullTextFiles/018882.pdf..

management and nominated specific responses for particular sectors of ocean activity.

More than 20 years on from the Oceans Policy, the maritime challenges and priorities identified in that document still resonate with the rules-based international order for the oceans and the global oceans agenda. This paper examines a selection of those maritime challenges and priorities and how Australia has responded to them.

The Oceans Policy set out some broad goals for Australia's oceans governance which are closely related to the rules-based international order of the oceans. These include:

- The exercise and protection of Australia's rights and jurisdiction over offshore areas, including offshore resources;
- Meeting Australia's international obligations under UNCLOS and other international treaties;
- Understanding and protecting Australia's marine biological diversity, the ocean environment and its resources, and ensuring ocean uses are ecologically sustainable;
- Improving Australia's expertise and capabilities in ocean related management, science, technology and engineering;
- Identifying and protecting Australia's natural and cultural marine heritage; and
- Promoting public awareness and understanding of the oceans.[9]

While the overarching vision of integrated oceans management for Australia's offshore marine environment has been modified since the issue of the Oceans Policy, the policy

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[9] *Ibid*, vol 1, p. 6.

did perform the important initial function of expounding the major maritime challenges confronting Australia in twenty areas of oceans planning and management together with proposed responses, and there has been no similar comprehensive statement of oceans policy since its issue.[10] It identified the need for specific action under several broad headings including ocean uses and impacts, protecting national interests and understanding the oceans. The following sections of this paper will analyse some key challenges identified in Australia's Oceans Policy, their relevance to the rules-based international order on the oceans and developments in addressing them.

Defining and Describing Australia's Maritime Jurisdiction

Critical factors in managing Australia's offshore areas are defining clearly the extent of Australia's maritime jurisdiction and understanding the physical nature of the marine areas under Australian jurisdiction. The Oceans Policy characterised this challenge as defining, describing and documenting the physical, geological and chemical attributes of the marine areas under Australian jurisdiction, including the continental shelf and the physical and chemical structure of the adjacent oceans.[11] Australia ratified UNCLOS in 1994, assuming a wide range of international legal obligations in relation to its offshore areas. One of the major achievements of UNCLOS was to provide clearly defined maximum limits for offshore jurisdictional zones including the territorial sea, contiguous zone, exclusive economic zone and continental shelf. Australia had already claimed a 12 nautical mile territorial sea in 1990 and a continental shelf based on earlier criteria in the 1958 Geneva Convention on the Continental

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[10] *Ibid*, vol 2, p. 29.
[11] *Ibid*, vol 2, p. 29.

Shelf.[12] In 1994, Australia claimed a contiguous zone adjacent to its territorial sea out to the maximum limit of 24 nautical miles provided for in UNCLOS.[13] Australia's exclusive economic zone was also proclaimed in 1994 out to the maximum limit provided for in UNCLOS of 200 nautical miles from the territorial sea baselines.[14]

The Oceans Policy noted that technical advice and information on mapping, seafloor morphology, geology and resource potential were required to support Australia's claim for a legal continental shelf extending beyond the exclusive economic zone under the provisions of UNCLOS and also to support Australia's negotiations on maritime boundaries with adjacent countries.[15] Geoscience Australia and its predecessor agencies, the Australian Geological Survey Organisation (AGSO) and the Australian Survey and Land Information Group (AUSLIG), have continued to meet this challenge; this is evidenced by the endorsement of Australia's recommendations for the outer limits of nine of the 10 areas of its extended continental shelf claim by the Commission on

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[12] Gareth Evans and Michael Duffy, "Australia Extends Territorial Sea," *Australian Foreign Affairs and Trade* (November 1990), p. 816.
R.D. Lumb, 'Australian Coastal Jurisdiction' in K.W. Ryan (ed.), *International Law in Australia*, 2nd edition (North Ryde, NSW: Law Book Co., 1984);
M. Landale and H. Burmester, 'Australia and the Law of the Sea: Offshore Jurisdiction' in Ibid.
[13] Donald R. Rothwell, 'The Legal Framework for Ocean and Coastal Management in Australia', *Ocean and Coastal Management*, 33 (1) (1996), p. 41.
[14] *Ibid*.
[15] *Oceans Policy*, vol 2, p. 29.

the Limits of the Continental Shelf (CLCS) in April 2008[16] and successful maritime delimitation negotiations with New Zealand in 2004[17] and Timor-Leste in 2018[18] since the Oceans Policy was issued. The scientific data gathered by agencies such as Geoscience Australia on the physical, geological, oceanographic and chemical aspects of the water column and the seabed has also been vital in meeting other challenges within Australia's marine areas such as conservation of marine biodiversity, ecologically-sustainable fisheries exploitation and the development of Australia's offshore petroleum and minerals industry.

Australia's Engagement with Global and Regional Maritime Security

The protection of Australia's interests at sea is a multi-faceted challenge which ranges from preventing potential aggressors crossing Australia's maritime approaches and deterring criminal activity in Australian offshore zones to supporting regional and global security initiatives which help maintain freedom of use and access to the oceans for vessels

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[16] Commission on the Limits of the Continental Shelf, Statement by the Chairman on the Limits of the Continental Shelf on the progress of the work of the Commission – Twenty First Session, UN Doc CLCS/58, 25 April 2008, available online http:www.un.org/Depts/los/clcs_new/commission_documents.htm#Statements

[17] 2004 Treaty between the Government of Australia and the Government of New Zealand establishing Certain Exclusive Economic Zone and Continental Shelf Boundaries, ATS 4.

[18] Julie Bishop, Christian Porter and Matt Canavan, "Australia and Timor-Leste sign Maritime Boundary Treaty", 7 March 2018, available online: https://www.attorneygeneral.gov.au/media/media-releases/australia-and-timor-leste-sign-maritime-boundary-treaty-7-march-2018

worldwide. Maritime Border Command and the Australian Defence Force (ADF) are the primary government organisations responsible for meeting these challenges although other government agencies such as Customs (within the Department of Home Affairs), Australian Fisheries Management Agency (AFMA), Australian Federal Police and state police services also contribute. The Oceans Policy listed projected responses to this challenge which have evolved in recent decades as a result of specific threats such as the increase in people smuggling in Australia's northern sea approaches and illegal fishing to the north of Australia and in the offshore zones of its sub Antarctic islands in the Southern Ocean.[19] Initiatives have been taken at national, regional and global levels to protect Australia's interests at sea.

National Initiatives

One response highlighted in the Oceans Policy was a full contribution by the ADF to the National Surveillance Program managed by Coastwatch.[20] This program, originally coordinated by Coastwatch and involving a range of Commonwealth Government agencies, is now coordinated by Maritime Border Force under the Department of Home Affairs which draws on ADF and Customs assets to perform surveillance and enforcement tasks in Australia's maritime zones.[21]

The ability of Australia's maritime surveillance and enforcement resources to respond to illegal activity within Australia's maritime zones including illegal foreign fishing,

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[19] *Oceans Policy*, vol 2, p. 37.
[20] *Ibid*, p. 38.
[21] Department of Home Affairs, Maritime Border Command, https://www.abf.gov.au/about-us/what-we-do/border-protection/maritime

customs and quarantine offences and drug trafficking has been further enhanced by the consolidation of maritime law enforcement powers in a single Commonwealth statute. The *Maritime Powers Act* which came into force in 2013 consolidates a wide array of maritime law enforcement powers contained in over 38 separate pieces of Commonwealth legislation by:

- Establishing comprehensive powers on interdiction, boarding, search, seizure and retention of vessels;
- Ensuring a common enforcement approach to promote coordination between agencies; and creating a mechanism to implement and enforce international agreements that have a maritime aspect.

Regional and Global Initiatives

Collaboration with regional and global partners in implementing oceans management regimes was identified in the Oceans Policy as a key challenge and critical to protecting Australia's national interests at sea as well as those of the global community.[22] Since the Oceans Policy was issued, Australia has made considerable progress in establishing both ad hoc and ongoing cooperation arrangements with regional and global partners to combat criminal activity at sea. Examples of this are evident in the spheres of illegal foreign fishing, people smuggling and counter-piracy operations. Just one of these examples is highlighted in Australia's ongoing collaboration with France in the Southern Ocean to combat illegal foreign fishing.

Since 1997, the Australian Government has mounted a concerted challenge to foreign fishing vessels (FFVs) fishing illegally in the exclusive economic zone off its sub-Antarctic

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[22] *Oceans Policy*, vol 2, p. 38.

territories: Heard Island and McDonald Islands. Addressing this challenge has entailed operational responses and legal developments which involve the broadest interpretation of the current international law framework for maritime law enforcement. The primary target species for illegal fishers in these waters has been the Patagonian toothfish. Australian fishermen began fishing for this species off Heard Island and McDonald Islands in 1997, and unlicensed FFVs were also operating in the area.[23] Most of these were registered in flag of convenience states which maintained very limited control over their activities. Lucrative potential returns made these waters an attractive prospect for the FFVs. Initially enforcement was hampered by FFVs contacting each other to report on the location of enforcement vessels, the extreme weather conditions and long transit times for enforcement vessels to reach the territory.[24]

Strengthened bilateral cooperation has played an important role in addressing this significant maritime challenge. Australia and France concluded an agreement on cooperation in their adjacent exclusive economic zones in the Southern Ocean in 2003.[25] The treaty provided a framework to enhance cooperative surveillance of FFVs in the neighbouring territorial seas and exclusive economic zones of Australia's

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[23] Warwick Gullett and Clive Schofield, "Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean," *The International Journal of Marine and Coastal Law* 22, no.4 (2007): 550.

[24] *Ibid*.

[25] 2003 Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands, (2005) ATS 6.

and France's sub-Antarctic islands. It provides for the exchange of information about the location, movements and other details of vessels suspected of fishing illegally to facilitate operational responses and logistical support in the conduct of hot pursuits and the undertaking of cooperative research on marine living resources.[26] There is also a provision for surveillance of each party's maritime zones with the consent of the relevant coastal state.[27] It establishes a consent regime allowing for the continuation of hot pursuit into the other party's territorial sea provided that the other state is informed and no physical law enforcement or coercive action is taken against the pursued vessel during this phase of the hot pursuit.[28] Under the 2003 treaty practical cooperation has taken place with Australian customs and fisheries officers taking part in French patrols and French enforcement officials participating in Australian patrols. Cooperative activities have also included the establishment of a shared register of FFVs licensed to fish in French and Australian waters and an exchange of information on suspected illegal FFVs.[29]

In 2007 Australia and France extended their cooperation with the conclusion of a further bilateral agreement on cooperative enforcement of fisheries laws in the maritime zones adjacent to their sub-Antarctic islands.[30] The 2007 treaty formalises

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[26] Articles 3(3), 3(5), 5(1)(a) and Annex II.

[27] Articles 1 and 3.

[28] Article 4.

[29] Warwick Gullett and Clive Schofield, "Pushing the Limits of the Law of the Sea Convention: Australian and French Cooperative Surveillance and Enforcement in the Southern Ocean," *The International Journal of Marine and Coastal Law* 22, no.4 (2007) , p. 560.

[30] 2007 Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the

cooperative enforcement of the two states' fisheries laws, allowing each party's enforcement officers to apprehend alleged FFVs in each other's adjacent exclusive economic zones.[31] The measures taken by Australia in cooperation with France over recent years to counter illegal fishing in the Southern Ocean appear to have resulted in successful deterrence of illegal fishers in this area of Australia's maritime jurisdiction.

Current and Future Challenges

This paper has examined various aspects of Australia's contribution to the international rules-based order of the oceans. It has reviewed Australia's implementation of UNCLOS and its engagement with regional and global organisations to advance the global oceans agenda. Australia faces a complex and multifaceted set of challenges to achieve the objective of integrated and ecosystem-based management of marine areas within and beyond Australian jurisdiction as well as promoting global and regional maritime security. These challenges are inextricably involved with the global oceans governance agenda and entail close engagement with a variety of regional and global organisations.

The paper has outlined a range of examples in which Australia nationally and with global and regional partners has addressed challenges such as the conservation of straddling and highly migratory fish stocks, the conservation and sustainable use of marine biodiversity and the maintenance of maritime security in its immediate region and beyond. These challenges will

French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, (2007), ATNIF 1.

[31] Articles 3 and 4.

require ongoing commitment as the global oceans governance agenda fluctuates and evolves.

As an island continent with an extensive coastline, significant offshore territories and enormous areas of ocean under its national jurisdiction, the task of protecting Australia's national interests at sea is constant and daunting in its complexity. Maintaining border security and combating the poaching of Australia's fisheries by foreign fishing vessels have been the focus of significant government policy initiatives, resource investment and legislative action in the two decades since Australia's Oceans Policy was issued. While these challenges will continue to absorb Australian Government resources for the foreseeable future, positive developments have also occurred in regional cooperative maritime surveillance and development with neighbouring states such as France in the Southern Ocean and the small island developing states of the Pacific.

At the global level, Australia has been supportive of the UN General Assembly process to develop the elements of an international legally-binding treaty to conserve and sustainably use marine biodiversity areas beyond national jurisdiction. It has powerful national imperatives for supporting improved conservation and management of high seas resources and biodiversity. There is also a strong economic incentive for Australia to support conservation and sustainable use of highly migratory species such as tuna and other fish stocks which straddle high seas areas and Australia's maritime resource zones. Since the extension of coastal state resource jurisdiction to 200 nautical miles offshore under UNCLOS, distant water fishing fleets have concentrated much of their effort in areas immediately adjacent to the exclusive economic zones of coastal states such as Australia. This has led to over-exploitation of many

straddling and highly migratory fish stocks which spend part of their life cycles in these areas. Australia's efforts to conserve and manage these stocks in its own exclusive economic zone are destined to fail without compatible measures being taken in high seas areas. Australia also has a long-standing interest in conservation of species that migrate through high seas areas. The South Pacific region has one of the highest quotients of biodiversity in the world with a large population of rare and endangered species such as whales, dolphins, sea turtles and dugongs whose migratory routes straddle high seas areas and Australia's maritime zones. These species are subject to multiple stress factors including unsustainable fisheries practices, ship strikes, noise and other forms of pollution from high volumes of shipping traffic.

As one of the key maritime nations in the southern hemisphere and a prominent middle power, Australia in conjunction with its regional neighbours has an important role to play in the evolving global ocean governance framework which is an integral element of the rules-based international order.

Rules or Law? Kenneth Bailey and the Law of the Sea[1]

Dr Kirsten Sellars
Fellow in the College of Asia and the Pacific, The Australian National University

We have been given the task of defining the concept of the rules-based international order, but it seems that the more we discuss it, the more it elusive it becomes. All that is clear is that we have not yet met the brief. That being so, we might ask a different question: not what the rules-based international order is, but what it is not.

The rules-based international order is a reaction against the perceived loss of traction of the post-war law-based international order. Law follows order: the American-led order is over; and the treaty-based framework it espoused is losing its purchase. The post-war treaty regime — bookended by its two most ambitious instruments, the UN Charter and the UN Convention on the Law of the Sea (UNCLOS) — no longer seems to be as appropriate or as effective as it might once have been. In these unsettled times, before the next order creates a new legal regime, it is not surprising that Australia, a middle power, is drawn to the more amorphous and politicised language of rules rather than the more formal and binding strictures of law. The danger, though, is that by advancing rules, Australia further diminishes the validity of the law to which it has contributed so much.

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[1] This edited version of Dr Sellars' remarks was printed by *Australian Outlook* at https://www.internationalaffairs.org.au/australianoutlook/rules-or-law-kenneth-bailey-and-the-law-of-the-sea/

This brings us to Sir Kenneth Bailey, the Australian jurist and diplomat who, as an active proponent of the law-based international order, believed that if the law-making process failed, what was required was better law. In other words, the law begat law, not non-legal rules.

Bailey was well aware that the making of laws, like the making of sausages, is not a pretty sight. For over a quarter of a century, from 1945's San Francisco Conference on the United Nations to 1971's Committee on the 'Principles of International Law concerning Friendly Relations', he played a significant part in the making of international law, while at the same time chronicling the far-from-pretty process of doing so. His reports are candid, insightful and on occasion wry, especially when recalling the underhand tactics and personal foibles of those involved in some of the harder-fought negotiations.

During his 'international' years, Bailey served as Solicitor-General and Secretary of the Attorney-General's Department (1946-1964), Australian High Commissioner to Ottawa (1964-1969) and international law advisor to the Attorney-General's Department and Department of Foreign Affairs (1969-1972). Over this period, he made a distinctive contribution to international legal debates, particularly on the law of the sea: a contribution that is less recognised than it should be, especially outside Australia.

As his nation's representative abroad, he was of course expected to campaign for the position outlined in the departmental brief, and he dutifully chivvied and cajoled others to support the Australian line. But more significantly, Bailey consistently articulated a 'Western' position at a time when it was perceived to be under great threat: from the Soviet bloc, from the non-aligned states and from rifts within

the Western camp itself. It is back-handed testimony to his effectiveness as an advocate that Soviet and Latin American delegates described him as an 'extremist' and even more bluntly, 'the enemy'.

By the mid-1950s, the Western powers were presented with a fundamental problem: how to successfully negotiate treaties on issues of importance to themselves without being stymied by their non-Western opponents. Their attempt to secure agreement on a fundamental law of the sea question – the breadth of the territorial sea – posed this problem in its starkest form. Should there be a narrow three-nautical-mile territorial sea, applicable to all, which the Western maritime powers claimed was customary international law or could states legitimately extend their territorial seas further out to sea?

The maritime powers wished to retain narrow territorial seas because these gave their navies and merchant and long-distance fishing fleets the greatest freedom of movement on the high seas. The less powerful states, by contrast, sought wider territorial seas as a peacetime buffer against unwanted foreign naval or fishing fleet activities close to their shores, and began to unilaterally claim territorial seas of between four to twelve miles. The maritime powers responded by convening the first post-war law of the sea conference, commencing in February 1958, to call a halt to this 'jurisdictional creep'.

At this conference, the United States nominated Kenneth Bailey, the head of the Australian delegation, as chair of Committee I, which would deal among other things with the question of the breadth of the territorial sea. This Committee produced a detailed draft treaty, the Convention on the Territorial Sea and Contiguous Zone, which dealt with every

relevant issue except the vital question of breadth, on which the members could not agree. The powers reacted to this omission by convening a second conference to resolve this outstanding question (as well as a related question on fishery limits) which was duly convened in March 1960. Again, Bailey headed the Australian delegation and as before, he played a significant role, trimming Western policy positions and drawing the sting from non-aligned proposals. Once again, though, the conference failed to reach a decision. The Western powers had thrown all their resources at the problem, and had exerted every form of pressure, yet were still unable to secure agreement.

Chastened by this experience, Bailey and others recognised that the West faced a significant difficulty: every time they mooted an agreement they were undone, not only by the opposition of the Soviet bloc and the disunity among the Western powers, but also by groups of smaller and newly independent states, which were becoming a force to be reckoned with. Furthermore, the problem posed by the non-aligned states could only get worse: first, because the admission of new UN members in late 1960 after the second conference would tip voting balances even further away from the West; and second, because these states presented the West with problems quite distinct from, and less predictable than, those presented by the Soviets and their satellites.

The Western powers initially responded to this development rather tentatively. The British and Americans, for example, were slow to grasp the implications of the non-aligned states' legal interpretations of issues such as self-determination: a tendency compounded by their preoccupation with Soviet doctrinal developments. By the early 1960s, however, quiet behind-the-scenes discussions had begun between the Australian, British and American legal advisors about a new

approach to the making of international law. They discussed whether resolutions passed with resounding majorities in the General Assembly could contribute to the formation of customary international law (Bailey thought not) or whether the claim to self-determination was a right or a principle (Bailey thought it was a principle). In 1962, at the West's instigation, the International Law Commission began talks on a draft 'law of treaties' with the express intention of drawing the non-aligned states into the codification process. This would culminate in the Vienna Convention on the Law of Treaties, opened for signature in 1969.

At the same time, the Western states began to explore new methods for constructing international agreements, which were usually decided by either a simple majority or a two-thirds majority vote. Unable to achieve these majorities, Western representatives proposed an alternative: agreement 'by consensus' on package deals, with voting only as a last resort. The non-aligned nations went along with this, having realised that resolutions passed by overwhelming majorities lacked legal purchase if opposed by the powerful states. Some of the UN negotiations with which Bailey was engaged during his final years abroad, on the 'Principles of International Law concerning Friendly Relations' and the 'Definition of Aggression', were conducted on these new lines.

Yet this form of decision-making brought new problems in its train, not least that irreconcilable views were now being incorporated into the agreements themselves. As for law of the sea, the third conference opened the year after Bailey's death in 1972 and closed a decade later, in 1982. It produced the UN Convention on the Law of the Sea, agreed by consensus, that manifested some of these new problems but at least finally answered the thorny question of the breadth of the territorial sea: twelve nautical miles.

Highlights of Discussion

Moderated by Frances Anggadi, Principal Legal Officer, Office of International Law, Attorney-General's Department

Law of the Sea

"I think there are some tremendously strong elements in the Law of the Sea Convention. For maritime zones, the number of countries that have claimed 12-nautical mile territory now is a very high proportion of the international community. Those limits that were agreed to and adherence to navigational regimes are very strong, so I think that we can at least look at those elements of the international order of the oceans as being relatively settled. There is a reluctance on the part of states to unravel the package deal that was agreed at the Third United Nations Conference (UNCLOS III), and that's reflected in the fact that with the new marine biodiversity process, states have all agreed that this process for an implementing agreement under the Law of the Sea Convention should not undermine any existing institutions or instruments in international law that relate to the oceans. States have been very focused on not undermining and not unravelling that order."

Professor Robin Warner
Australian National Centre for Ocean Resources and Security, University of Wollongong

Timor Sea

"I would generally accept the thesis that... Australia has been a good international citizen when it comes to the Law of the Sea. However, I see two major exceptions. The first is the events arising from the *MV Tampa* through to push-backs and

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tow-backs. The second is the Timor Sea and... the multiple issues arising in terms of the finalisation of a maritime boundary.... Whilst I think there quite rightly has been a great deal of support for the eventual conclusion of the Timor Sea Treaty... anyone who objectively looks at the treaty could, of course, raise multiple issues, one of which is its consistency with the other maritime boundaries in the Timor Sea, the other is... the settlement of the circumstances surrounding Greater Sunrise. These would, at face value, appear to be a complete anomaly and embrace significant challenges in terms of the consistency with the Law of the Sea's delimitation of maritime boundaries."

Professor Donald Rothwell FAAL
ANU College of Law, The Australian National University

"Australia had the right, of course, to opt out under Article 298 from compulsory dispute settlement where it relates to the negotiation of maritime boundaries... Australia, I think, felt that in its national interest it would prefer to negotiate maritime boundaries. So whether that makes Australia a bad international citizen in relation to Law of the Sea I'm not sure I agree that it does, because it had been recognised in the convention negotiations in UNCLOS III that this was one area where states couldn't reach consensus on sending disputes on maritime boundary delimitation to compulsory third-party settlement."

Professor Robin Warner
Australian National Centre for Ocean Resources and Security, University of Wollongong

"It's true to say that of course Australia and China have both made Article 298 declarations. However, if one looks at Australia's practice, when it was confronted with an attempt

by Timor to commence compulsory conciliation, what was Australia's response? Australia actively engaged in that conciliation in good faith.... Australia did that and one of the remarkable outcomes is the Timor Sea Treaty."

Professor Donald Rothwell FAAL
ANU College of Law, The Australian National University

"I might be one of the people who'd find the idea of putting 'good faith', 'Australia' and 'Timor-Leste' in the same sentence a bit rich. I don't think Australia has been a paragon of good international citizenship in its negotiations. There are whole books that discuss this and show how Australia behaved. Australia did decide to engage in the conciliation with Timor-Leste and I think that's precisely because the hypocrisy of continuing to challenge and criticise China over its behaviour versus Australia's own behaviour was something it could no longer bear."

Melissa Conley Tyler FAIIA
Asia Institute, The University of Melbourne
Former National Executive Director, Australian Institute of International Affairs

South China Sea

"On the South China Sea arbitration, China exercised its right to opt out where it concerned historic rights, maritime boundary delimitation and military activities. I think that was a legitimate course of action for China to make those opt-out declarations. Now when you come to the actual judgment, the judges did not agree that they didn't have jurisdiction. They didn't feel that China's Article 298 opt-out clauses applied in the South China Sea arbitration circumstances. They were clever arguments, I think, made by the judges. Whether they

were arguments that advance the course of international relations is another question."

Professor Robin Warner
Australian National Centre for Ocean Resources and Security, University of Wollongong

"I worry that much of the discussion about South China Sea arbitration has exposed Australia to a charge of hypocrisy... If it had been Australia receiving the tribunal ruling, it would not have been happy at all; but Australians very often in our discussions just assume that China is not playing by the international rules. I guess it's because most people have an domestic analogy in mind. They think that this was a court, not an arbitral tribunal, and they think that it has jurisdiction and therefore China was not playing by the rules, rather than seeing it as more like a mediation with your neighbour where you never agreed to jurisdiction."

Melissa Conley Tyler FAIIA
Asia Institute, The University of Melbourne
Former National Executive Director, Australian Institute of International Affairs

"What was China's response to the Philippines' commencement of proceedings? China returned the documents that were lodged with it on the day that they were received and China did not actively in any way in good faith seek to engage.... China lost the jurisdictional phase. It was then actively invited on multiple occasions to participate in the merits phase, once again it choose not to do so."

Professor Donald Rothwell FAAL
ANU College of Law, The Australian National University

Rules vs. Law

"Is this perhaps an example of the difference between a law-based order and a rules-based order? In this particular example we have the law that sets expectations around engagement in the resolution of disputes, but rules or norms or principles around the spirit in which we should engage. So we find examples where we have norms being violated, rather than laws."

Associate Professor Elizabeth Thurbon
School of Social Sciences, University of New South Wales

"In relation to the move to more soft law – i.e. measures, initiatives, non-binding initiatives in international law – I think it's just out of necessity that the international community has moved to something which gives some way of agreeing to move forward on issues that it has to address which does not necessarily involve negotiating a binding treaty. So there can be some code, some action, some cooperation among states and other players in the international system while you are waiting for a binding instrument to emerge. We have certainly seen that in the Biodiversity Beyond National Jurisdiction process, and ocean governance generally I think, and in environmental law where we've been able to agree on certain principles –without having a binding instrument – upon which we can base some international cooperation and action. So I think it's just out of necessity. There are so many issues to address on the global agenda that we need something which is a bit quicker, a bit more rapid than negotiating a binding treaty."

Professor Robin Warner
Australian National Centre for Ocean Resources and
Security, University of Wollongong

Freedom of Navigation

"Now on the question of prior notification or authorisation of innocent passage of, say, foreign warships through your territorial sea, the convention says that all vessels have the right of innocent passage. It doesn't say that warships have to give prior notification or authorisation. There was a vote taken in UNCLOS III on that issue. The convention is solid on whether prior notification or authorisation is required: there is no obligation under international law to give prior notification or seek prior authorisation to exercise your right of innocent passage through the territorial sea of another state."

Professor Robin Warner
Australian National Centre for Ocean Resources and
Security, University of Wollongong

Chapter 5:
Australia and the Rules of Antarctica and the Environment

The Rules-Based Order Applying to Antarctica and its Environment[1]

David Mason
Former Executive Director, Treaties Secretariat, Department of Foreign Affairs and Trade

The Antarctic Treaty was concluded in Washington on 1 December 1959. Only 19 months later, on 23 June 1961, it came into force. The treaty formed the basis for what eventually became known as the Antarctic Treaty System (ATS) which included several later-negotiated legal instruments, notably the 1972 Convention on the Conservation of Antarctic Seals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the 1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol), plus multiple legally binding recommendations and measures adopted at annual Antarctic Treaty Consultative Meetings.

When this thickening body of law and institutional development is combined with other bodies of international law that apply in the region, especially those found in the 1982 United Nations Convention on the Law of the Sea, it becomes apparent that there is a distinctive rules-based order governing Antarctica and the Southern Ocean.

This chapter asserts three propositions:

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[1] An edited extract of these remarks was published by *Australian Outlook* at
http://www.internationalaffairs.org.au/australianoutlook/the-rules-based-order-applying-to-antarctica/

1. That, taken together, the operation of these legal instruments constitutes a solid establishment of rules governing Antarctica and regulating activities affecting its environment;
2. That, over the years, Australia has made a very significant contribution to the negotiation and application of these Antarctic rules; and
3. That in addressing future challenges, Australia is likely to continue to play a leading role in formulating and gaining acceptance of proposed solutions.

Looking more broadly, the Antarctic Treaty and its associated treaties set the precedent for ways of approaching other issues – such as strategic and nuclear issues, but also environmental issues. For instance, the emphasis in CCAMLR on approaching conservation issues from a holistic approach and not just a purely commercial approach as had been the case in other fisheries conventions. The whole concept of what later became known as the precautionary principle in environmental matters is there in the Antarctic Treaty and the Antarctic Treaty System. I would argue that the hallmark of the Antarctic Treaty System provisions as they now exist is an emphasis on protecting the environment and coming up with innovative ways of doing so, which would surely have influenced and set a precedent for the approach to environmental protections in many other areas and in other treaties.

The Achievement of the 1961 Antarctic Treaty

One of the prime motivations for negotiating the Antarctic Treaty was security. The 1950s was a decade of considerable tension regarding Antarctica. Seven territorial claims had been made to parts of the continent, including the largest – 42% – by Australia, but those claims were not widely recognised.

The Antarctic Peninsula was particularly contested, with overlapping claims made by Argentina, Chile and the United Kingdom. The two Cold War protagonists – the Soviet Union and the United States – had a significant physical presence on the continent and had reserved their rights to possible territorial claims. Antarctica was even suggested as a venue for the testing of nuclear weapons.[2]

It was therefore remarkable that at the end of the 1950s – the height of the Cold War era – it proved possible to conclude an Antarctic Treaty, which *inter alia* stipulated the demilitarisation of the continent, the creation of the world's first nuclear weapons-free zone, the putting aside of sovereignty disputes, the protection of scientific research and the use of Antarctica solely for peaceful purposes. In effect a new security construct for Antarctica was created in the form of a legally-binding treaty.

As of 2018 the Antarctic Treaty has 48 signatories including the original twelve and others including China, Germany, India, Italy, the Netherlands and Spain which together comprise the key Antarctic Treaty Consultative Parties. While short – only 14 Articles – the Treaty is a unique and imaginative document which has stood the test of time and served Australia's enduring national interests in the region well.

From Australia's perspective, Article IV of the Treaty was, and remains, the cornerstone of the document. That Article is usually described in shorthand as "freezing" territorial claims in Antarctica. It provides that no action can be taken while the

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[2] Tom Griffiths and Marcus Hayward, eds., *Australia and the Antarctic Treaty System: 50 years of influence*, (Sydney: University of New South Wales Press, 2011), 4.

treaty is in force, which shall constitute a basis for asserting, supporting or denying a claim and that no new claims or enlargement of an existing claim can be asserted. This unusual provision has succeeded spectacularly since 1961 in largely eliminating frictions and disputes over territorial claims. By contrast, there are emerging tensions in the Arctic, which has no similar governance mechanism.

While Article IV is the very heart of the treaty, its negotiation was highly problematic, so much so that for a while during the early months of the 1959 deliberations in Washington, it looked unlikely to be successful. To Australia's credit, Minister for External Affairs Richard Casey played a role in breaking the impasse. It is worth recording the details of Casey's achievement as has been done by the Antarctic authors Robert Hall and Marie Kawaja. In their informative chapter "Australia and the negotiation of the Antarctic Treaty" in *Australia and the Antarctic Treaty System: 50 Years of Influence*,[3] they describe the complexities of negotiating a provision for freezing the legal status of those Antarctic Treaty Parties asserting a territorial claim to the continent and those denying all such claims, which had become highly contentious.

In particular, the Russian delegation strongly opposed having any such clause. By the end of April 1959, Russia's position was threatening the very negotiations, given its insistence that the best way of setting aside the question of territorial claims and consequent political rivalry was not to mention the issue in the treaty at all.[4] With that issue seemingly unresolvable,

[3] Robert Hall and Marie Kawaja, "Australia and the negotiation of the Antarctic Treaty", in *Australia and the Antarctic Treaty System: 50 years of influence*, ed. Tom Griffiths and Marcus Hayward (Sydney: University of New South Wales Press, 2011), 68-96.
[4] Ibid, 84

meetings were adjourned. Then, after a two-month intermission, meetings resumed on 13 July 1959 and concluded three months later. Critically, on 23 July of that year, Russian representative Filipov affirmed that his government was now prepared to agree to the conclusion of an article on rights and claims in view of its desire to conclude the treaty and because it agreed with the objectives of the article.[5]

Hall and Kawaja record that this crucial change in the Russian position on draft Article IV was a significant turning point in the negotiations.[6] They also record that it resulted from a diplomatic meeting occurring 10,000 miles away from Washington. On 2 March 1959, during an Economic Commission for Asia and the Far East Conference held at Broadbeach in Queensland, Minister for External Affairs Casey had a private conversation with the leader of the Russian Delegation, Deputy Foreign Minister Firubin, about the reciprocal reinstatement of their Embassies in Moscow and Canberra following the Petrov affair. At one point Casey also raised the issue of Antarctica and explained Australia's objectives and interests in "orthodox but forceful terms".[7] Firubin responded by explaining his government's view in familiar terms.

The next day, Casey gave Firubin a letter expressing Australia's views on the matter of freezing of territorial claims. He indicated that Australia felt strongly on the matter and would have substantial doubts about participating in a treaty "that did not in substance contain the provisions that it

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[5] Ibid, 86.
[6] Ibid, 85.
[7] Ibid, 85.

had in mind".[8] He summarised that Australia supported a provision in an Antarctic Treaty that was designed to have two effects:

1. To "relegate all questions of territorial sovereignty with differences that would not be resolved, but would be held quietly in abeyance, rather than matters of actual dispute";
2. To "create a legal situation in which no activities in Antarctica by any country (whether claimant or non-claimant) after the treaty came into effect, would improve its legal claims to sovereignty, as compared with the existing state of rights, whatever that may be".[9]

Casey asserted that the draft Article IV being discussed in Washington would not damage legitimate interests in Antarctica of the non-claimant Soviet Union and United States. He added that Australia saw no advantage in concluding a treaty that failed to achieve this objective and said that if the Soviet Union doubted that the proposed Article IV could protect its position, the Australian Government would be willing to examine an alternative formulation by the Soviet Union. He attached the terms of the draft article to the letter and invited Firubin's comments. Shortly afterward it became clear in Washington that the Soviet Union could agree to the proposed text of Article IV.[10]

Historians have long pondered why Canberra was chosen by the Antarctic Treaty Parties as their first meeting place and why that choice actually was inscribed in the text of the treaty, Article IX. It was indeed unusual in treaty-making to nominate a city for the first meeting. Marie Kawaja records that Richard Woolcott, a former Secretary of the Department

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[8] Ibid, 85.
[9] Ibid, 85.
[10] Ibid, 86.

of Foreign Affairs, who was an officer of the department during the Antarctic Treaty negotiations, believed this honour was accorded to Australia in recognition of the "significant role" it played "in the complex negotiations leading to a signature of the Treaty". Casey's biographer, W. J. Hudson, made similar observations.[11]

International Governance Through the Antarctic Treaty System

Under the arrangements of the Antarctic Treaty system, nations active in Antarctica consult through the following forums:

a.   annual Antarctic Treaty Consultative Meetings (ATCMs);
b.   the Committee for Environmental Protection (CEP), the principal forum under the Environmental Protocols which reports to the ATCMs;
c.   the Commission for the Conservation of Antarctic Marine Living Resources, the principal forum under the Convention on the Conservation of Antarctic Marine Living Resources based in Hobart;
d.   *ad hoc* consultations among parties to the Convention for the Conservation of Antarctic Seals;
e.   the Scientific Committee on Antarctic Research;
f.   the Council of Managers of National Antarctic Programs.

These Antarctic Treaty System bodies have over the years adopted a comprehensive range of measures, decisions and guidelines in pursuing the effective governance of human activities in Antarctica.

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[11] William J. Hudson, *Casey*, (Melbourne: Oxford University Press Melbourne, 1986).

It is worth highlighting the nature of the rules promulgated in the two most important Environmental Conventions relating to Antarctica.

1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)

The CCAMLR was established in response to concerns that increased krill catches in the Southern Ocean might have a serious effect on the population of krill and other marine life. CCAMLR aims to conserve the marine life of the Southern Ocean while permitting harvesting, where consistent with the Convention's conservation objectives. The CCAMLR Commission is responsible for managing all the living marine resources in the convention's area, which roughly follows the northern extent of the Antarctic Convergence, a distinct region separating the cold polar surface and warmer waters to the north.

CCAMLR stipulates that the conservation of Antarctic marine living resources and decisions about their rational use must be based on a holistic approach.[12] Unlike other fisheries conventions, CCAMLR requires that consideration be given to all species in the ecosystem and to conserving ecological relationships, balance and sustainability. This was a very far-sighted and unprecedented approach at the time the Convention was negotiated.

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[12] Stuart Kaye, Marcus Haward and Rob Hall, "Managing marine living resources", in *Australia and the Antarctic Treaty System: 50 years of influence*, ed. Tom Griffiths and Marcus Hayward (Sydney: University of New South Wales Press, 2011), 177.

1991 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)

The parties to the Environmental Protocol commit to the comprehensive protection of the Antarctic environments and declare Antarctica a natural reserve dedicated to peace and science. The commitments are underpinned by a system of environmental principles, measures and standards which require that protection of Antarctica's unique environment is a fundamental consideration in the planning and conduct of all activities in the Antarctic Treaty area.

The Environmental Protocol bans mining and requires that all proposed activities be subjected to prior environmental impact assessment. It also establishes the Committee for Environmental Protection which is responsible for providing environmental advice and formulating recommendations on the implementation of the Environmental Protocol.

There are currently six annexes detailing provisions for particular issues that form an integral part of the Environmental Protocol:

1. an environmental impact assessment, which outlines procedures for prior environmental assessment of all proposed activities, including consideration of alternatives;
2. a provision for the conservation of Antarctic flora and fauna;
3. a strategy to regulate management and disposal of waste generated through present-day operations and waste remaining from past activities;
4. an annex regulating the prevention of marine pollution: this prohibits and regulates the discharge of substances from ships, including waste and garbage;

5. an annex on area protection and management: this establishes Antarctic Specially Protected Areas, Antarctic Specially Managed Areas, and Historic Sites and Monuments;
6. an annex adopted in 2005 relating to liability arising from environmental emergencies—this outlines arrangements to prevent and respond to environmental emergencies from scientific research programs, tourism and other environmental and non-government activities.

Australia and France, led by their respective Prime Ministers Bob Hawke and Michel Rocard in 1989-1991, played a pivotal – and controversial – role in converting the originally envisaged draft Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA) into a conservation rather than Antarctic mineral regulation convention. This is comprehensively detailed by Andrew Jackson and Peter Boyce.[13]

Hawke's own reflection on this in 2011 at a symposium in Hobart marking the 20th anniversary of the Madrid Protocol provides an apt summary:

"Twenty-two years ago the Antarctic Treaty Parties adopted the text of a Convention [CRAMRA] which would have allowed for oil and mining the rich resources of Antarctica. When the proposal came across my desk my thoughts were that it would be an act of vandalism for Antarctica to be exploited in this way. It would diminish the

[13] Andrew Jackson and Peter Boyce, "Australia and 'World Park Antarctica', 1982-1991", in *Australia and the Antarctic Treaty System: 50 Years of Influence*, ed. Tom Griffiths and Marcus Hayward (Sydney: University of New South Wales Press, 2011), 243-273.

capacity of this untamed continent with its role in scientific research and experimentation and recording, at a time of awakening awareness of the effects of global warming on our planet. My reaction was that Australia, together with France, should put it to our Treaty partners that we should consider a regime which gave priority to protecting the environment and show the international community that concerted effort between nations could protect its pristine environment. […]

"Within two years the Treaty Parties had adopted the Protocol which would prohibit mining, and importantly, place environmental protection at the front of our attention on Antarctica. I am delighted that the Protocol's Committee for Environmental Protection is now the driver of much of the business of the annual Treaty meetings."[14]

The 1991 adoption of the Protocol was a landmark in the evolution of the treaty system. In terms of international law, binding rules had been agreed to provide for protection of the Antarctic. In policy terms, a new priority for Antarctic consensus decision-making had been agreed – Article 3 of the Protocol made protection of the environment a "fundamental consideration in the planning and conduct of all activities". In political terms, international criticism of the treaty system had been largely defused by the system's demonstrated capacity to manage Antarctica successfully.

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[14] Commentary by former Australian Prime Minister Bob Hawke in the context of the Hobart symposium on 4 October 2011 marking the 20th anniversary of the Protocol on Environmental Protection to the Antarctic Treaty.

Challenges to the Treaty

In its first six decades of operation, the treaty has survived at least two major challenges and has emerged the stronger for having done so.

The first came in 1983 when the UN General Assembly considered arguments by a group of Asian and Third World States that the Treaty was a relic of colonialist mindset. Led by Malaysia, the draft UN Resolution aimed to draw on elements of the 1982 Law of the Sea Convention and the 1979 Moon Treaty by arguing that Antarctica should be managed by the UN as the "common heritage of mankind".[15] The Treaty parties responded constructively and in unanimity, insisting that nations had only to accede to the Treaty if they wished to participate in Antarctic affairs.[16]

The second major challenge was precipitated by the oil crisis of the 1970s when Antarctica became regarded as a possible source of fossil fuels. The number of states acceding to the treaty increased, and in 1988 the treaty parties agreed to adopt the Convention on the Regulation of Antarctic Mineral Resource Activities. However, led by Australia and France and influenced by a range of environmental campaigners, the treaty parties decided instead to adopt the Protocol of Environmental Protection to the Antarctic Treaty (the Madrid Protocol) which declared a 50 year ban on mining in Antarctica and established binding measures for environmental protection. The negotiation of the Madrid Protocol represented a dramatic shift from an exploitation

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[15] Marcus Hayward, "Australia, the United Nations and the question of Antarctica", in *Australia and the Antarctic Treaty System: 50 years of influence*, ed. Tom Griffiths and Marcus Hayward (Sydney: University of New South Wales Press, 2011), 204.

[16] See commentary also at ibid, 215.

view to a protection view of dealing with Antarctic resources. It was also seen by many as an impressive measure of Australian influence on Antarctic politics, and indeed of Australia's foreign policy prowess.

The ability of the system to overcome these challenges is testament to its strength. A key reason for the success of the system is that decisions under the treaty are reached by consensus. The Antarctic Treaty itself also provided for a Review Conference to be held once it had been in force for 20 years, in 1991.[17] The fact that there was no call for a Review Conference suggests that parties are accepting current arrangements and are unlikely to challenge the consensus that they represent.

As to future challenges, there has in recent years been speculation in academic presentations and by the media that the mining prohibition contained in the Madrid Protocol may be under threat.[18] The argument for making this case is somewhat overdrawn. Parties with active Antarctic programs are parties to the Protocol and therefore committed to the mining prohibition. This commitment was recently confirmed by all treaty parties, and there is no suggestion that any other countries are interested in exploiting Antarctic minerals. The constraints on doing so would be formidable since the Protocol also sets out stringent conditions which must be met before the mining prohibition can be removed. The prohibition can be amended only by the unanimous agreement

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[17] Antarctic Treaty, Article XII 2 (a).
[18] See, for example, comments of Alan D. Hemmings in "Globalisation's cold genius and the ending of Antarctic isolation" in *Looking South: Australia's Antarctic Agenda*, ed. Lorne K, Kriwoken, Julia Jabour and Alan D. Hemmings (Sydney: The Federation Press, 2001), 180.

of the 1991 Consultative Parties, which is highly unlikely.[19] Challenges like these are bound to emerge from time to time, but the Antarctic Treaty parties' capacity to respond creatively and effectively to such challenges has been well-demonstrated.

Conclusion

The governance of the Australian Antarctic Territory and Australia's broader interests in Antarctica are overwhelmingly affected by international and domestic law. In particular, since 1961 the Antarctic Treaty and its associated treaties have provided the basis for a remarkable regime which maintains in a unique way equilibrium between the interests of Antarctic claimants and others.

The promotion of a system of international legal instruments around the treaty has transformed a continent essentially devoid of rules and regulations into a model of international cooperation and stewardship.

It is within this context that Australia, as both a claimant state and an active supporter of the Antarctic Treaty System, negotiates and balances its interests and frames its laws. This outstanding example of the application of a rules-based order has shown itself to be robust, flexible and capable of meeting emerging challenges. It has evolved based on cooperation and consensus decision-making and Australia has been actively involved throughout.

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[19] Andrew Jackson and Lorne Kriwoken, "Mining and 'World Park Antarctica', 1982-1991", in *Australia and the Antarctic Treaty System: 50 years of influence*, ed. Tom Griffiths and Marcus Hayward (Sydney: University of New South Wales Press, 2011), 273 (footnote 108).

It is likely that the integrity of the System will endure in the future and continue to demonstrate resilience to address changing circumstances; Australia has strong national and international interests in ensuring that it does.

Response: The Rules Based Order Applying to Antarctica and its Environment

Dr Tony Press
Adjunct Professor at the Institute for Marine and Antarctic Studies at the University of Tasmania and former Director, Australian Antarctic Division

The Antarctic Treaty is a critical part of Australia's national security landscape because it provides a huge region of security adjacent to Australia where we don't have to have a mobilised military presence: we don't have to have the ability to fight wars or defend ourselves. The Treaty protects our claim to the Australian Antarctic Territory: 42% of Antarctica

The Treaty has withstood critical and significant discussions and conflict, for example, over the minerals convention. In the early 2000s, Australia collected data off the coast of the Australian Antarctic Territory for the purposes of, *possibly* at some stage, defining an extended continental shelf off the Australian Antarctic Territory, under the United Nations Convention on the Law of the Sea. This was seen by many as a threat to the Antarctic Treaty itself. It led to an exquisitely delicate series of discussions between Australia and other Antarctic Treaty parties in the lead up to Australia submitting its data to the Commission on the Limits of the Continental Shelf – but asking the Commission to not consider data relating to the Australian Antarctic Territory. That was a very significant event in diplomatic relations, which Australia led, and helped Parties reach agreement not to turn it into a dispute, just as the Antarctic Treaty itself dealt with sovereign claims.

But not all commentators share David's, and some of my views, about the Antarctic Treaty System. They don't think that it's going to be "fit for purpose" to meet the challenges of the future. Indeed, a recent editorial in the prestigious scientific journal *Nature*[20] (of all places) called for the abandonment of consensus as the fundamental principle of the Antarctic Treaty of decision-making, and proposed that the Treaty should move to a system of majority vote decision-making. That will never happen because one would have to fundamentally rewrite the Antarctic Treaty in order to give up consensus decision-making. But it's a rather odd suggestion anyway. There are problems with consensus decision-making, but we certainly wouldn't want the Antarctic Treaty to turn into a vote-buying forum like the International Whaling Commission.

The UK-based academic, Klaus Dodds, considers the Antarctic Treaty System to be confronted by five inconvenient truths[21]:

- that the Antarctic is a deeply disputed space;
- that parties to the Antarctic Treaty System are struggling to manage resource exploitation, particularly fisheries;
- that some countries are perfectly prepared to investigate the Antarctic for its mineral potential;
- that the Antarctic is heavily commercialised; and
- that there is a growing anxiety about the role of China in Antarctica.

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[20] Editorial, "Reform the Antarctic Treaty", *Nature*, 13 June 2018. Available online: https://www.nature.com/articles/d41586-018-05368-7
[21] Klaus Dodds, *The Antarctic: A Very Short Introduction* (Oxford University Press, 2012).

The last is the one that gets repeated over and over again: that one word, China; that the rise of China is somehow going to disintegrate the Antarctic Treaty System. New Zealand-based academic Anne-Marie Brady has consistently argued that the rise of China will fundamentally reshape the Antarctic Treaty System and that China has explicit territorial ambitions in Antarctica.[22]

Now, I think these commentators and others raise legitimate points of view, but I don't agree entirely with them. They're wrong in many different ways, but fundamentally there's an inherent assumption that consensus is somehow deeply flawed. Consensus might be a difficult instrument to use, but it's an enormously powerful one. And one of the reasons the Antarctic Treaty and the Antarctic Treaty System has been so successful is that consensus is a very binding thing. The Antarctic Treaty System, without consensus, would be a completely different system than it is now. As I said, the alternative is a possible degeneration into vote buying. I think that the trade-offs are far too costly to move away from those fundamental principles. There might have to be new ways of dealing with recalcitrant countries; and there is a tendency to use consensus as a blocking mechanism, that we need to challenge head on. But I don't think you change the System by getting rid of consensus.

The other thing about this "rise-of-China view" is that it is one-dimensional. China, particularly in the Antarctic space, isn't one dimensional. There are many Antarctic interests in China, in the academies, particularly the Chinese Academy of

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[22] See, for example, Anne-Marie Brady, *China's expanding interests in Antarctica* (Australian Strategic Policy Institute, 17 August 2017) https://www.aspi.org.au/report/chinas-expanding-interests-antarctica; Anne-Marie Brady, *China as a Polar Great Power* (Cambridge University Press, 2017).

Sciences. Historically, now-senior Chinese Antarctic researchers spent time in Antarctica with Australian researchers and have deep connection with Australian scientists. The Chinese Academy of Sciences is intensely interested in the importance of Antarctica and the Southern Ocean and its role in climate change and they're investing heavily in that research. China can't just be looked at look at as a one-dimensional behemoth that's going to run over the top of everybody else. Finally, there's the assumption that everyone else will let China "win", whatever "win" means. I don't think that's necessarily the fact at all.

Australia has responded very effectively to some of the challenges we, as a nation, have faced with respect to our Antarctic interests – some, not all. In recent years, Australia has invested very heavily in new science and logistic capabilities such as the commissioning of the construction of a new icebreaker, *Nuyina*, which, when it hits the water, will be the most advanced research icebreaker in the world and will provide an extraordinary platform for international collaboration in Antarctic science.[23] The government has recently, in the last couple of years, committed to the use of heavy lift military aircraft, the C-17, as a logistics platform for Australian Antarctic science and also for collaborating with other countries. It fundamentally changes the way you do some kinds of science (like deep-field science) in Antarctica and it's an extraordinarily important investment. The government has announced its intention to scope the construction a year-round runway at Davis Station in

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[23] For an update on the RSV Nuyina see https://www.antarctica.gov.au/news/2020/australias-new-icebreaker-on-the-move/

Antarctica.[24] Davis Station is the region where the Australian, Russian, Chinese, and Indian research stations are all located near each other in Antarctica, and where the stepping-off point for China's overland traverse to Dome A in central Antarctica is situated. If the Davis runway proceeds, it will totally alter the logistics landscape, how Australia collaborates with other countries, and what the shape of those scientific and logistic collaborations will be in the future. All of those things are game changers and are really important for our interactions with France, Italy, India, China, Japan, Korea, New Zealand and the United States, and   many other Antarctic Treaty parties.

But we do fall short in a couple of areas. Australia's Antarctic program and its Australian Antarctic Division still runs on the smell of an old rag. For around $140 million in direct operational expenditure, we get really cheap investment in a critical piece of Australia's security infrastructure - and they're struggling. They are struggling to keep their heads above water and to run the entire Australian Antarctic program.

The other thing we need to do to back ourselves, and to face those challenges out there, is to invest more heavily in our national resources, in particular our diplomatic resources. We do not have enough capacity at the moment to be on the front foot on Antarctic matters in all the areas where we need to be on the front foot. If, for example, China or Russia are behaving badly at CCAMLR meetings or elsewhere, we actually need to have the diplomatic resources, skills and strategy to confront those issues early on - for example, to

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[24] For an update on this project see https://www.antarctica.gov.au/antarctic-operations/travel-and-logistics/aviation/davis-aerodrome/about-the-project/

demarche. When was the last time we had a joint demarche with other countries over an important Antarctic matter? I think it was quite some time ago. We used to do it regularly on issues like illegal, unreported, and unregulated fishing. I think Australia needs to enhance diplomatic efforts and other national resources, and its ability to understand the motives of other nations – for example, Iran and Turkey: what are they interested in the Antarctic? We need those resources to help us manage the challenges of the future and keep the Antarctic Treaty System as a world-leading environmental and diplomatic resource.

Is Antarctica being viewed in the bureaucracy and its agencies as a security issue? I think the answer is yes. We would not have got the preferred specifications for the icebreaker through cabinet without a national security lens, and Australia's national interest in the Antarctica being at the forefront of those discussions. I think that's also the case in the recent announcement about the runway. I've been participating in Antarctic discussions over the last decade or so and I can see the level of engagement in Antarctic matters from the national bureaucracy has gone up by 10 times what it was when I was the Director of the Antarctic Division. The whole of government is much more engaged in Antarctica matters now. That's really important.

Australia's relationships – with the other claimant states; with Russia and the United States; with the 12 original signatories, etc. still need to be built and fostered. Australia's influence will still partly depend on its history, which includes its sovereignty, but more importantly, into the future it will depend on Australia's ability to demonstrate the fact that it is a leader in Antarctic affairs, in science in logistics and, most importantly, in being a facilitator of international collaboration.

Bilateral Relations within the Rules-Based Order

Professor Shirley Scott FAIIA[25]
Head of the School of Humanities and Social Sciences,
UNSW Canberra at the Australian Defence Force Academy

The focus in discussion of Australia and the rules-based order
is often on Australia's contributions to large-scale multilateral
negotiations and whether or not it complies with or implement
specific agreements. It is important to remember that in
practice, however, participation in the rules-based order has
been integral to the conduct of Australia's bilateral
relationships. I would like to illustrate this point with four
vignettes in Australia-Japan relations, two related to pearl-
shelling, and two to whaling.[26]

Pearl-shelling in the 1930s

In the 1930s, Australia sought to limit Japanese pearling off
the northern coastline as it was in direct competition with the

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[25] This edited version of Professor Scott's remarks was printed by
Australian Outlook at
http://www.internationalaffairs.org.au/australianoutlook/bilateral-
relations-within-rules-based-order/.

[26] The vignettes are based on her articles titled 'The Japanese
Lugger Cases: The Triumph of the Rule of Law?' published in
Australian Journal of Legal History; 'The Inclusion of Sedentary
Fisheries within the Continental Shelf Doctrine' in *The International
and Comparative Law Quarterly*; 'Australian Diplomacy opposing
Japanese Antarctic Whaling 1945-1951: The Role of Legal
Argument', in the *Australian Journal of International Affairs*; and
'Whaling in the Antarctic (Australia v. Japan: New Zealand
intervening) Judgment of 31 March 2014: A decisive victory – but
for whom?' in *The International Journal of Marine and Coastal
Law*.

Australia industry and more efficient; the Japanese industry also had close ties to the Japanese Navy. The Japanese pearling operations were, for the most part, carried out on the high seas in complete accordance with international law.

Finding no basis in international law on which to exclude the Japanese, Australia's rather clumsy attempt to curb their operations via an amendment to the Aboriginal Ordinance turned into a farce and the cases were either decided in favour of the Japanese or settled out of court in their favour.

Pearl-shelling in the 1950s

During the 1950s, Australia sought to negotiate with Japan to limit Japanese pearling off Australia's northern coastline. Australian officials sought to rectify the lack of legal basis on which to demand limits by influencing the International Law Commission's draft articles on the continental shelf and related subjects so that sedentary fisheries would be included within the resources that the coastal state could regulate. Australia's efforts began with a trip by Australia's Solicitor-General to Geneva to influence members of the Commission, followed by the 6th Committee of the UN General Assembly and at the 1958 Geneva Conference on the Law of the Sea.

In 1953 the strategic manoeuvring became more complicated when Japan applied to become party to the Statue of the International Court of Justice (ICJ). Japan wanted to bring a case to the Court by Special Agreement. Australia agreed to do so subject to the two sides agreeing a provisional regime. Once Japan became party, Australia terminated its acceptance of the compulsory jurisdiction of the Court and replaced it with one accepting jurisdiction other than on matters concerning the Australian continental shelf or Australian waters as defined by the Pearl Fisheries Act, conditional upon

acceptance by the other party of Australia's provisional regime pending the final judgment of the Court on the matter.

Thereafter there were annual bilateral agreements but no agreement instituting proceedings. Australia's position strengthened once the 1958 Convention was concluded and the issue died down in the 1960s when plastics replaced pearl buttons.

Occupation whaling

Australian officials, under H.V. Evatt, then Minister for External Affairs, expended considerable diplomatic energy attempting to persuade the US not to permit the resumption of Japanese Antarctic whaling pending the conclusion of a peace treaty. Although Australia failed to persuade the US, what was notable from reading the archival records was that, while arguments couched in economic, practical or political terms carried little if any weight with US officials, those which identified a possible breach of international law did lead to a re-evaluation of policy and/or procedure on the part of the US.

On 31 May 2010 Australia instituted proceedings before the ICJ in the Whaling Case, which was decided on 31 March 2014. The Court found, *inter alia*, that the special permits Japan had granted its nationals to undertake scientific whaling in connection with the second phase of its Antarctic research program (JARPA II) did not fall within the provisions of article VIII, para 1 of the International Convention for the Regulation of Whaling, i.e. it was "not for the purposes of scientific research". The verdict was unequivocal in requiring Japan to end JARPA II but did not prevent it beginning a new Antarctic whaling program (NEWREP-A).

These vignettes illustrate that Australia's participation in the rules-based order has, to a large extent, been an extension of a domestic respect for the rule of law in Australia and its allies. We lost the "lugger cases" to Japan in its own courts in the late 1930s. The 1950s pearling story shows that we adopted a legalistic approach to resolving a dispute even when, at the beginning of the episode, the law was not in our favour. Integral to addressing the dispute was its manoeuvring in the International Law Commission, in the 6th committee of the UN General Assembly and at the UN Conference on the Law of the Sea in order to influence the law to favour Australia's position.

In doing so, Australia very much relied on the UK and the US for strategic advice, expertise and support. The US and UK had been so key to the design of the ICJ that they were well-placed to help us pursue our interests via that avenue.

The Occupation vignette illustrates just how seriously the US took criticisms couched in terms of international law. The fact that international law was so important to the conduct of these primary security relationships may help account for why Australia has produced just so many high-quality international lawyers.

We are now in an era in which Australia's security identity is more complex than in the past when it was tied so closely to the UK and then the US. Interrelated is the fact that there is an apparent reduction in the dominance of law as a reference point in international negotiations. It no longer gives the UK and US the degree of strategic advantage that it once did. Hence, perhaps it is little wonder that the US is turning away from its long-standing commitment to international law in favour of other ways by which to obtain a strategic advantage.

Rules of Antarctica and the Environment

Highlights of Discussion

Moderated by Professor Donald Rothwell FAAL, Professor of International Law, College of Law, The Australian National University

Influence

"What is the primary source of Australia's influence in the Antarctic Treaty System? If it's our sovereignty claim, is it inevitable that our relative force will decline as the proportion of claimants to non-claimants in the system increases? Can we counteract that just by adding more diplomatic resources?"

Professor Shirley Scott FAIIA
Head of the School of Humanities and Social Sciences, UNSW Canberra

"I have the honour of representing Australia on the United Nations on a number of space matters, and I have worked with various governments and bodies on space law. Whenever we talk about the Antarctic Treaty, its almost as if we have tears in our eyes because it is to a certain degree 'the mother of all treaties' in terms of some of the issues that were then subsequently codified in the Outer Space Treaty. It's a remarkable treaty concluded at a really interesting time. You see in the Outer Space Treaty, so much was taken and learned from the success of the Antarctic Treaty. Like with respect to Antarctica, comments are often made about space commercialisation, exploitation and the rise of China – in fact some people would go further and would describe space as 'contested, congested and competitive'... I think whilst there are parallels, there are great differences as well. In the space area, it's also based on consensus and consensus hasn't always resulted in speedy resolution of issues. This

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consensus requirement in the Committee on the Peaceful Uses of Outer Space is highly criticised by some, but I fail to see how you could have it any other way, particularly in areas that are so strategic. The COPUOS is now increasingly dealing with the space environment – which was never really a concern in the 50s, 60s and 70s – but we are now really grappling with the whole issue of cleaning the environment and the potential of proliferating space debris to threaten the ongoing sustainability of space. I wonder what lessons the space diplomatic, political and law-making community can learn from the Antarctic community about approaching and addressing environmental concerns."

Emeritus Professor Steven Freeland
Former Dean, School of Law, Western Sydney University

Mining, Environment and Security

"The Madrid Protocol was basically fought on mining. The other issues in the Madrid Protocol weren't particularly contentious. Now, it seems to be highly desirable for environmental reasons alone to keep the Madrid Protocol totally intact, even if a number of countries are losing enthusiasm for it. There is a 50-year time period in it anyway and that has to lapse before it can be changed, which is a very good idea. I think you've got to hold on to what you've got, which is essentially a treaty of perpetuity, but there are mechanisms to seek to amend it at the end of 50 years. One of the problems, which I think is really pertinent to Australian security and the security aspects of Antarctica, is that if you open up mining, major countries will have a real reason to have a stake in Antarctica, a national interest reason as they will see it. You'll get a race for resources in Antarctica. They will have reasons to want to get into the structure of Antarctic mechanisms and, because of the stake that will be created by

resource interests in Antarctica, they will have a reason to use that territory with potential adverse security consequences for us."

John McCarthy AO FAIIA
Former National President, Australian Institute of International Affairs and former Ambassador, Department of Foreign Affairs and Trade

"It's a compelling argument that Antarctica is essential to Australia's national security. I think that clearly at one point in Australian history, with the Holt Government, there was a political imperative to have a very strong view on Antarctica and the environment. Today, does the question of national security resonate both with the political classes and the public? Other than boffins sitting in rooms talking about policy, is that an argument that is getting traction out there? And is that reflected in a more holistic sense? So climate change surely must have a big impact when we are talking about Antarctica."

Dr Kristie Barrow
Australian Civil Military Centre, Department of Defence

Whaling

"As we know, the treaty doesn't mention whaling. In 1946, the International Convention for the Regulation of Whaling was concluded. We also know that there's a significant amount of whaling activity that has occurred in Antarctica, both at the commercial level and also since the moratorium entered into force in the mid-1980s. Australia has played a role in presenting a very robust opposition to whaling and challenging Japan's position on whaling in the International Court of Justice. Has that had an impact upon relations within

the Antarctic Treaty System? How might Australia seek to respond to Japan's announcement that it might be seeking to put forth proposals at the International Whaling Commission to lift the moratorium?"

Professor Donald Rothwell FAAL
College of Law, The Australian National University

"All of the Antarctic Treaty instruments defer the issue of whaling to the International Convention for the Regulation of Whaling and the International Whaling Commission, but whaling continues due to Japanese domestic political issues. There's really no reason for Japan to continue its scientific whaling program. All of the 'research' that's been conducted under the permits that Japan issues to itself can be done without lethal whaling. It would be a miniscule part of the data that is provided by the lethal whaling program that could not be done by non-lethal means. So, we have this deeply-entrenched problem of Japan insisting on whaling under the guise of a scientific program and Australia deeply opposing that, so it's been an issue that has been managed by keeping explicit discussions of whaling itself (rather than the ecosystem impacts) outside of the Antarctic Treaty and also by isolating the issue of whaling from everything else in the diplomatic relationship between Australia and Japan. That's how it's been handled. Japan's latest efforts have been extraordinary. First of all, the response to the ruling of the International Court of Justice where it was clear in the court's ruling that the Japanese whaling program, JARPA II, was in breach of international law.What Japan did was launch a new program called NEWREP-A, where they essentially do exactly what they did under JARPA II but call it a new whaling program. They then absent themselves from the jurisdiction of the International Court of Justice in respect to matters of living resources of the sea, therefore there's no

recourse for anybody to legally challenge Japan's whaling program in international law. Having done that, they are now moving to try and have the moratorium lifted and to essentially change the rules of the International Whaling Commission in relation to the way it makes law. I don't think it's possible for Japan to actually get the numbers to do that, but Australia does need to respond very strongly to this because it's the one part of international law, particularly environmental law, where Japan, as a nation, is consistently playing badly and consistently undermining the basic tenets of that legal system."

Dr Tony Press
Adjunct Professor at the Institute for Marine and Antarctic Studies at the University of Tasmania and former Director, Australian Antarctic Division

*"*First of all, on whaling and the Japanese attitude on whaling, it's assumed that it is a major political issue in Japan. It is, but probably for slightly different reasons to those that are commonly assumed. Only four electorates in Japan are actually affected by whaling, two significantly: one of which is Mr Abe's electorate, which is quite important to the way this is being played as an issue. Second, there is a deep-seated belief in the Ministry of Agriculture that they have to hold on to whaling. It sounds a bit archaic to us, but in the Japanese system it actually makes a lot of sense. It's a very powerful group of people, linked to a powerful group of politicians, and it's become sort of an ethos and they actually have responsibility for for the market in the whaling industry. Third is that the Japanese population don't eat whale much. It doesn't taste very good like beef. It's really not an issue, but it has become a nationalist issue in Japan and part of the reason for this has been the activities of NGOs in the Southern Ocean. If the Japanese have a complaint about Australia, it is

not so much that they'd invoke the international case against them, though I don't frankly think that's particularly good idea – just poking them with a stick really – but the real complaint was that Australian and New Zealand politicians did nothing at all about the activities of Sea Shepherd in the Southern Ocean. It was on Japanese television every night and it's become an issue we have to manage with the Japanese and it's a very difficult one. It is in our interest to dissuade them from taking the sorts of actions that they are proposing to take partly because I don't think it's a very good idea that we have holes being shot in the international regime... you really want to keep that intact."

John McCarthy AO FAIIA
Former National President, Australian Institute of International Affairs and former Ambassador, Department of Foreign Affairs and Trade

Chapter 6:
Australia and the Rules of International Trade and Finance

Australia's Role in Shaping the Rules-Based Economic Order

Associate Professor Elizabeth Thurbon[1]
School of Social Sciences, University of New South Wales

As a relatively small nation, Australian policymakers have long understood that expanding international trade and investment opportunities is central to the nation's prosperity.[2] Successive Australian governments have thus taken a keen interest in the rules under which international trade occurs.

As a result, despite its size, Australia has contributed in significant ways to the development of the rules-based international order in trade, especially since the negotiation and establishment of the World Trade Organization (WTO), which came into being in 1995 after a decade of negotiation. Australia's leadership of the Cairns Group of agricultural exporting nations established in 1986 is an oft-cited case in point, while its contribution to the development of the WTO's General Agreement on Trade in Services (GATS) agreement is also a noteworthy, if frequently overlooked, example.[3]

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[2] Given the turmoil in the international trade regime and Australia's emphasis on trade policy in its 2017 Foreign Policy White Paper, I largely focus my analysis on trade policy, whilst highlighting the most crucial finance-related issues in the latter part of the chapter.
[3] For a full discussion of Australia's critical contribution to the GATS negotiations and its "aggressive" defense of multilateralism and non-discrimination, even in the face of America's more

In this sense, it is fair to say that Australia has at times managed to "punch above its weight" in shaping various aspects of the WTO, the body that now oversees the multilateral framework of trade rules. Australian policy-makers took such an interest in the WTO's development not just because of the importance of trade to Australia; they also understood that their country's interests were more likely to be secured in a strong, multilateral forum, where its "size and weight" disadvantage could be offset through alliance formation with other smaller or similarly-interested nations.[4] Yet no sooner was the WTO created than it seemed to stall under the weight of conflicting expectations and dashed hopes. This eventually led many countries – including Australia – to reconsider their primary focus on multilateralism and embrace a preferential path.

As a result, since the early 2000s, preferential deals have become the primary site of international rulemaking as far as trade and investment is concerned, in many ways even more

discriminatory ambitions, see Ann Capling, *Australia and the global trade system: From Havana to Seattle* (Cambridge University Press, 2001), ch. 5. On Australia's proactive contribution to the creation of the WTO's predecessor, the General Agreement on Tariffs and Trade (GATT) following the Second World War, see Don Kenyon and David Lee, *The Struggle for Trade Liberalisation in Agriculture* (DFAT, 2006) and John Crawford,*' Australian Trade Policy 1942-1966*: *A Documentary History* (1968). Australia was one of the original 23 signatories to GATT, the world's first multilateral agreement on trade which established the norm of multilateralism.
[4] Department of Foreign Affairs and Trade, *2017 Foreign Policy White Paper* (Commonwealth of Australia, 2017), available online: https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper/fpwhitepaper/index.html. Indeed it acknowledges the fact that multilateral liberalisation will deliver the biggest gains for Australia (p. 50).

significant than the WTO.[5] As the 2017 Foreign Policy White Paper makes clear, Australia now sees the promotion of preferential trade agreements (PTAs) as central to the pursuit of its foreign policy objectives.[6] These objectives include defending the rules-based international economic order against growing protectionism and unilateralism – especially on the part of the United States – and ensuring that emerging economies – especially China – abide by liberal economic rules.[7]

In the sections that follow, I briefly explain the key reasons for the global shift away from multilateral rule-making towards preferentialism since the early 2000s. I then evaluate Australia's current role in the proliferation of preferential trade rules. Finally, I assess the implications of Australia's

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[5] At least in terms of rule-making surrounding 'new' trade issues (such as services and investment) that have had rules ascribed to them under PTAs and the level of market opening achieved under PTAs compared to the WTO. While WTO still provides the foundation of global trade rules (and remains the starting point for most PTA negotiations), many of its most important functions, not least dispute settlement, continue to be mired in conflict. From 2018, the United States blocked the appointment of new judges to the WTO's appellate body on the grounds of perceived bias against the US. As a result, one of the WTO's most important functions – dispute settlement – ceased to function in December 2019.

[6] *Ibid*, ch. 4.

[7] As the White Paper makes clear, by defence of the "rules-based order" the government means defence of the *liberal* rules based order. For example, from the Overview: 'Australia will continue strongly to support US global leadership … We believe that the United States' engagement to support a rules-based order is … in the interests of wider international stability and prosperity. Without sustained US support, the effectiveness and *liberal character* (emphasis added) of the rules-based order will decline' (*ibid* p. 7).

current approach to international economic rule-making for the pursuit of its wider foreign policy objectives.

In the spirit of this volume, my primary aim is to identify any tensions that exist between Australia's existing foreign economic policy approach on the one hand, and its stated foreign policy objectives on the other, with a view to highlighting the most likely challenges facing Australia in this particular policy sphere over the next two decades, and to advancing debate about the most desirable future direction of Australian foreign economic policy.

From Multilateralism to Preferentialism: An Uneasy Settlement Unsettled

From its inception, the WTO represented an uneasy settlement between "developed" and "developing" countries, crudely conceptualised. "Developing" nations plus Australia had long lamented the exclusion of agriculture from the WTO's predecessor, the General Agreement of Tariffs and Trade (GATT). The GATT had provided the multilateral framework of trade rules since the end of the Second World War. Yet, thanks to developed country preferences, GATT had only ever covered trade in manufactured goods; agriculture was effectively excluded. GATT was thus largely unhelpful for most developing nations, which were heavily reliant on agricultural exports. GATT also lacked an effective system of dispute resolution, which eventually became a key concern for developing and developed nations alike, especially in light of the United States' growing reliance on unilateral trade sanctions in the 1980s.[8]

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[8] The United States' growing unilateralism was largely a response to the new competitive challenges posed by the rapidly-growing East

For their part, "developed" nations (especially the US) also grew increasingly dissatisfied with the GATT during the 1970s and '80s, as technological advances dramatically transformed their trading interests. By the 1980s, the GATT's focus on tariff reductions for manufactured goods no longer reflected their core concerns, which now centred squarely on expanding foreign investment, securing market access for trade in services (such as banking, telecommunications and transport) and ensuring the global recognition and protection of intellectual property (IP) rights such as patents, copyright and trademarks.[9]

The WTO's creation thus embodied an uneasy settlement between two very different sets of interests: "developed" nations would agree to start liberalising their agricultural markets and refrain from employing unilateral trade sanctions if "developing" nations would agree to implement more

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Asian economies, led by Japan, which by the 1980s were emerging as significant new players in key US export industries. For an overview and critique of America's aggressive use of unilateralism in the lead up to the WTO's creation, see Jagdish Bhagwati and Hugh T. Patrick (eds), *Aggressive Unilateralism: America's 301 Trade Policy and the World Trading System,* (University of Michigan Press, 1991).

[9] For an accessible discussion of the different interests of 'developed' and 'developing' countries (broadly defined) in the Uruguay Round of negotiations that led to the establishment of the WTO, see Joseph Stiglitz and Andrew Charlton, *Fair Trade for All* (Oxford University Press, 2005). The authors also examine the extent to which developing countries' expectations were disappointed in that Round. As a result, while some least developed countries (LDCs) benefitted from the Uruguay Round, no less than 48 suffered economic losses of around US$600 million per year as a result of the commitments entered into under those agreements: p. 181.

stringent protections for IP rights and open their doors to foreign service providers and foreign investors on an increasingly non-discriminatory basis. In this way, the WTO's establishment was a significant turning point in the focus and nature of the rules-based international economic order: it marked a fundamental shift in focus from "at the border" trade issues (such as tariff reduction) to "behind the border" issues centred on the dismantling of domestic regulatory arrangements that might "restrict or distort" trade or privilege local over foreign firms (for example, local content requirements for foreign investors and government procurement arrangements that give preference to local firms). The justification was that the dismantling of foreign direct investment (FDI) restrictions, the privatisation and liberalisation of domestic services and the "harmonisation" of domestic regulatory arrangements would dramatically boost trade and investment flows, thereby increasing competition and efficiency across the globe and producing win-win outcomes for developed and developing countries alike.[10]

Yet no sooner had the WTO come into being than this uneasy settlement began to fracture, not least because the promised meaningful liberalisation of agriculture failed to materialise, and because the WTO's IP provisions and other liberalising reforms posed significant challenges for developing countries (such as limiting access to affordable medicines). In launching the so-called Doha Development Round in 2001, WTO members pledged to address some of these inequities,

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[10] These assumptions reflect neoliberal beliefs about how economies work, and about the inherently positive relationship between trade and financial openness on the one hand and economic development on the other. For arguments in this spirit see Jagdish Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004) and Martin Wolf, *Why Globalization Works* (Yale University Press, 2005).

especially agricultural liberalisation. Progress proved painfully slow, leading many countries to lose hope for meaningful progress at the WTO and to place primary emphasis on preferential deals instead.[11] It is important to note that for some developed nations, especially the United States, a key driver of the pursuit of PTAs was to advance developmentally-controversial reforms that would have no hope of succeeding at the WTO or other multilateral fora, not least WTO-plus IP provisions (for example longer, stronger patent and copyright provisions), investor-state dispute settlement processes (ISDS) and faster and deeper service-sector liberalisation.

As a consequence, PTAs have since become the primary site of international economic rule-making in the trade and investment sphere. In other words, the long-established norm of "multilateralism" has given way to "preferentalism".

Assessing Australia's Role in Shaping the Preferential Rules of the Game

Australia was at first a very reluctant player in the preferential game, given its longstanding preference for and commitment to multilateralism. The government even turned down two approaches from the United States for a bilateral trade deal in 1992 and 1997. However, as bilateral agreements proliferated both within the region and beyond, anxieties grew about Australia being locked out of and disadvantaged by the growing preferential trend.

It was in this context (along with 9/11, the invasion of Afghanistan and the Iraq war) that the government reversed

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[11] Joseph E. Stiglitz and Andrew Charlton, *Fair Trade for All* (Oxford University Press, 2005), p. 6.

its stance and approached the US for a bilateral trade agreement in 2001, which resulted in the Australia-United States Free Trade Agreement (AUSFTA) in 2004. The assumption was that as a faithful ally, Australia was in the position to secure significant concessions in sensitive areas like agriculture.[12]

Since that time, Australia has embraced an aggressive preferential agenda, although the major parties have adopted quite different approaches to the content of agreements over the years.[13] As the 2017 Foreign Policy White Paper observes: "since the mid-1990s, comprehensive deals agreed in the WTO have not been possible … [therefore] The best current prospects to protect and improve Australia's competitive position … lie in bilateral and regional FTAs."[14]

It is fair to say that Australia is now playing a key role in the proliferation of preferential trade agreements (PTAs), such as leading together with Japan the revised Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) negotiations following US withdrawal from the original Trans-Pacific Partnership (TPP) in 2017. Australia has also been party to the creation of some of the most "advanced" trade-related rules, for example, ushering into

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[12] On the economic and political drivers and negotiating outcomes of the Australia-United States Free Trade Agreement (AUSFTA), see Linda Weiss, Elizabeth Thurbon and John Mathews, *How to kill a country: Australia's devastating trade deal with the United States* (Allen & Unwin, 2004).

[13] For a discussion of these different positions, see Elizabeth Thurbon, 'Trade and Industry Policy: The Growing Partisan Divide' in Shahar Hameiri and Mark Beeson (eds), *Navigating the New International Disorder: Australia in World Affairs* (Oxford University Press, 2016).

[14] *Foreign Policy White Paper,* p. 59.

being the world's most stringent IP laws in 2004 under the AUSFTA and the world's first agreement on state-owned enterprises under the CPTPP.

The government now sees the pursuit of comprehensive PTAs as central to securing Australia's foreign policy objectives. Those objectives include:

- Promoting an open, inclusive and prosperous Indo-Pacific region in which the rights of all states are respected;
- Delivering more opportunities for our businesses globally and standing against protectionism;
- Promoting and protecting the international rules that support stability and prosperity and enabling cooperation to tackle global challenges;
- Stepping-up support for a more resilient Pacific and Timor-Leste.[15]

So, in assessing Australia's contribution to the rules-based international order, a key question is whether the trade rules it is now promoting help realise its objectives?

In the sections that follow, I consider this question in relation to each of Australia's stated goals. I pay particular attention to identifying the potential risks associated with Australia's current approach to international economic rule-making. I conclude with an assessment of key challenges for Australia in this foreign policymaking arena.

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[15] *Ibid*, p. 4. There is also a fifth objective identified in the White Paper: Ensuring that all Australians remain safe, secure and free in the face of threats such as terrorism. I have not included this objective as it is less directly relevant to trade agreements, although the extent to which economic disadvantage can create the conditions under which political instabilities and grievances flourish should not be underestimated.

Promoting an Open, Inclusive and Prosperous Indo-Pacific Region in Which the Rights of All States are Respected

In light of the goal to promote an "open, inclusive" region, it is important at least to acknowledge the potentially perverse relationship between preferentialism and protectionism, and thus the inherent risks involved in deploying PTAs as a weapon against protectionist practices and illiberalism more broadly. There are at least three ways in which preferentialism can actually *reinforce* protectionism, discrimination and market distortion and thus undermine support for a rules-based international order.

First, preferentialism can fuel support for discrimination among powerful business sectors by delivering exclusive benefits that would be undermined by more inclusive agreements. Even when genuinely intended as a stepping stone to multilateralism, PTAs are inherently exclusionary. Moreover, many of the economic benefits that flow from PTAs to certain sectors actually *derive from the exclusion of others*; this is why certain PTAs are often so appealing to particular business interests. For example, some of the most significant benefits flowing to Australian agricultural producers, especially beef producers, from the CPTPP actually derive from the US withdrawal from that deal and would be significantly undermined by that country's inclusion. Australia has even described the benefits of other PTAs in such exclusionary terms, such as the China–Australia Free Trade Agreement (ChAFTA) being good for Australia because it allows Australian firms to "get into China before

everyone else" and thus to reap exclusive benefits.[16] Given these dynamics, the risk is that once beneficial exclusive deals are secured, politically powerful segments of the business community will agitate *against* making these deals more inclusive. Precisely this occurred in the wake of the signing of the CPTPP-11. At a 2018 Parliamentary inquiry, a number of peak Australian business bodies made it clear that they are in no rush for the United States to be brought back into the fold, for the very reason that this would undermine their competitive position, especially in Japanese markets.[17]

Second, PTAs can entrench discrimination and market-distortion when they include provisions that violate the principles of the existing liberal international economic order. Australia is currently promoting a number of the PTAs that do precisely this. For example, several of Australia's PTAs including AUSFTA and CPTPP-11 extend IP protections well beyond limits deemed acceptable by the WTO. These protections violate liberal principles by entrenching monopolies, thwarting competition and encouraging a business model based on rent-extraction over productive job-creating investment.[18] Similarly, Investor State Dispute

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[16] See for example DFAT, *ChAFTA outcomes at a glance,* <https://dfat.gov.au/trade/agreements/in-force/chafta/fact-sheets/Pages/chafta-outcomes-at-a-glance.aspx>, where the agreement is described as giving Australian agricultural producers "an advantage over our major agricultural competitors, including the United States, Canada and the European Union" without bilateral deals in place with China.

[17] Submissions to the Inquiry can be located here: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/TPP-11/Submissions.

[18] On the ways in which the internationalisation of US IP rules abroad has promoted such a business model in the United States,

Settlement (ISDS) provisions violate the WTO's foundational principles of national treatment and non-discrimination. They do so by giving foreign firms more rights than local firms, allowing the former the exclusive right to sue national governments for regulatory changes that might impact on their profit-making expectations.[19]

Moreover, ISDS provisions as currently structured in many PTAs arguably conflict with Australia's stated objective of ensuring that "the rights of all states are respected".

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undermining production, innovation, job-creation and tax revenue, see Linda Weiss and Elizabeth Thurbon, 'Power Paradox: how the extension of US infrastructural power abroad diminishes state capacity at home' (2018) *Review of International Political Economy*, pp. 1-32. On the ways in which IP provisions enshrined in Australia's PTAs could thwart competition, entrench monopolies and hamper innovation in critical industries of the future, not least security-related software development, see the excellent analyses by Kimberlee Weatherall, 'Intellectual Property in the New TPP: Not 'the new TRIPS'' (2016) 17(2) *Melbourne Journal of International Law* 1, and Matthew Rimmer, 'Back to the Future: The Digital Millenium Copyright Act and the Trans-Pacific Partnership' (2017) 6(3) *Laws* 11.

[19] Indeed, in its 2010 review of Australia's PTAs, the Productivity Commission noted that ISDS provisions tend to provide foreign firms with higher levels of protection and standards of treatment than local firms: Productivity Commission, *Bilateral and Regional Trade Agreements (*Research Report, November 2010), p. 271. In that review, the Commission undertook an extensive evaluation of the likely benefits and risks of ISDS and concluded that including ISDS provisions in PTAs was not in Australia's interests and recommended that they be excluded from future deals. It is noteworthy that the Howard Government refused to include ISDS in AUSFTA, and in 2010 the Australian Labor Party adopted a 'No-ISDS' policy following the Productivity Commission's recommendations.

Specifically, they have been shown to transgress the sovereign right and democratic imperative of governments to regulate to secure the economic, social and environmental well-being of their citizens. In other national contexts, both developed and developing, ISDS provisions have demonstrably impinged on those rights by subjecting critical regulations related to financial stability and health, environmental and energy security to challenge by foreign firms.[20] Insofar as PTAs that include ISDS typically fail to respect the crucial regulatory rights of states, they can be said to conflict with Australia's foreign policy objectives.[21] Australia is lagging well behind others in realisation of this point. ISDS provisions are currently being reviewed, suspended and rejected by governments around the globe, from the United States to the European Union. Significantly, the EU has taken ISDS off the table from the outset in negotiations for an Australia-

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[20] For example, since the early 2000s, governments elsewhere have been successfully sued for: introducing domestic bans on the use of highly toxic substances and the export of hazardous waste; imposing environmental regulations on coal-fired power stations; ordering companies to clean up their toxic spills before being granted new operating licences; and refusing to issue mining permits on Indigenous lands.

[21] In relation to the CPTPP – which includes ISDS – there exists significant difference of opinion regarding the adequacy of the so-called 'carve out' clauses that are supposed to protect the regulatory space of governments in key areas including health and environmental protection. Australia maintains that the carve-outs leave it sufficient scope to regulate in the national interest. However detailed analysis of similar agreements challenge this position and suggest that the safeguards are insufficient to protect crucial regulatory space: see Kyla Tienharra, *Canary in the Coalmine: What Canada's experience with Investor-State Dispute Settlement tells us about Australia's future under the Trans Pacific Partnership,* 14 October 2016: http://cdn.getup.org.au/1929-Tienhaara_TPP_Final.pdf..

European Union Free Trade Agreement. Nevertheless, Australia agreed to the inclusion of ISDS in the recently signed CPTPP and the current Coalition government has stated that it will consider the inclusion of ISDS in future deals on a case-by-case basis.

The third way in which PTAs can potentially undermine support for a rules-based international order is by slowly and steadily supplanting mutually agreed multilateral rules with highly controversial rules that are first secured and then gradually "normalised" via successive preferential deals. This risks the further fracturing of support for a rules-based international order insofar as that order comes to be viewed by the citizenry as less and less representative of shared interests and more and more representative of a narrow but very powerful set of private interests seeking to advance their rent-extracting objectives.[22] We are currently witnessing precisely this outcome as public opposition to PTAs like the CPTPP has grown. There is a tendency to attribute public opposition to the CPTPP to "protectionist sentiment". This, however, is a dangerous misdiagnosis. As noted above, objections are often grounded in grave concerns about the market-distorting, rent-extracting aspects of these deals and their impact on the ability of states to regulate for legitimate national interest purposes.

If the objective is to foster broad-based support for the rules-based economic order, Australia must ensure that the rules it

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[22] For example, after the Doha Round stalled in 2004, the Pharmaceutical Research and Maufacturers of America (whose members include America's largest drug companies) explicitly stated its intention to use PTAs to pursue longer and stronger IP protection across the globe: Sarah Joseph, *Blame it on the WTO* (2011, Oxford University Press) p. 243.

is promoting support rather than undermine stable, inclusive and sustainable economic growth in the region and beyond.

Delivering More Opportunities for Australian Businesses Globally and Standing Against Protectionism

Australia's recent PTAs, including the CPTPP, deliver some significant new market access opportunities for some Australian businesses, especially in some agricultural and service industries.[23] These opportunities flow from both the lowering of tariffs and the dismantling of some "behind the border" barriers to trade arising from differences between national regulatory regimes. This is an excellent outcome for some Australian businesses.

Yet when it comes to delivering benefits to the Australian economy as a whole – surely the yardstick against which outcomes should be measured – the picture is far less rosy, including for the much-touted CPTPP. The government has continually refused to have the CPTPP's impacts independently modelled by the Productivity Commission despite widespread calls for it to do so, including from the business sector.[24] Rather, the government has cited revised

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[23] More specifically, the CPTPP delivered a large number of new market access outcomes for many products in many markets – although it should be noted that many of these outcomes were incremental and not particularly significant. These gains are summarised at https://www.dfat.gov.au/trade/agreements/in-force/cptpp/Pages/comprehensive-and-progressive-agreement-for-trans-pacific-partnership.

[24] Including the Australian Chamber of Commerce and Industry: Eryk Bagshaw, 'TPP: Tear up other trade agreements or risk becoming a 'noodle bowl', warns business', *The Sydney Morning Herald,* 24 January 2018. Indeed, securing such analysis prior to

modelling by the Peterson Institute for International Economics (PIIE) to support its claims that the deal will benefit the Australian economy. This modelling indicates that by 2030 the CPTPP will have boosted Australia's GDP by 0.5 per cent, which is modest by any measure.[25] Moreover, PIIE modelling does not include the substantial costs likely to arise from other, non-tariff related provisions of the deal, including its IP and ISDS provisions.

Such modest gains should not surprise. This is because unlike multilateral deals, preferential deals typically produce trade diversion, a welfare-reducing outcome. Precisely this occurred with the AUSFTA. In 2015, the first comprehensive evaluation of this deal found that over a decade, it had resulted in a decline in Australian and US trade with the rest of the world, that is it had produced welfare-reducing trade *diversion*.[26] The deal was also associated with a *reduction* in trade between Australia and the United States.

Other recent deals are anticipated to deliver similarly lacklustre results for the Australian economy as a whole. Consider the troika of Northeast Asian bilaterals: Korea-Australia Free Trade Agreement (KAFTA), Japan-Australia Economic Partnership Agreement (JAEPA) and ChAFTA.

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signing was a key recommendation of the Productivity Commission: *Bilateral and Regional Trade Agreements (*Research Report, November 2010)

[25] Peter A. Petri, Michael G. Plummer, Shujiro Urata, and Fan Zhai , 'Going it Alone in the Asia-Pacific: Regional Trade Agreements without the United States', *Peterson Institute for International Economics Working Paper* 17-10 (October 2017): https://piie.com/system/files/documents/wp17-10.pdf.

[26] Shiro Armstrong, 'The Economic Impact of the Australia-US Free Trade Agreement' (2015) 43(4) *Australian Journal of International Affairs* 491.

The 2017 White Paper identifies some stellar export outcomes for some Australian businesses arising from these deals over the last two years.[27] Significantly, however, government-commissioned modelling anticipates that these deals will send Australia's overall trade balance backwards in the long-run: the Centre for International Economics forecasts that between 2016 and 2035 these agreements will increase Australia's exports by 0.5 per cent and its imports by 2.5 per cent. Collectively they are expected to produce an overall economic welfare gain for Australia of only 0.4 per cent over this period.[28]

The key point is that while the benefits of PTAs are often loudly proclaimed by supporters, their actual economic impact is often less than impressive. If the government's aim is to maintain public support for its pursuit of PTAs, it must be wary of over-selling their anticipated outcomes.[29] The risk otherwise is that unmet expectations fuel public scepticism of the PTA project, undermining support for the government's pursuit of this particular rulemaking enterprise.

Australia's PTAs go well beyond the issue of trade promotion, extending to the crucial issue of catalysing foreign investment in Australia. As the Foreign Policy White Paper notes, increased foreign investment is expected to deliver

[27] *Foreign Policy White Paper,* p. 59.
[28] Center for International Economics, *Economic Benefits of Australia's North Asian FTAs*, 12 June 2015: https://www.dfat.gov.au/sites/default/files/economic-modelling-of-australias-north-asia-ftas.pdf.
[29] The Productivity Commission has been critical of the government's tendency to over-state the likely benefits of these deals and warned against overselling in the future: Productivity Commission, *Bilateral and Regional Trade Agreements (*Research Report, November 2010)

major benefits to the Australian economy.[30] Such an outcome could also help bolster public support for continued economic openness. The White Paper also notes that in the two years since signing three Northeast Asian deals inward FDI has increased by more than $30 billion. It should be noted, however, that government-commissioned modelling predicts no discernable increase in FDI into Australian arising from these deals in the long run. Of course, real-world developments might confound this modelling. But even if FDI inflows exceed expectations, two further questions must be answered to evaluate the investment-related merits of Australia's PTAs.

The first is *what kind of foreign investments are Australia's PTAs catalysing?* For example, are we seeing an increase in mergers and acquisitions (M&As) – the transfer of ownership of existing assets – or an increase in greenfield investment? And if FDI largely relates to M&As, what are the orientations of the new foreign shareholders? Are they likely to privilege short-term return of profits to shareholders, leading to repatriation of profits abroad, or the reinvestment of profits locally? More concretely, what are these firms' plans for skill and technological upgrading and new job-creation in Australia? Without a granular analysis of the kind of FDI taking place, it is impossible to predict the impact of increasing levels of FDI for the dynamism of the local economy. There is of course no question that Australia needs and can benefit enormously from FDI. But the reality is that not all foreign investments are nationally beneficial. Moreover, the nature of FDI that Australia attracts can be shaped crucially by domestic economic policy settings: a point not always appreciated by the Australian policymakers.

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[30] *Foreign Policy White Paper,* p. 59.

The second question is whether there are any costs associated with the investment-related aspects of Australia's PTAs and whether these costs outweigh the benefits? As noted above, the modelling of recent PTAs does not include the costs likely to arise from their investment-related provisions, especially the introduction of ISDS provisions allowing foreign investors under certain circumstances to sue national governments for regulatory changes that impact on their profit-making expectations. ISDS cases are typically heard by small, non-transparent tribunals with no appeal mechanism: arrangements that have been shown to produce perverse outcomes for national governments.[31] So, for example, if Australian chose to introduce a mining tax to claw back revenue from super-profits and to assist with climate change mitigation, it could face legal challenge under ISDS. This is not hypothetical; a key motivation of Korea in insisting on ISDS in KAFTA was Australia's introduction of a mining tax in 2012.[32] The expectation is that the ISDS provisions in that deal will prevent adoption of a more comprehensive tax in the future.

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[31] The critical literature on ISDS is voluminous and led by some of the most respected legal minds. Illustrative is the work of prominent US legal scholar and practitioner George Kahale III, who brings to his analysis years of experience defending national governments in some of the world's largest ISDS cases: Georgeg Kahale III, 'Is Investor-State Arbitration Broken?' (2012) *Transnational Dispute Management*, *9*(7) and George Kahale III, 'ISDS: The Wild, Wild West of International Law and Arbitration', Lecture delivered at Brooklyn Law School, 3 April 2018: https://www.bilaterals.org/IMG/pdf/isds-the_wild,_wild_west_of_international_law_and_arbitration.pdf. Kahale reveals the extent to which the existing ISDS arbitration system is fundamentally broken, routinely resulting in cases being unjustly awarded to litigating firms at the expense of national governments and their citizens.

[32] Author's discussions with Korean officials involved in the negotiations

While recently negotiated PTAs deliver some market access wins for some Australian firms, it is also critical to ask: is securing market access sufficient to enable Australian firms to compete in export markets? In other words, do Australian firms have the support they need to capitalise on market access opportunities? In this context, Australia's trade policy approach since 2013 has been marked by a worrying trend. On the one hand, Australia has pumped vast resources into negotiating trade deals that increase market access. Yet on the other, it has dismantled policy initiatives that would help boost the innovation and export capacity of Australian firms. In this way Australia has effectively substituted trade policy for industry policy, under the misguided assumption that increased exposure to "market forces" will drive the structural adjustment and techno-industrial upgrading required for Australia to compete in existing industries and to pioneer new ones.[33]

Importantly, the Foreign Policy White Paper acknowledges the critical role of domestic economic policies "that strengthen our competitiveness [and] enable Australia to make the most of trade and investment opportunities"[34] – including infrastructure spending, support for research and development (R&D), skill development and venture capital financing –and outlines the range of support programs currently available to Australian firms. Yet the rosy picture painted belies the paucity of these programs compared with Australia's trading partners and the crippling lack of consensus within the government about the need for a more strategic and sustained

[33] Elizabeth Thurbon, 'Trade and Industry Policy: The Growing Partisan Divide' in Shahar Hameiri and Mark Beeson (eds), *Navigating the New International Disorder: Australia in World Affairs* (Oxford University Press, 2016).
[34] *Foreign Policy White Paper*, p. 65-67.

approach to techno-industrial upgrading and export promotion. It is precisely this lack of consensus that enabled the damaging policy reversals since 2013, thanks to whichAustralia now appears to be an outlier amongst advanced industrial countries in terms of the variety and depth of support extended to local firms at every stage of the business lifecycle: from new technology creation to commercialisation, domestic market penetration and export initiation and expansion. While the vast majority of support programs extended by other national governments to their local firms are compliant with international trade rules, they go far beyond the obvious and quite basic supports offered by the Australian government.[35]

It is important to point out that the risks to Australian competitiveness posed by the growing disconnect between Australian trade and industry policy are currently being amplified by the intensification of two global trends. The first is what has been termed the Fourth Industrial Revolution (Industry 4.0), which is transforming the competitive landscape in which Australian firms operate and creating new opportunities for engagement with global value chains, and indeed the re-localisation of those chains. The second is the growing financialisation that is starving many smaller Australian firms of the funds they need to establish or expand new enterprises, especially technology-intensive ones. Financialisation is a worldwide trend. Under conditions of financialisation, private financial institutions effectively abandon investment in the productive economy to chase speculative returns. As a result, firms in the "real" economy –

[35] For an extended discussion of the sophisticated PTA-compliant policies deployed in South Korea, and how they compare with Australia's hyper-minimalist approach, see Elizabeth Thurbon, 'Trade agreements and the myth of policy constraint in Australia' (2016) 51(4) *Australian Journal of Political Science* 636.

that is, the job-creating, high-wage and high-skill) economy – are starved of the patient capital required to either kickstart or expand their activities. Consequentially, many firms find it easier to exit the market or to take their productive activities offshore rather than try to upscale at home. Thus, in many contexts, not least the United States, financialisation has played a key role in driving the trend towards de-industrialisation, which now poses yet another major economic and political challenge to developed and developing countries alike.[36]

In response to the financialisation challenge, many countries have been experimenting with new ways to keep the financial and productive sectors of their economies connected in ways that will support innovation, commercialisation, job-creation and export expansion.[37] This has included the newfound embrace of national development banks in developed countries from the UK to South Korea aimed at nurturing a new generation of firms and helping them find their feet in export markets. Yet in Australia early experiments with development banking such as the establishment of the Clean Energy Finance Corporation have been subjected to unsophisticated, ideologically-driven criticism by influential

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[36] On the relationship between financialisation and offshoring see Linda Weiss, *America Inc: Innovation and Enterprise in the National Security State* (Cornell University Press, 2014) and Linda Weiss and Elizabeth Thurbon, 'Power Paradox: how the extension of US infrastructural power abroad diminishes state capacity at home' (2018) *Review of International Political Economy*, 1-32.

[37] For an in-depth analysis of the South Korean experiment, see Elizabeth Thurbon, *Developmental Mindset: The Revival of Financial Activism in South Korea* (Cornell University Press, 2016).

members of the government who erroneously equate any kind of strategic activism with "protectionism".[38]

The growing disconnect between trade and industry policy poses a major risk for Australia in its quest to deliver more opportunities for Australian firms globally. To be sure, Australia is right to be concerned about and to want to defend against growing protectionism and unilateralism on the part of the United States. But in its efforts to defend against protectionism, Australia must take great care to distinguish between protectionism proper and PTA-compliant strategic activism. The reality is that the world's most successful exporting nations have embraced trade and investment openness on the one hand whilst pursuing sophisticated modes of techno-industrial support for local firms on the other.[39] Until Australian policymakers come to appreciate the crucial difference between strategic industry policy and protectionism and make serious efforts to reconnect Australia's trade and industry policies, Australian firms will continue to be disadvantaged in global markets, despite Australia's proactivity on the PTA front.

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[38] For a particularly pejorative attack on the Clean Energy Finance Corporation from the then shadow trade minister Andrew Robb discussed in Elizabeth Thurbon, 'Trade agreements and the myth of policy constraint in Australia' (2016) 51(4) *Australian Journal of Political Science* 636, p. 641.

[39] For an examination of the space that remains under WTO rules for developed countries to pursue strategic techno-industrial governance, see Linda Weiss, 'Global governance, national strategies: how industrialised states make room to move under the WTO' (2005) 12(5) *Review of International Political Economy* 723.

*Promoting and Protecting the International Rules that
Support tability and Prosperity and Enabling Cooperation to
Tackle Global Challenges*

Australia occupies a region largely populated by developing
nations. Thus, nurturing a development-friendly trade and
investment regime is crucial to Australia's goal of supporting
stability and prosperity in its region and beyond. Economic
development has always been a complex challenge. Indeed,
since the end of the Second World War only a handful of
developing countries have successfully made the transition to
developed country status. While embrace of financial
liberalisation and the creation of the WTO in the 1990s were
supposed to unleash market forces and boost global
development prospects, very few countries have successfully
scaled the development ladder since that time. Indeed since
the 1990s, countries that *had* successfully begun that climb
have become caught in the so-called "middle-income trap".[40]
Of course, domestic political and economic factors go some
way towards explaining the stalling of global development
efforts over the past two decades. However, the almost
universal nature of this stalling strongly suggests that external
factors – including international trade, investment and finance
rules – are also part of the problem and are not sufficiently
development-friendly.

What do development-friendly international economic rules
look like? This is a highly contentious question. The answer
turns principally on one's beliefs about where development
comes from, and the appropriate role of the state in that
process. The dominant (liberal) belief holds that development

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[40] See Richard F. Doner and Ben R. Schneider, 'The Middle-Income
Trap: More Politics Than Economics' (2015) 68(4) *World Politics*
608.

springs spontaneously from a country's exposure to international trade and investment flows, combined with the state's embrace of privatisation, liberalisation and deregulation, its commitment to market-enhancing "good governance" (such as rule of law, transparency and accountability), and its promotion of 'human capabilities' (such as education and skill development).[41] These beliefs are now firmly embedded in the existing framework of international trade, investment and finance rules which promote economic openness on the one hand and a quintessentially liberal limited role for the state in national economic governance on the other.

Yet as history shows – and as volumes of detailed empirical research reveals – no country has ever successfully developed by simply embracing trade and investment openness and focussing on "good governance" and "human capabilities".[42] This is particularly true if we define development in the classical sense to involve the large-scale and continuous techno-industrial transformation of the nation and the associated creation of higher-wage, higher-skilled and higher-

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[41] See, for example, Jagdish Bhagwati, *In Defense of Globalization* (Oxford University Press, 2004).

[42] The literature debunking liberal development myths is voluminous. The classic texts include Eric S. Reinart, *How Rich Countries Got Rich and Why Poor Countries Stay Poor* (PublicAffairs, 2008) and Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press: 2002). On the ways in which an exclusive focus on "poverty reduction" and "human capabilities" might hamper meaningful economic development objectives see Alice Amsden, 'Say's Law, Poverty Persistence, and Employment Neglect' (2010) 11(1) *Journal of Human Development and Capabilities* 57 and Alice Amsden, 'Grass Roots War on Poverty' (2012) 1 *World Economic and Social Review* 114.

value added jobs. Rather – as the experiences of Australia's successful regional neighbours Japan, South Korea and Taiwan have shown– successful development has historically hinged on the careful management of the nation's integration into the global economy. This management has been designed to ensure that gradual exposure to international trade and investment promotes the upgrading and export capacity of local firms, rather than these firms' suppression or displacement by foreign competition.[43]

Japan, Korea and Taiwan did not pioneer this kind of strategic approach to techno- industrial development; they carefully followed the examples set by countries like the United States and Germany in their own latecomer quests to industrialise. But three particular aspects have distinguished these economies' successful approach and set them apart from other less successful efforts since the end of the Second World War. The first was their policymakers' rejection of blanket protectionism and the conditional nature of the support they extended to local firms. That support hinged on firms meeting performance targets related to technological upgrading and

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[43] An extensive literature comprehensively documents the strategic role played by the state in East Asia throughout its late industrialisation process. Foundational texts include Chalmers Johnson, *MITI and the Japanese Miracle: the Growth of Industrial Policy, 1925-1975* (Stanford University Press, 1982); Robert Wade, *Governing the Market: Economic Theory and the Role of Government in East Asian Industrialization* (Princeton University Press, 1990); Jenni Hay Woo, 'Education and economic growth in Taiwan: A case of successful planning' (1991) 19(8) *World Development* 1029; Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (Oxford University Press, 1989); and Linda Weiss and John Hobson, *States and Economic Development: A Comparative Historical Analysis* (Wiley, 1995).

export volumes set by the state.[44] Such conditionality makes mockery of the oft-repeated but deeply misleading criticism that East Asian governments somehow tried to "pick winners". Winning firms typically self-selected by meeting rigorous performance standards placed on them by the government.

The second was the conditionality placed on foreign direct investment (FDI) by national governments. Foreign investors were welcomed to participate in the local economy on the condition that they at least temporarily help build local techno-industrial capacity through the transfer of technology, the sourcing of local content and providing employment and skill development for local workers. The third was the dedicated effort on the part of these governments to mobilise financial capital and channel it towards productive investment that would produce local technological upgrading and mass job-creation. This was made possible by the state's strategic interventions into national financial markets, which were intended to ensure that firms had access to the patient capital required to initiate and upscale new activities.

The East Asian three were able to pursue such a strategic approach to global economic integration because of an enabling international environment. The geopolitical context of the Cold War kept their political leaders and policymakers focussed on the task of national economic development for survival purposes. International trade rules were more permissive of developmentally-friendly "behind the border" policies like local content and technology transfer requirements that linked FDI positively with local

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[44] Alice Amsden, *Asia's Next Giant: South Korea and Late Industrialization* (Oxford University Press, 1989) famously described this as the state "disciplining capital".

development. Financial markets were more tightly regulated, enabling governments to carefully manage capital inflows and outflows and to intervene in markets to mitigate against financial instability and avert crisis. There was no overwhelming external pressure rapidly to privatise state-owned financial institutions. And there were no international rules preventing states from creatively combining privatisation and deregulation with re-regulation when necessary, in order to keep finance and production connected.

The circumstances now facing developing nations is very different indeed. First, international trade rules, including the WTO's TRIMS (Trade-Related Investment Measures) Agreement, now outlaw the kinds of policies that historically enabled governments to proactively connect FDI with local development.[45] This particular constraint on governments has proved especially detrimental to development in light of the growing fragmentation and geographical distribution of production processes, and the emergence and consolidation of global value chains (GVCs). Thanks to their newfound ability to fragment and geographically distribute production, foreign firms are now typically less interested in upgrading the local techno-industrial capabilities of the nations in which they

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[45] On the ways in which the WTO has narrowed the development space for developing nations see Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press: 2002); Robert Wade, 'What strategies are viable for developing countries today? The World Trade Organization and the shrinking of 'development space' (2003) 10(4) *Review of International Political Economy* 621; and Alisa Dicaprio and Kevin P. Gallagher, 'The WTO and the Shrinking of Development Space; How Big is the Bite?' (2006) 7(5) *Journal of World Investment and Trade* 781.

invest.[46] This is perhaps one reason why the explosion of FDI across the developing world over the past decade has not produced more positive development spillovers.[47] Indeed, the increase in FDI has coincided with the worrying onset of premature de-industrialisation across the developing world, a trend comprehensively documented by Harvard economist Dani Rodrik.[48]

Premature de-industrialisation and the attendant shift into low wage, low value-added service industries characterised by high levels of informal employment is not just economically detrimental for developing countries. It is politically detrimental as well in that it makes democratisation "less likely and more fragile".[49] As Rodrik explains: "mass political parties have traditionally been a by-product of industrialization. Without the discipline and coordination that an organized labor force provides, the bargains between the

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[46] For an elaboration of these reasons see Richard F. Doner and Ben R. Schneider, 'The Middle-Income Trap: More Politics Than Economics' (2015) 68(4) *World Politics* 608.

[47] Specifically why FDI has not helped to kickstart the sustained industrial transformations of the countries in which FDI is occurring, helping them to upgrade local capabilities and develop higher wage, higher value-value added economic activities. The exception of course is China, which ironically simply ignores international rules that outlaw trade local content and technology transfer requirements. This perhaps explains why it is the only country to have managed to achieve the broad and deep upgrading of local industrial capacity in the context of global value chains. On China's strategic management of FDI, see Dan Breznitz and Michael Murphree, *Run of The Red Queen: Government, Innovation, Globalization, and Economic Growth in China* (Yale University Press, 2011).

[48] Dani Rodrik, 'Premature Deindustrialization' (February 2015) *NBER Working Paper* No. 20935.

[49] *Ibid*, p.5.

elite and non-elite needed for democratic transitions and consolidation are less likely to take place".[50] Thus by promoting international trade and investment rules that inhibit the industrialisation of its neighbours and supports their premature servicification, Australia risks failing in its objective to support not only the economic development of the region, but its political development and stability as well.

Shifting focus to the challenge of financialisation, some of the PTAs Australia is promoting place serious pressures on countries to privatise state owned financial institutions and to deregulate and liberalise financial markets. Recent provisions in the CPTPP go even further than this, effectively outlawing re-nationalisation and complicating re-regulation, even if privatisation and deregulation produce perverse economic and social consequences. This is despite the historic relationship between financial liberalisation and deregulation on the one hand and financial speculation and crisis on the other. Indeed, history shows that the countries that have most benefited from financial liberalisation have done so because they have maintained the policy space required to re-regulate when faced with growing financial speculation and instability.[51]

The importance of policy space for developing countries – and the need to preserve it – is explicitly recognised in the United Nations' Sustainable Development Goals, to which Australia has committed. Specifically, under goal 17.15, Australia commits to "Respect each country's policy space and leadership to establish and implement policies for poverty

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[50] *Ibid*.
[51] The case of Taiwan is instructive: Elizabeth Thurbon, 'Two paths to financial liberalization: South Korea and Taiwan' (2001) 14(2) *The Pacific Review* 241.

eradication and sustainable development".[52] However, multiple aspects of the WTO and PTAs impinge in major ways on that space. In doing so these rules serve to undermine rather than support the development prospects of Australia's neighbours. Of course, ensuring that policy space remains for national governments does not guarantee that all national governments will deploy that space effectively. However, to the extent that policy space is a necessary prerequisite for effective strategic activism, protecting policy space is a crucial step in creating the conditions under which development might actually occur.

The recently-signed CPTPP-11 contains a development chapter – Chapter 23 – that seeks to carve out policy space for developing-country governments actively to pursue economic and social development goals. Nevertheless, other aspects of that agreement are likely to conflict with the promotion of development goals, such as Chapter 18's patent protection provisions, as well as the ISDS provisions that leave financial regulations aimed at reigning in speculation open to challenge and service sector provisions that prevent the government from stepping back in should the social and economic outcomes of privatisation in critical areas prove developmentally detrimental. The potential for the development chapter of the CPTPP to conflict with other chapters of the CPTPP is explicitly acknowledged in Article 23.8 ("Relation to other chapters") and unfortunately, in the event of such a conflict, development goals are effectively subordinated to all the other goals embodied in the agreement, such as protecting private-sector profits. It is thus fair to say that developmental concerns have been far from prioritised in the CPTPP.

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[52] United Nations Sustainable Development Goals, Goal 17: https://sustainabledevelopment.un.org/sdg17.

To the extent that they significantly impinge on the policy space needed to promote sustained and sustainable economic development, many of the trade and investment rules that Australia currently supports risk undermining its objective of promoting prosperity and stability in the region.[53]

Stepping-Up Support for a More Resilient Pacific and Timor-Leste

In light of China's recent economic and military expansion into the Pacific, the Australian Government has identified "supporting a more resilient Pacific and Timor-Leste" as a key foreign policy priority. Yet again there are ways in which Australia's approach to trade, investment and finance in the region complicate and constrain these nations' sustainable economic and political development.[54] I have outlined the importance of policy space to the development project of all states. Insofar as the Pacific Agreement on Closer Economic Relations Plus (PACER Plus) places serious constraints on

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[53] For an overview and evaluation of debates about the state's role in development under globalisation see Elizabeth Thurbon and Linda Weiss, 'The State of Development in a Globalising World' in E. Vivares (ed) *Routledge Handbook of International Political Economy* (Routledge, 2020).

[54] This is leaving aside the question of aid to the region, which is also a sphere of competition between China and Australia. On the strengths and weaknesses of Australia's approach to regional aid see Jonathan Pryke, *Submission to the Inquiry into the Strategic Effectiveness and Outcomes of Australia's Aid Program in the Indo-Pacific*, 31 July 2018: https://www.lowyinstitute.org/publications/submission-joint-standing-committee-foreign-affairs-defence-and-trade.

that space, it is arguably unlikely to produce the development outcomes intended by the government.[55]

Equally concerning is Australia's approach to mobilising finance for infrastructure investment in the region. To the extent that Australia seeks to position itself as a positive development partner, especially compared to China, it is crucial that the projects it finances produce positive economic, environmental and socio-political outcomes for the people of the Pacific and Timor-Leste. Currently however, Australia is not fully meeting its obligation to ensure that the development financing produces beneficial outcomes.

The recent case of financing the Papua New Guinea LNG pipeline by the Export Finance and Insurance Corporation (EFIC) is a case in point. Through EFIC, on the advice of DFAT, in 2009 Australia lent $500 million in taxpayers' money to the Exxon-led project to establish the PNG LNG pipeline: the largest-ever loan made by Australia's state-owned export finance corporation. The outcomes of that project have been evaluated in a report co-authored by Paul Flanagan, a former senior executive in the Australian Government who has also worked with the PNG Treasury. The report found that, in stark contrast to predictions of windfall gains to PNG in terms of growth in employment essential services, household income and the broader economy, the project has been disastrous for PNG.[56] According to the report:

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[55] For a detailed examination of the likely development constraints imposed by PACER Plus see Wesley Morgan, 'Trade Negotiations and Regional Economic Integration in the Pacific Islands Forum' (2014) 1(2) *Asia & the Pacific Policy Studies* 325.
[56] Paul Flanagan and Luke Fletcher, *Double or Nothing: The Broken Promises of PNG LNG*, (Jubilee Australia Research Centre, 2018),

- "Despite predictions of a doubling in the size of the economy, the outcome was a gain of only 10% and all of this focused on the largely foreign-owned resource sector itself;
- Despite predictions of an 84% increase in household incomes, the outcome was a fall of 6%;
- Despite predictions of a 42%increase in employment, the outcome was a fall of 27%;
- Despite predictions of an 85% increase in government expenditure to support better education, health, law and order and infrastructure, the outcome was a fall of 32%;
- Despite predictions of a 58% increase in imports, the outcome was a fall of 73%."[57]

To the extent that Australia seeks to position itself as the development partner of choice for the region, it is crucial that the lending operations of its state-owned financial institutions be held to the highest possible standards of accountability. The report just cited provides a host of recommendations for reforming Australia's approach to the financing of regional development projects. These recommendations should be considered seriously by the government in its quest to step-up support for a more resilient Pacific and Timor-Leste.

Where to From Here?

My aim in this chapter has been to evaluate Australia's contribution to the rules-based international economic order, with a primary focus on trade and a secondary focus on finance. In doing so, I have sought to identify the most

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p. 5: https://www.jubileeaustralia.org/resources/publications/double-or-nothing.

[57] *Ibid*, p. 5.

significant tensions that exist between Australia's stated foreign policy objectives on the one hand, and its approach to international economic rule-making on the other. I have identified a number of ways in which Australia's current approach to international economic rule-making conflicts with its stated foreign policy objectives.

In light of these conflicts, the key challenges for Australia can be summarised as follows:

- To acknowledge and take steps to mitigate against the potentially perverse relationship between preferentialism and protectionism.
- To ensure that the trade and investment rules it promotes do not violate its commitments to the principles of national treatment and non-discrimination under the WTO.
- To refrain from overselling the likely benefits of PTAs and creating inflated expectations on the part of the Australian public about their likely economic outcomes. To do otherwise risks generating disillusionment and undermining support for the government's PTA project.
- To distinguish more carefully between protectionism and strategic activism, with a view to promoting a more sophisticated and productive national debate about the government's role in securing the nation's competitiveness.
- To take urgent steps to re-connect trade and industry policy with a view to bolstering the competitiveness of Australian firms and countering the serious challenge to national prosperity posed by financialisation and de-industrialisation.
- To reject trade and investment rules that do not respect the rights of Australia's neighbours, and indeed

    Australia's own rights, to regulate to secure the social, economic and environmental security of their citizens.
- To reject trade and investment rules that impinge on neighbours' development space and which prevent them from mitigating the serious development challenges posed by the geographical distribution of production, financialisation and de-industrialisation. To do otherwise risks thwarting not only their industrial development but their political development as well, with serious implications for the region's prosperity and stability.
- To ensure that Australia's financial institutions are held to the highest level of accountability in order to position Australia as the development partner of choice of the Pacific and Timor-Leste.

In sum, Australia's challenge is to fundamentally re-think its approach to international economic rule-making and to seize a leadership role in establishing a truly development-friendly international trade, investment and financial regime.

Highlights of Discussion

Moderated by George Mina, First Assistant Secretary at the Office of Trade Negotiations, Department of Foreign Affairs and Trade

Australia's Contribution

"In terms our major achievements, very briefly, I think Australia was very proactive in terms of rule-making and certainly was one of the major players in Geneva and the WTO. But we were initially constrained by the fact that we had a highly protectionist industry policy and subsidised agricultural sector... Once we had begun reducing tariffs and liberalising more broadly, we were in a position to be quite active in an international sense. That was combined with what was a brilliant piece of diplomacy through the Cairns Group. The Cairns Group was different because it was based on a sector (agriculture), rather than geography and/or a particular level of development; it included major developed countries through to middle-range countries and very poor countries, and that was something that hadn't been done before, at least in the WTO context... Secondly, the government took the position of being active in all areas of the Uruguay Round, even when we had, at the time, less direct trade interest, thereby ensuring we were at the main table on all key issues."

Peter Grey FAIIA
Former Chief Trade Negotiator and former Ambassador to the WTO and APEC

Threats to the Global Trading Order

"Australia's engagement in the rules-based order and trade since the Second World War has been through the GATT and

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then the WTO. As I understand it, if the United States continues to veto the appointment of judges to the WTO, the WTO will cease to exist. There won't be a WTO able to do things, so this seems to me a pretty big deal for the rules-based order in trade. Is it likely that we may end up with no rules-based order at that multilateral, global level?"

Allan Gyngell AO FAIIA
National President, Australian Institute of International Affairs

"What should our policy be in dealing with the fracas between the United States-China and the United States-Europe right now? It obviously has severe implications for us. Should we take an approach which is based on the rules-based order, or should we make political allowances for Trump? How should we deal with the Chinese complaints on this?"

John McCarthy AO FAIIA
Former National President, Australian Institute of International Affairs and former Ambassador, Department of Foreign Affairs and Trade

"The key driver of the pursuit of preferential trade agreements was a desire to advance trade liberalisation and trade reform. The WTO has stopped working as effectively and quickly as Australia wanted and this is still the case. The reasons why it has stopped working are numerous, but a key reason was very simple and obvious: it's a consensus-based organisation... so, any one member can prevent progress – and the number of active members had become very large. Through the Doha Round, consensus was needed between 165 people."

Peter Grey FAIIA

Former Chief Trade Negotiator and former Ambassador to the WTO and APEC

Politics and Trade

"A comment on the threat currently posed to international trade rules and the international framework by the United States' trade policy. It's easy to characterise current policy under Trump as clumsy, culturally-insensitive, historically-illiterate and possibly counterproductive, but I suspect there's an element in which Trump has some justifications. So, it's not all one way. It seems to me that Trump's policy is pretty shrewd domestically. Trump's main objective must be to win the 2020 presidential election, and he's building a case that says, 'Don't blame me. Don't blame conservatives for the failure to address the inequities in the United States. Don't blame us for the failure to invest adequately in public infrastructure. Blame Brussels, blame Beijing: they are the reasons why you're not getting what you want.' It seems to me that Trump and those around him are not being stupid. They're possibly being thoughtful in building and affecting domestic support."

Philip Flood AO FAIIA
Former Secretary, Department of Foreign Affairs and Trade

"One of the aspects I find frustrating about some of the debate is how quickly people forget. Back in 1988 all the clothes you're wearing would cost probably double what you paid for them today because we had tariffs around 100% plus on textiles, clothing and footwear to protect our industry. You drive a car you might think of as expensive, but it would be about 70% more expensive for the same car 20 or 30 years ago. The benefits of trade are quickly pocketed, but people forget that that's why they're getting cheaper cars, cheaper

clothes, cheaper school uniforms or whatever it is. In terms of the broader politics of it all, I think greater transparency, generally, and greater use of social media makes managing the politics of it all very, very difficult.... There are perfectly sensible, legitimate domestic policies which can be utilised to manage any distribution or other adverse effects stemming from trade liberalisation, like tax policy. The problem is blaming trade for everything."

Peter Grey FAIIA
Former Chief Trade Negotiator and former Ambassador to the WTO and APEC

Economy and Security

"We talk as if economic law thinking and our national security law thinking are separate. What's clearly happening at the moment is the bringing together of these two fields: you see it very clearly in the US National Security Strategy last year, where they redefine the threat as not being terrorism in Afghanistan and Al Qaeda, but very much being China and economics. You see it in the trade sphere where they're giving national security justifications for trade policy. You can clearly see this in investment space with the rise of strategic investments and investment screening. What happens when you have this economic frame and this national security frame coming together and how's that going to affect us going forward?"

Professor Anthea Roberts
School of Regulation and Global Governance, The Australian National University

"A wider question: it isn't what should be done to repair the rules-based order as it currently exists, but what should be

done in terms of formulating new aspects to rules-based order in the future that deals with issues like cyber security, AI, all those questions which are really just getting up on our screens in a very major way."

John McCarthy AO FAIIA
Former National President, Australian Institute of International Affairs and former Ambassador, Department of Foreign Affairs and Trade

Sanctions

"A further serious question facing any future international order is whether or not economic sanctions – covering investment or trade – should be imposed against countries but outside the United Nations, as has happened quite frequently. The challenge is to decide how a new 'order' might come to terms with imposing economic sanctions, which are likely to remain a convenient political choice for some countries and their leaders. The uncomfortable truth is that economic sanctions are a crude instrument and are not usually effective on their own anywhere; there is plenty of independent evidence supporting this thesis... Economic sanctions imposed under UN authority can work, because they are universal and can be thoroughly monitored. But in any circumstances, a framework is needed to assist the process of adopting a comprehensive set of policy measures which might containing some standard, workable procedures with certain common elements to provide predictability and uniformity."

Trevor Wilson
Visiting Fellow, Coral Bell School of Asia Pacific Affairs, The Australian National University and former Ambassador to Myanmar, Department of Foreign Affairs and Trade

Chapter 7:
Australia and the Rules of People Movement and Human Rights Law

Frontiers of Crisis: Australia's Contribution to a Rules-Based Order regarding Cross-Border Movement of People

Professor Penelope Mathew
Dean of Auckland Law School, then Dean of Griffith Law School

Large and unauthorised movements of migrants and refugees across international borders have contributed to a sense of disorder, indeed, crisis. This has prompted new governance efforts. However, the label 'crisis' is a double-edged sword. On one hand, the invocation of crisis served as a stimulus for the negotiation of two non-binding global 'compacts' on refugees and migrants in 2018.[1] On the other hand, at national and regional levels, the trope of crisis frequently pulls against international governance of migration. Australian approaches have been surprisingly significant, and not always progressive. The strategic deployment of a crisis paradigm by Australia and its export value for other governments is key to understanding Australia's influence.

The New York Declaration and the Global Compacts

In 2016, the United Nations General Assembly adopted a landmark document by consensus, the New York Declaration for Refugees and Migrants ('New York Declaration').[2] It is in

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[1] *Report of the United Nations High Commissioner for Refugees: Global Compact on Refugees (part II)*, UN Doc A/73/12 (13 September 2018) ('*Global Compact on Refugees*'); *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195 (11 January 2019, adopted 19 December 2018) ('*Marrakech Compact on Migration*').
[2] *New York Declaration for Refugees and Migrants*, GA Res 71/1 (3 October 2016, adopted 19 September 2016) ('*New York Declaration*').

many respects an exemplary document of the liberal rules-based order: a resolution adopted by a key multilateral institution seeking cooperation through consensus. The New York Declaration foreshadowed two further such instruments: the Global Compact on Refugees[3] and the Global Compact for Safe, Orderly and Regular Migration (also known as the Marrakech Compact on Migration).[4]

The outcome of a high-level plenary meeting on large movements of refugees and migrants, the Declaration responded to a sense of crisis and an urgent need for cooperation.[5] In the Declaration, the General Assembly speaks of 'an unprecedented level of human mobility', noting that migrant numbers are growing and that there are 65 million forcibly displaced persons globally.[6] Similarly, the UN Secretary-General described the impetus for the meeting as the media images of people on the move that:

> "have shocked the world's conscience: rickety boats piled high with people seeking safety; women, men and children

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[3] *Global Compact on Refugees*, UN Doc A/73/12. The Global Compact on Refugees was 'affirmed' by the General Assembly, which also called upon states to implement the Compact: *Office of the United Nations High Commissioner for Refugees*, GA Res 73/151 (10 January 2019, adopted 17 December 2018) paras 23-4.

[4] The Global Compact for Safe, Orderly and Regular Migration was adopted at an intergovernmental conference in Marrakech on 10–11 December 2018 and endorsed by the General Assembly.

[5] The New York Declaration does not define a large movement precisely, but notes that whether a movement is 'large' depends on a number of considerations, including: 'the number of people arriving, the economic, social and geographic context, the capacity of a receiving State to respond and the impact of a movement that is sudden or prolonged': *New York Declaration*, para 6.

[6] *New York Declaration*, para 3.

drowning in their attempts to escape violence and poverty; fences going up at borders where people used to cross freely; and thousands of girls and boys going missing, many falling prey to criminal groups."[7]

The fact that mixed migration flows encompass not only refugees – in so many respects an exception to the prevailing rules about immigration – but also irregular migrants is a good reason to deal with refugees and migrants in an interconnected, holistic way.[8] However, when states have historically dealt with refugees and migrants together, they often have treated them as a single category, failing to recognise protection needs and vulnerability. States have insisted on control over immigration, adopting unilateral deterrence mechanisms that defeat the right to seek asylum. This response 'makes people illegal' or, more accurately, places them in an irregular situation.[9]

The New York Declaration and the Global Compacts hold the promise of a different response: one that preserves the right to seek asylum; offers more regular and therefore safer pathways for cross-border movement for both refugees and, in principle,

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[7] *In safety and dignity: addressing large movements of refugees and migrants – Report of the Secretary-General*, UN Doc A/70/59 (21 April 2016) [1].
[8] See *New York Declaration*, para 6. This contrasts with most migration which conforms with states' domestic laws: *In safety and dignity: addressing large movements of refugees and migrants – Report of the Secretary-General*, UN Doc A/70/59 (21 April 2016) [87].
[9] I draw on Catherine Dauvergne's work, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008).

other people on the move[10]; and commits to 'a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees.'[11] This suggests that the international community of states has reached a watershed moment. But how firm are the promises? How vulnerable is the process to a mass stampede into sovereignty, away from governance and back to the default of every state for itself?

Crisis and Progress: From "Migration Misrule" to Cooperative Migration Governance and Responsibility Sharing?

To answer these questions, it is important to understand the historical background to the current lack of cooperative migration governance or what might be termed 'migration misrule'.[12] The liberal rules-based order established following

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[10] See *New York Declaration*, annex II para 8(e); *Global Compact on Refugees*, UN Doc A/73/12, [91], [95]; *Marrakech Compact on Migration*, para 21.

[11] *New York Declaration*, para 68; *Global Compact on Refugees*, UN Doc A/73/12, part IIIA (Arrangements for burden- and responsibility sharing).

[12] The Commission on Global Governance defined governance as "the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action taken": *Migration in an interconnected world: New directions for action – Report of the Global Commission on International Migration* (October 2005), p. 65, citing Commission of Global Governance (1995). According to the Global Commission on International Migration, governance in migration takes many forms, including 'the migration policies and programmes of individual countries, interstate discussions and agreements, multilateral fora and and consultative processes, the activities of international organizations, as well as [human rights

the Second World War built on the fundamental Westphalian principle of territorial sovereignty. Determination of the composition of a state's population, one of the constitutive criteria for statehood, through the allocation of citizenship and control of immigration remains largely within the domestic jurisdiction of states.[13] International law imposes few restrictions regarding the allocation of nationality or citizenship[14] and little by way of a right *to* nationality.[15] Similarly, although it is now accepted that human rights apply to all human beings regardless of migration status,[16] it is

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and labour standards]': *Migration in an interconnected world: New directions for action – Report of the Global Commission on International Migration* (October 2005), 65.

[13] *Montevideo Convention on the Rights and Duties of States* (entered into force 26 December 1933), art 33.

[14] In the *Nottebohm case*, the International Court of Justice decided that for a state's conferral of nationality on an individual to be recognised internationally, there had to be a genuine and effective link between the individual and the state: *Nottebohm (Liechtenstein v Guatemala) (Second Phase)* [1955] ICJ Rep 4.

[15] Every child has the right to 'acquire' a nationality: *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 7; *United Nations International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 24(4). Under the Convention on the Reduction of Statelessness, stateless people may gain nationality in certain instances, including where the stateless person was born on state territory, although they may be required to *apply* for citizenship and meet other requirements as outlined in the convention: *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 980 UNTS 175 (entered into force 13 December 1975). International law also provides protection against arbitrary loss of nationality: article 15, *Universal Declaration of Human Rights*, GA Res 217 A (III) (10 December 1948).

[16] As in the *New York Declaration*, paras 5, 41.

largely within the power of states to determine eligibility for immigration.[17] This state of affairs reflects both a diversity of historical experiences of migration and a common concern for sovereign control.[18]

In previous centuries, European colonial endeavours were buttressed by appeals to freedom of movement for the colonists.[19] Towards the end of the 19th Century, racist fears of migration by colonised peoples or peoples viewed as inferior in 'White Dominions' such as Australia and Canada resulted in the now ubiquitous insistence on a 'sovereign

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[17] Article 12 of the International Covenant on Civil and Political Rights and Article 13 of the Universal Declaration of Human Rights both protect the right to leave and return to one's own country, but there is no express right of admission to a country that cannot be called 'one's own'. Further, while the definition of one's own country extends to permanent residents, the best guarantee of the right of return is citizenship of a country, as shown by jurisprudence regarding criminal deportation of permanent residents to countries of citizenship which have often not been called home by the deportee for decades. See, for example, Human Rights Committee, *Views: Communication No 538/1993*, 58th Sess, UN Doc CCPR/C/50/D/538/1993 (18 March 1994) ('*Stewart v Canada*').

[18] Pécoud and de Guchteneire write that, '[i]t is … unrealistic to assume that all states will eventually adopt similar immigration (not to mention integration) policies; migration is too deeply rooted in each country's history and nature to be dealt with in the same way throughout the world': Antoine Pécoud and Paul de Guchteneire, 'Between Global Governance and Human Rights: International Migration and the United Nations' (2007) 8(2) *Georgetown Journal of International Affairs* 115, 119.

[19] Francisco de Vitoria, 'On the Indians Lately Discovered' trans John Pawley Bate in James Brown Scott, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (Clarendon Press, 1934).

prerogative over entry'.[20] Australia was at the forefront of this movement[21] and the White Australia Policy remained in place until the 1970s.[22] This sovereign prerogative over entry is still a basic international legal rule and a fundamental component of the current rules-based order.

The critical exception to the sovereign prerogative has been the protection of refugees. Pursuant to the 1951 Convention relating to the Status of Refugees (Refugee Convention), refugees cannot be returned (or *refouler*) to a place of persecution.[23] Australia's accession to the Refugee Convention supplied the necessary sixth ratification for the treaty to enter into force. However, Australia participated as a potential resettler of refugees, rather than a recipient of spontaneous asylum seekers. To this extent, Australia's participation may be viewed as an example of exceptionalism, where the rules were perceived as being for others.[24]

The exception of refugee status proves the rule of sovereignty. The Convention was conceived as a temporary exception.

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[20] James A R Nafziger, 'The General Admission of Aliens Under International Law' (1983) 77 *American Journal of International Law* 804, 816.

[21] Henry Reynolds and Marilyn Lake, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press, 2008).

[22] James Jupp, *From White Australia to Woomera: The Story of Australian Immigration* (Cambridge University Press, 2002).

[23] *United Nations Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) art 33, ('*Refugee Convention*').

[24] For this phenomenon in Australia's approach to human right law more generally, see Dianne Otto, 'From "Reluctance" to "Exceptionalism": the Australian approach to domestic implementation of human rights' (2001) 26 *Alternative Law Journal* 219.

Article 1A(2) of the Refugee Convention originally contained a deadline concerning events occurring before 1 January 1951.[25] While the ongoing nature of refugee problems was recognised with the adoption of the 1967 Protocol relating to the Status of Refugees,[26] refugee status is itself envisaged as temporary: a surrogate status that may terminate with a fundamental change of circumstances in the country of origin.[27] In other words, refugee status is a crisis that does not really need to be fully normalised, thus posing little threat to the territoriality of the rules-based order.[28]

In this respect, international refugee law projects a remarkable stability as compared with counter-terrorism law, for example, in which the invocation of emergency and necessity has

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[25] This was modified by the *United Nations Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[26] *United Nations Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

[27] *Refugee Convention*, art 1C(5)-(6).

[28] Catherine Dauvergne argues that refugee law is both limited and (at least moderately) successful because it is itself a perpetual crisis: 'refugee law is the crisis of sovereign infringement': 'Refugee Law as Perpetual Crisis' in Satvinder Singh Juss and Colin Harvey (eds), *Contemporary Issues in Refugee Law* (Edward Elgar Publishing, 2013) 13, p. 26. Regarding the paradigm of temporariness, see Guy Goodwin-Gill, 'Principles and Purpose – Stepping up to Refugee Protection in this Era of Displacement', Michael Whincop Lecture for Griffith University on 23 October 2018: https://www.kaldorcentre.unsw.edu.au/news/%E2%80%98principles-and-purpose-%E2%80%93-stepping-refugee-protection-era-displacement%E2%80%99-michael-whincop-lecture

threatened the rule of law.[29] However, the paradigm of temporariness assists in maintaining the disorder of irregular migration. The reality of refugee protection for the majority of refugees is a depressingly stable and indefinite limbo. Around two thirds of all refugees are in protracted refugee situations, defined as situations enduring for over five years,[30] and some countries have chosen to house refugees in camps administered by the Office of the United Nations High Commissioner for Refugees (UNHCR) that resemble states in some respects, rather than offering surrogate citizenship.[31]

Notwithstanding the adoption of the New York Declaration and Global Compacts, universal consensus on refugee protection is somewhat tenuous and fractured. One hundred and forty-eight states are party to either the Convention or Protocol, or both, but there is a paucity of ratifications from countries in the Middle East and Asia; a deficiency not sufficiently redressed by regional arrangements. This relative lawlessness also promotes disorder. As the New York Declaration attests, the international community accepts *non-refoulement* as a norm of customary international law and, in practice, states that are not party to the Convention or

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[29] See, for example, Colm O'Cinneide, 'Strapped to the Mast: The Siren Song of Dreadful Necessity, the United Kingdom Human Rights Act and the Terrorist Threat' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU e-press, 2008) ch 5.

[30] For UNHCR's definition of a protracted situation and statistics, see UNHCR *Global Trends: Forced Displacement in 2019*, 18 June 2020, 24: available online https://www.unhcr.org/en-au/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html

[31] Amy Slaughter and Jeff Crisp, 'A surrogate state? The role of UNHCR in protracted refugee situations' in Gil Loescher, James Milner, Edward Newman, and Gary Troeller (eds), *Protracted Refugee Situations* (United Nations University Press, 2008) 123.

Protocol do observe the obligation of *non-refoulement*, albeit imperfectly.[32] However, refugees in such countries still frequently lack legal status and attendant rights such as the right to work or to education.

The gap between *non-refoulement* and other rights fundamental to refugee protection may be bridged in law, if not practice, by other norms such as the prohibition on inhuman or degrading treatment or the notion of constructive *refoulement*.[33] However, there is also a yawning, geographical gap between the protection of *non-refoulement* and the physical location of most asylum seekers. It is usually impossible for refugees to 'migrate' specifically to seek protection in compliance with states' national immigration laws. In order to be a refugee, an international border must have been crossed,[34] and there are few opportunities to obtain refugee protection in country[35] or even whilst in a country of first asylum. Once they have crossed an international border, less than 1% of the global population of refugees is able to

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[32] In the New York Declaration, states "reaffirm respect for the institution of asylum and the right to seek asylum' as well as 'respect for and adherence to the fundamental principle of non-refoulment in accordance with international refugee law": *New York Declaration*, para 67. For a detailed analysis prior to the adoption of the New York Declaration concluding that *non-refoulement* is both customary international law and ripe for recognition as *jus cogens*, see Cathryn Costello and Michelle Foster, 'Non-refoulement as custom and *jus cogens*? Putting the prohibition to the test' (2016) in Maarten den Heijer and Harmen van der Wilt (eds), 46 *Netherlands Yearbook of International Law 2015*, 273.
[33] For discussion, see Penelope Mathew, *Reworking the Relationship between Asylum and Employment* (Routledge, 2012), 97-9.
[34] Refugees are by definition "outside" their countries of origin: *Refugee Convention*, art 1A(2).
[35] For example, through "protected entry procedures" which allow a refugee to apply for admission to a state through its embassy.

access a resettlement place.[36] In addition to failing to enable migration for the purposes of protection, wealthy Northern states control their borders through a variety of measures of *non-entrée*, such as carrier sanctions, which effectively externalise the border.[37] These barriers to irregular migration catch asylum seekers in their net. As a consequence, like irregular migrants, refugees use the services of people smugglers in order to cross international borders. Along the way, they are subjected to many dangers including, all too frequently, death.[38]

The response from the international community prior to the New York Declaration and Global Compacts has generally not entailed the creation of lawful paths of movement, but rather has involved attempting to clamp down on people smugglers, including through the adoption of the Palermo People Smuggling Protocol.[39] Meanwhile, countries sharing porous international borders with refugees' countries of origin bear a disproportionate responsibility for sheltering refugees – 85 per cent of refugees are sheltered in the developing world –

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[36] This is a fairly consistent statistic over time: see resettlement statistics reports at UNHCR online at https://www.unhcr.org/resettlement.html.

[37] James C Hathaway, 'The Emerging Politics of Non-Entrée' (1992) 91 *Refugees* 40, 40-41; James Hathaway and Thomas Gammeltoft-Hansen, 'Non-refoulement in a World of Cooperative Deterrence' (2015) 53 *Columbia Journal of Transnational Law* 235.

[38] Leanne Weber and Sharon Pickering, *Globalization and Borders: Death at the Frontier* (Palgrave Macmillan UK, 2011).

[39] *United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime*, opened for signature on 15 November 2000, 2241 UNTS 507 (entered into force 28 January 2004).

which threatens the quality of protection and sometimes the cardinal principle of *non-refoulement* itself.[40] This inequitable and unsustainable situation has fuelled debates about sharing responsibility for refugees.[41]

The New York Declaration and the Global Compacts attempt to address these shortcomings. The Comprehensive Refugee Response Framework, outlined in the New York Declaration and which now forms an integral part of the Global Compact on Refugees,[42] aims to simultaneously increase safe migration pathways for refugees, including providing resettlement on a scale that meets the UNHCR-identified annual resettlement needs,[43] and resourcing for host states designed to meet humanitarian needs and promote development.[44] The Programme of Action in the Global Compact on Refugees establishes four-yearly Global Refugee Forums, and envisages support platforms for particular crises, which may include solidarity conferences, as mechanisms to raise the necessary contributions.[45] Meanwhile, the Marrakech Compact on Migration sets out 23 objectives and accompanying actions[46] with the fifth objective being to enhance availability and

[40] UNHCR *Global Trends: Forced Displacement in 2019*, 18 June 2020: available online https://www.unhcr.org/en-au/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html

[41] *New York Declaration*, para 7. See also the discussion of academic and other proposals in Penelope Mathew and Tristan Harley, *Refugees, Regionalism and Responsibility* (Edward Elgar Publishing, 2017), ch 3.

[42] *New York Declaration,* annex I; *Global Compact on Refugees*, UN Doc A/73/12, para 10.

[43] *New York Declaration*, annex I, para 16.

[44] *Ibid,* paras 6, 8(c).

[45] *Global Compact on Refugees*, UN Doc A/73/12, [17]-[19], [22]-[27].

[46] *Marrakech Compact on Migration*, para 16.

flexibility of pathways for regular migration[47] while also having a strong focus on labour mobility.[48]

Avoiding a "Crisis" of Irregularity by Normalising Migration

While presenting the need for cooperation as a response to crisis, the New York Declaration and Global Compacts also attempt to normalise migration and present it as an engine of development. This effort builds on 25 years of international summits and reports beginning with the Cairo Conference on Population and Development and culminating in the *2030 Agenda for Sustainable Development*[49] and the World Humanitarian Summit.[50] The Marrakech Compact on Migration declares that it is 'rooted in the 2030 Agenda for Sustainable Development.'[51] Its critical fifth objective to "enhance availability and flexibility of pathways for regular migration" assumes that "demographic and labour market realities" make more migration desirable.[52] The Global Compact on Refugees also makes a number of references to

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[47] *Ibid*, para 21.

[48] It is notable that there are fewer explicit measures for vulnerable migrants and family reunion. Labour mobility can benefit refugees provided protection from *refoulement* and of labour rights are guaranteed, however it may be a 'precarious form of temporary protection': Katy Long, 'Extending Protection? Labour Migration and Durable Solutions for Refugees' (New Issues in Refugee Research, Research Paper No 176, UNHCR, 2009) 20.

[49] *Transforming Our World: the 2030 Agenda for Sustainable Development*, GA Res 70/1 (21 October 2015, adopted on 25 September 2015).

[50] *Outcome of the World Humanitarian Summit – Report of the Secretary-General*, UN Doc A/71/353 (23 August 2016).

[51] *Marrakech Compact on Migration*, para 15.

[52] *Ibid*, para 21.

the Agenda for Sustainable Development[53] and, in particular, attempts to shift financing for refugee protection from crisis humanitarian relief to build on the potential development opportunities of hosting refugees.[54]

Unfortunately, there is a distinct danger that development assistance and investment may be viewed as a pay-off for the developing world to continue to play by the rules as treaty and customary international law or the rules of realpolitik dictate that the developing world must provide the significant public good of refugee protection because the developed world is not prepared to do so. During the consultations and stocktaking on the Global Compact on Refugees, one host state delegate expressed reservations about the use of the term 'opportunity' to describe refugees and said that he looked forward to other states seizing these opportunities.[55] Similarly, it has been observed in the context of EU policy, that the development turn in migration may tend to contain 'unwanted' or low-skilled labour within developing countries, while reserving the right of developed countries to skim off the cream of skilled labour from developing countries.[56]

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[53] *Global Compact on Refugees*, UN Doc A/73/12, [9], [64], [65].

[54] *Ibid* 32, 64, 65.

[55] Intervention by the Representative of Iran, Closing Plenary, 10th High Commissioner's Dialogue on Protection Challenges, Webcast, 01:24:30, available online: http://webtv.un.org/d/watch/closing-plenary-unhcr-10th-high-commissioner%E2%80%99s-dialogue/5680163210001/?term=&lan=original.

[56] Sakina Abushi and Hicham Arroud, *A Migration Bubble? Reading the New European Neighbourhood Policy in the Moroccan Context* (15 June 2016) Heinrich Böll Stiftung European Union, available online: https://eu.boell.org/en/2016/06/15/migration-bubble-reading-new-european-neighbourhood-policy-moroccan-context.

Such scepticism is understandable. The crisis which provided the impetus for the New York Declaration is arguably not the humanitarian crisis encapsulated in the photo of little Alan Kurdi, lifeless on a Mediterranean shore[57], nor the Syrian civil war, nor the serious strain on countries neighbouring Syria, nor the rather manageable number of refugees and migrants world-wide[58] – but the fact that Europe experienced a large, irregular influx of refugees and migrants. There are, moreover, strong forces pulling against change as the following survey of state practice in developed states demonstrates.

What Lies Beneath International Summitry: Crisis and Retreat

Below the rarefied air of international summitry, the practices of key developed states on the ground demonstrate a tendency to retreat into sovereignty as a response to migration crises, whether real or manufactured. This section looks at the practice of the European Union, the United States and Australia.

Together, the EU, US and Australia account for 60% of the Western European and Others Group ('WEOG') UN regional grouping. The US and Australia are traditional countries of immigration, while the EU is an interesting case study of a regional free movement regime in action. These states or blocs are significant players in the international refugee regime as donors and/or resettlement states. They also borrow

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[57] Available online: http://100photos.time.com/photos/nilufer-demir-alan-kurdi

[58] Globally, estimated migrant stocks represent under four per cent of the population, while the number of forcibly displaced persons, including refugees, is around one per cent of the global population.

practices from each other, whether progressive or regressive, and Australia's recent practice has had significant export value, belying its status as a mere middle power.[59]

The Australian Blueprint

Since the demise of the White Australia Policy, Australia's approach to immigration generally has been relatively open and welcoming, with explicit commitments to multiculturalism. While there have been political debates about the size of the immigration programme, the respected Scanlon Foundation survey has consistently found that the view that immigration is too high is a minority view.[60] The main flashpoint for political controversy has been unauthorised asylum seekers, particularly those arriving by boat.[61] Increasingly restrictive measures have been taken since 1992, when legislation requiring mandatory detention of such asylum seekers was adopted.[62]

The arrival of the Norwegian freighter *MV Tampa* in 2001 saw the government enter crisis-management mode and further harsh measures – including the closure of the territorial sea to the *Tampa*, the use of the Special Air Service to board the ship, a programme of boat push-backs (Operation Relex) and offshore detention of asylum seekers on Manus

[59] Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World* (Cambridge University Press, 2016) 26.
[60] Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2018* (2018), p. 40, available online: https://scanlonfoundation.org.au/wp-content/uploads/2018/12/Social-Cohesion-2018-report-26-Nov.pdf.
[61] Claire Higgins, *Asylum by Boat, Origins of Australia's Refugee Policy* (NewSouth Publishing, 2017).
[62] Eve Lester, *Making Migration Law: The Foreigner, Sovereignty, and the Case of Australia* (Cambridge University Press, 2018) ch 5.

Island in Papua New Guinea and on Nauru (the insensitively named 'Pacific Solution').[63] The approach was not entirely new, borrowing from the United States' previous practice of intercepting Haitian asylum seekers.[64] The prime minister at the time, John Howard, declared that 'we will decide who comes to this country, and the circumstances in which they come' and went on to claim victory in the 2001 federal election.[65]

The Pacific Solution and associated measures were abandoned during the first Rudd Government, but offshore detention was reintroduced by the Gillard Government. This was followed by the introduction of 'regional resettlement agreements' by Prime Minister Rudd when he was re-installed.[66] Subsequently, the Abbott Government introduced 'Operation Sovereign Borders', a border protection programme enforced by the military which included boat pushes and tow-backs, having successfully campaigned on a platform to 'stop the boats'.

The Gillard Government's decision to revert to offshore detention was the product of governmental panic about the increasing number of boat arrivals and sustained pressure

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[63] Susan Metcalf, *The Pacific Solution* (Australian Scholarly Publishing, 2010).

[64] Advice was received from a senior US official with experience of Haitian interdiction: Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World*, (Cambridge University Press, 2016), 26, 83.

[65] John Howard, 'Election Speech' (Sydney, 28 October 2001), available online: https://electionspeeches.moadoph.gov.au/speeches/2001-john-howard.

[66] Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing, 2016), ch 8.

applied by the Abbott-led Opposition.[67] A crisis was 'constructed' around the arrival of boats in Australia with a range of 'deterrence scripts' – including deterrence for the purpose of 'breaking the people smugglers' business model' and 'preventing deaths at sea' – developed to justify the ill-treatment of refugees and asylum seekers.[68]

In fact, offshore detention has been far from humane. It has caused significant rates of mental illness amongst refugees and asylum seekers[69] and created a bureaucratic headache as countries in which asylum seekers have been held have lost enthusiasm over time, while third countries resettlement arrangements have been difficult to secure.[70] However, the apparent electoral impact of Australia's policies has won

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[67] Leanne Weber and Sharon Pickering, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law & Social Inquiry* 1006, p. 1009.

[68] *Ibid*, p. 1007.

[69] See the description of the situation on Nauru in Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing, 2016), 317-319.

[70] Of those determined to be refugees after transfer to Nauru or Papua New Guinea under the first iteration of the Pacific Solution, 61% were eventually resettled in Australia: Arianne Rummery, *Australia's "Pacific Solution" draws to a close* (11 February 2008, UNHCR), available online: https://www.unhcr.org/news/latest/2008/2/47b04d074/australias-pacific-solution-draws-close.html. Through an executive agreement reached with the Obama administration, the US agreed to accept some of the refugees sent offshore under the second iteration of the Pacific Solution: Kaldor Centre, *Fact Sheet – Australia US Resettlement Arrangement* (28 January 2018), available online: https://www.kaldorcentre.unsw.edu.au/publication/australia%E2%80%93united-states-resettlement-arrangement.

emulators amongst parties on the far right, populists and governments facing a crisis of legitimacy.[71]

The European Union

As a regional arrangement, the EU aspires to be an area of freedom, justice and security.[72] However, the internal freedom of movement for EU citizens has rested on a secure EU perimeter. The very make-up of the EU has been challenged both by the influx of migrants and refugees and the internal freedom of movement of EU citizens. One of the most visible signs of the strain is the UK's decision to leave, known as Brexit.[73] During the 'European migrant crisis' of 2015, other visible signs were the walls that were erected to contain the flows of migrants and refugees.[74]

Rather than accept equitable, physical responsibility-sharing arrangements, some governments chose to build walls.

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[71] Sasha Polakow-Suransky, 'How Europe's Far Right Fell in Love with Australia's Immigration Policy', *The Guardian* (online), 12 October 2017 https://www.theguardian.com/world/2017/oct/12/how-europes-far-right-fell-in-love-with-australias-immigration-policy.

[72] C*onsolidated Version of the Treaty on the Functioning of the European Union* [2016] OJ C 202/1, art 67.

[73] According to one analyst, Brexit was driven by a misguided causal link between various problems facing UK citizens, particularly poor, white UK citizens, such as falling wages, the housing shortage, lack of educational attainment and problems financing other social services such as health, and migrants: Simon Tilford, *Britain, immigration and Brexit*, 105 CER Bulletin (December 2015/January 2016), p. 3 available online http://www.cer.eu/sites/default/files/bulletin_105_st_article1.pdf.

[74] *In safety and dignity: addressing large movements of refugees and migrants – Report of the Secretary-General*, UN Doc A/70/59 (21 April 2016) 1.

Hungarian Prime Minister Viktor Orban started this trend, drawing on 'an impressive narrative of crisis'.[75] A limited mandatory quota system using a distribution key made up of population size, GDP, unemployment levels and past contribution to hosting refugees was applied by the European Union with respect to relocation of asylum seekers from Italy and Greece, resulting in successful litigation,[76] but failure to meet the quotas in practice and feet-dragging on the broader question of reform of the Dublin Regulation,[77] which allocates responsibility for irregularly arriving asylum seekers to the first EU country entered by the asylum seeker, contributing to the EU's inability to cope with irregular migration.

The year 2018 featured a number of disputes over the reception of asylum seekers rescued at sea, with Italy taking a particularly harsh stance, copying Australia's practice of interception of boats of asylum seekers.[78] Italy had followed

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[75] For an account of this use of crisis narrative with respect to migration, pointing out that the narrative was not completely successful as few migrants wished to remain in Hungary, see Gabor Illes, Andras Korosenyi and Rudolph Metz, 'Broadening the limits of reconstructive leadership: Constructivist elements of Viktor Orban's regime-building politics' (2018) 20(4) *The British Journal of Politics and International Relations* 790, p. 803.

[76] *Slovak Republic and Hungary v Council of the European Union,* (Court of Justice of the European Union, joined cases C-643/15 and C-647/15 ECLI:EU:C:2017:631, 6 September 2017).

[77] *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)* [2013] OJ L 180/31.

[78] See Jacquelin Magnay, 'Italy Immigration: New Interior Minister Matteo Salvini promises to 'stop the death boats'', *The Australian*, 4

Australia's lead under the Berlusconi Government, too, when intercepting vessels and returning asylum seekers to Libya, until the practice was condemned by the European Court of Human Rights.[79] Yet in in 2018, the response of the European Council to the Italian government's position endorsed, among other things, cooperation with Libya.[80]

The EU also sought to emulate the Australian practice of offshore detention, drawing on the same humanitarian deterrence scripts as Australia. In the conclusions of the European Council meeting in June 2018, the Council determined to 'break the business model of the smugglers, thus preventing tragic loss of life'[81] – a refrain often heard in Australia during the years of the Gillard Government – and called for the exploration of 'regional disembarkation platforms.'[82]

While lacking in detail, these platforms sounded a little like regional processing centres as proposed by the Gillard Government[83] and strongly resembled the Pacific Solution.

June 2018; Crispian Balmer and Steve Scherer, 'Italy Follows Australia's Lead in 'Stopping the Boats', sparking EU tensions', *The Australian Financial Review*, 13 June 2018.

[79] *Hirsi v Italy*, ECtHR, App No 65109, 23 February 2012.

[80] Note from General Secretariat of the Council to Delegations, 'European Council meeting (28 June 2018) – Conclusions, CO EUR 9 CONCL 3, EUCO 9/18, Brussels, 28 June 2018, 3.

[81] Ibid, 5. The EU also used this phrase in the EU-Turkey agreement: 'EU-Turkey statement' (Press Release, 144/16, 18 March 2016), fourth preambular paragraph.

[82] Ibid, 5.

[83] Julia Gillard, 'Moving Australia Forward' (Lowy Institute, 6 July 2010) <https://archive.lowyinstitute.org/sites/default/files/pubfiles/Moving-Australia-forward_Julia-Gillard-PM_1.pdf>.

There are also older precedents, namely the refugee camps established under the Comprehensive Plan of Action for Indochinese Refugees (CPA), in which Australia played a supporting role to the United States and which successfully garnered resettlement offers in exchange for temporary protection in countries of first asylum.[84] In the European Council's conception of disembarkation platforms, durable solutions including resettlement – though not necessarily in Europe – were envisaged.[85] This suggests that while the Europeans were not as adamant as Australian governments that no one would be resettled on their home soil, the regional disembarkation platforms could have seen refugees languishing for years as has happened under the Pacific Solution. Another unfortunate similarity with Australian proposals was the lack of agreement to these extra-territorial centres on the part of the states potentially concerned.[86]

The Council's conclusions went on to discuss 'controlled centres' for processing asylum seekers on EU territory, from which member states could voluntarily relocate and resettle refugees.[87] The Council's aim here might, in part, have been

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[84] *Declaration and Comprehensive Plan of Action of the International Conference on Indo-Chinese Refugees – Report of the Secretary-General,* UN Doc A/44/523 (22 September 1989).

[85] European Commission, Non-paper on regional disembarkation arrangements, attached to European Commission – Press Release, 'Managing Migration: Commission expands on disembarkation and controlled centre concepts', Brussels, 24 July 2018.

[86] Former Prime Minister Gillard announced the possibility of a centre in Timor-Leste without consulting the Timorese. Reportedly Egypt, Morocco, Tunisia, Algeria and Albania responded that they would not build the centres proposed by the EU.

[87] Note from General Secretariat of the Council to Delegations, 'European Council meeting (28 June 2018) – Conclusions, CO EUR 9 CONCL 3, EUCO 9/18, Brussels, 28 June 2018, 6.

an attempt to control the mess around irregular migration in order to find political space for refugees in Europe. The Council was also clearly aiming for a political compromise that uses control over migration to hold the European Union together. Perhaps more hopefully, the conclusions also acknowledged the need to engage with countries of origin and 'transit' through development assistance and investment.[88]

The United States

The EU's effort to engage with source and transit countries within a development framework stands in stark contrast to the approach of the United States under the Trump Administration: distinctly and deliberately isolationist and xenophobic, as summed up in President Trump's slogan 'America First'. This trend commenced with candidate Trump's campaign promise of a wall between the US and Mexico which neither Mexico nor the US Congress agreed to fund, leading to a lengthy, partial government shut-down beginning on December 22, 2018. Towards the end of 2018, migrant 'caravans' comprising thousands of Hondurans, Guatemalans, Salvadorans and Nicaraguans attempted to enter the United States, after travelling to Mexico. Early in 2019, US authorities fired tear gas when 150 of the migrants attempted to cross from Tijuana, Mexico into the US.[89]

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[88] *Ibid*, 8.

[89] AP, 'US fires tear gas across Mexico Border to Stop Migrants', *AP News* (online)*,* 2 February 2019 https://www.politico.com/story/2019/01/02/border-tear-gas-migrants-1077406.

As a candidate, Trump also campaigned on a Muslim travel ban.[90] In office, President Trump implemented the ban with executive orders focused on national security, rather than religion *per se*, with the result that the third iteration narrowly survived a legal challenge before the US Supreme Court.[91] The Trump Administration also pursued a 'zero tolerance policy' of prosecuting migrants who crossed the US-Mexico border irregularly and separating children from their parents while prosecutions occurred, until public outcry caused him to sign an executive order permitting children to be detained with their parents. The policy, including the executive order, ran into difficulties before the courts.[92] An attempt to deny

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[90] Mr Trump published a 'Statement on Preventing Muslim Immigration' which advocated the 'total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on': *Trump v Hawaii*, 585 US ___, 27 (Roberts CJ) (2018).

[91] The Court found by a five to four majority that the proclamation was facially neutral and plausibly linked to national security as the entry restrictions were imposed on states previously recognised as posing national security risks and on the basis of a 'worldwide review process' by a number of Cabinet officials. Further, the court noted the removal of three of the countries from the ban since entry restrictions were imposed in January 2017 and that there were numerous exceptions for various categories of affected foreigners along with a waiver program: *Trump v Hawaii*, 585 US ___, 27 (Roberts CJ) (2018).

[92] For example, in the first half of 2018, see *Ms L et al v United States Immigration and Customs Enforcement ("ICE") et al,* 301 F Supp 3d 1133 (SD Cal, 2018) (parents must not be separated from their children absent a finding that the parent is unfit or dangerous to the child or the parent chooses not to be reunited with the child in detention); *Ansly Damus et al v Kirstjen Nielsen, Secretary of the Department of Homeland Security et al,* 313 F Supp 3d 317 (DC, 2018) (the Administration has to follow its own guidance

asylum to persons who enter the US in an irregular fashion met with a similar fate.[93]

In addition to pursuing unilateral, isolationist measures at its borders, the US also withdrew from the Global Compacts. At the end of 2017, the US Mission to the UN announced the US's withdrawal from the Marrakech Compact on Migration citing inconsistency between the New York Declaration and 'the Trump Administration's Immigration Principles'.[94] Ambassador Nikki Haley stated that '[w]e will decide how best to control our borders and who will be allowed to enter our country. The global approach in the New York Declaration is simply not compatible with U.S. sovereignty.'[95] The echo of former Prime Minister John Howard's words during the 2001 Australian federal election is unmistakable.

In turn, Peter Dutton, Australian Minister for Home Affairs, took the position that Australia also should not support the

concerning 'parole' of immigrants into the community); *Jenny L. Flores, et al v Jefferson B. Sessions, III, et al* (CD Cal, CV 85-4544-DMG, 9 July 2018) (refusing to modify a long-standing court-sanctioned agreement in order to permit detention of immigrant families together instead of releasing the children from detention within 20 days as required by the agreement).

[93] On 19 December 2018, a preliminary injunction was granted: *East Bay Sanctuary Covenant et al v Donald J Trump et al* (ND Cal, 18-cv-06810-JST, 19 December 2018).

[94] United States Mission to the United Nations, Remarks, *United States Ends Participation in Global Compact on Migration* (2 December 2017).

[95] *Ibid*. See also the explanation of the US' position days before the conference at which the Marrakech Compact on Migration was adopted: United States Mission to the United Nations, *National Statement of the United States of America on the Adoption of the Global Compact on Safe, Orderly and Regular Migration* (7 December 2018).

Marrakech Compact on Migration: a case of an Australian populist following an American populist's lead in an attempt to revive the electoral success enjoyed by John Howard. Despite a number of similar withdrawals from the compact process, the Marrakech Compact on Migration attracted strong support as 164 states adopted it by consensus at a conference in Marrakech and it was subsequently endorsed at the General Assembly by a majority of 152 states with only five negative votes; Australia abstained.[96]

Finally at the end of 2018, the US called for a vote on the UNHCR omnibus resolution containing the Global Compact on Refugees; the first time a vote had ever been required in relation to the omnibus resolution. The vote in both the Third Committee of the General Assembly and the Assembly itself was overwhelmingly in support of the resolution, including affirmative votes by Australia on both occasions,[97] with only the US and Hungary voting against the resolution when the final vote at the Assembly was taken.[98]

The Trump Administration's measures were designed to appeal to a domestic support base. Like other populists, Mr Trump repeatedly invoked the trope of crisis in support of these measures.[99] However, it was a crisis of his own making.

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[96] *Global Compact for Safe, Orderly and Regular Migration*, GA Res 73/195 (19 December 2018) [2].

[97] All members of the Assembly are members of the Third Committee. The one surprise was the couple of states which changed their votes in the short period between the vote at the Third Committee and the vote in the Assembly.

[98] 181 states voted in favour of the omnibus resolution (A/RES/73/151). Three abstained. Seven did not cast a vote.

[99] See for example, a campaign speech in Phoenix in 2006: Feliks Garcia, 'Donald Trump Immigration Speech', *The*

It is tempting to riff off the theme of frontiers and conclude that the US' approach under Trump resembled the Wild West. It did not assist efforts to create a global migration governance regime, it violated international human rights and, to the extent that the rules-based international order as we know it reliess on US leadership, it was deeply unsettling.

Conclusion: Uncertainty Demands Cooperation, Including Australia's

In the face of the uncertainty posed by the rise of China, technological change, climate change and the unpredictability and lack of US leadership under the Trump Administration, a rules-based international order underpinned by human rights and the subject of widespread agreement provides a measure of comfort and stability. Australia can play a role in promoting such an order, but it has to be both true to human rights values and consistently outward-facing.

Australia, like the United States and many other countries, has its share of people fearful of and angry about change who want to retreat into the shell of a familiar past.[100] This often correlates with heightened concern about migration. Projecting an open and cooperative image internationally is challenging for politicians wishing to keep these voters on side. However, the deeply racist origins of the sovereign prerogative over entry and its harmful and antisocial effects at the international and national levels means that there is a strong case for softening this 'rule' through cooperation and

Independent (online), 1 September 2016, available online: https://www.independent.co.uk/news/world/americas/us-elections/donald-trump-immigration-speech-full-transcript-read-arizona-us-election-2016-a7219341.html.
[100] Hillary Clinton, *What Happened?* (Simon & Schuster, 2018), pp. 271–77.

the provision of more lawful migration pathways. This has been recognised by a strong majority of UN members in the votes regarding the two Global Compacts.

As the representative of Education International stated at the conference at which the Marrakech Compact on Migration was adopted: 'Migration is not a crisis … It is the governance of migration — or lack of it — that has become a crisis.'[101] Trying to rewrite the social contract by reinventing basic elements such as education and taxation to help all citizens negotiate the changes facing us is more likely to secure our common future than building walls.[102] Sovereignty may provide a temporary electoral shelter from the storm, but it avoids problems that, at the end of the day, require cooperative solutions.

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[101] United Nations, Meetings Coverage, Intergovernmental Conference on the Global Compact for Migration, 5th – 8th Plenary Meetings (AM, PM & Night), DEV 13378, 11 December 2018, available online:
https://www.un.org/press/en/2018/dev3378.doc.htm.
[102] Ian Bremmer, *Us vs. Them; The Failure of Globalism* (Penguin Random House, 2018).

Response

Associate Professor Savitri Taylor
Law School, College of Arts, Social Sciences and Commerce,
La Trobe University

I am mostly in furious agreement with Pene, possibly because I too am an international human rights and refugee lawyer. However, in the spirit of promoting lively dialogue, I shall try to introduce a slightly different perspective: a perspective informed by the fact that I am a non-white migrant from Sri Lanka. In other words, mine is a perspective which straddles the inside and outside of Western society.

I agree with Pene that on the one hand, a sense of crisis served as a stimulus for negotiation of two global compacts of refugees and migrants, but, on the other hand, at "national and regional levels, the trope of crisis frequently caused against international governance migration." You'll note her care for wording; she speaks of the trope of crisis. Many have questioned whether objectively speaking there is any more of a crisis now than in the past and have observed that it is only when *Western* populations started feeling threatened by large scale events and movement that the issue was framed as a global crisis worthy of a global response.

The late Peter Sutherland, who at the time was the UN Special Representative of the Secretary-General for International Migration, was the person who got the ball rolling on the UN Summit for Refugees and Migrants held in September 2016.

He actually proposed a conference focusing on Syrian refugees in the Mediterranean, but it morphed.[1]

The outcome document of the UN Summit was the New York Declaration for Refugees and Migrants. Pene describes it as, "In many respects an exemplary document of the liberal, rules-based order, a resolution adopted by a key multilateral institution seeking cooperation and consensus." My own take on the declaration is that it was a disappointment, with more to come.

In April 2016, the UN Secretary General released a report making recommendations to states about what they should be aiming to achieve at the UN Summit in September 2016. These recommendations included *adopting* a global compact on responsibility-sharing for refugees and initiating the development of a global compact for safe, regular and orderly migration. After the Secretary General released his report, states got to work on drafting the outcome document. The final version of the New York Declaration was considerably weaker than the zero draft of the document, which was released towards the end of June 2016. The most significant difference between the zero draft and the final version of the New York Declaration – apart from the fact that the zero draft had hard targets and the final version did not – was that the former included a global compact on responsibility-sharing for refugees, while the latter just included the commitment to work towards the adoption in 2018 of such a compact. The best that can be said is that it could have been worse. I gather

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[1] Alexander Betts, 'U.N Refugee Summit: Abstract Discussions in the Face of a Deadly Crisis', *Refugees Deeply*, 12 September 2016: https://www.rsc.ox.ac.uk/news/un-refugee-summit-abstract-discussions-in-the-face-of-a-deadly-crisis-alexander-betts

that some countries, including Australia, tried to kill off the idea of the global compact on refugees altogether.[2]

In her chapter, Pene notes that borders have not always been closely controlled. She says, "In previous centuries, European colonial endeavours were buttressed by appeals to freedom of movement for the colonists. Towards the end of the 19th Century, racist fears of migration ... resulted in the now ubiquitous insistence on a 'sovereign prerogative over entry'." If you wonder why people like me think the Western obsession with border control is steeped in hypocrisy and imbued with racism, that is why.

As Pene also says, the international legal regime created to protect refugees is an exception to the relatively recently established rule that state sovereignty entails the power to exert absolute control over borders and immigration. However, there is one respect in which the regime is seriously underdeveloped, and that is in its ability to provide durable solutions for refugees. The sad reality is that the kind of circumstances that cause people to flee their country of origin are not usually resolved within a reasonable time frame. What most refugees need in order to have fulfilling lives, therefore, is integration in the community of the country of refuge or resettlement in a different country. However, states have not

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[2] Jane McAdam, 'Filling up or emptying the glass? Musings on the 19 September refugee summit', *Kaldor Centre Blog*, 5 September 2016: http://www.kaldorcentre.unsw.edu.au/publication/filling-or-emptying-glass-musings-19-september-refugee-summit; Jeff Crisp, 'Minor miracle or historic failure? Assessing the UN's refugee summit', *Kaldor Centre Blog*, 5 August 2016: http://www.kaldorcentre.unsw.edu.au/publication/minor-miracle-or-historic-failure-assessing-un%E2%80%99s-refugee-summit

been prepared to take on legally-binding obligations to provide either of these durable solutions.

Together with a colleague, I am conducting an archival research project on the legal and political history of Australia's engagement with refugee protection from 1945-1989.[3] Among other things, we have traced Australia's engagement with attempts by some influential international lawyers to achieve legal recognition of an individual right to be granted asylum. Those attempts failed because states did not wish to compromise their ability to determine the composition of their populations. In Australia until the early 1970s the desire to preserve 'White Australia' was front and centre in internal government discussions. Australia couched its position in different terms in international forums once overt racism became unacceptable in those forums.

I should, at this point, acknowledge that most developing countries are no more enthusiastic than Western countries about providing durable solutions for refugees and that there is a strong element of ethnic nationalism involved in many cases. However, I would submit that developing countries also have some legitimate justifications for their stance that Western countries do not. As Pene points out, 85% of refugees are hosted by developing countries. That is because most refugees come from the developing world, and most are

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[3] Savitri Taylor and Klaus Neumann, "Australia and the 1967 Declaration on Territorial Asylum: A Case Study of the Making of International Refugee and Human Rights Law" (2018) 30(1) *International Journal of Refugee Law* 8-30 doi:10.1093/ijrl/eey019; Savitri Taylor and Klaus Neumann, "Australia and the Abortive Convention on Territorial Asylum: A Case Study of a Cul de Sac in International Refugee and Human Rights Law" (2020) 32(1) *International Journal of Refugee Law* 86-112 doi:10.1093/ijrl/eeaa006.

unable to travel very far afield in their search for protection. As Pene also points out, one of the factors impeding asylum seeker mobility is the erection by Western countries of physical and other barriers to entry. The basic position taken by host states in the developing world is that they cannot be expected to take a disproportionate share of the responsibility of providing refugees with immediate protection let alone durable solutions simply because they happen to be geographically proximate to refugee-source countries.

There have been many attempts over the years to achieve responsibility-sharing at an international level. The Global Compact on Refugees is simply the latest, albeit the most ambitious, attempt. Whether it will be any more successful than previous attempts remains to be seen. I am somewhat sceptical. I think it is rather telling that neither of the Global Compacts will be legally binding. By contrast, the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air is an actual treaty requiring states to take measures, which, in effect, make it more difficult for asylum seekers to depart their countries of origin with or without the assistance of people smugglers.

Pene in her chapter says, 'Below the rarefied air of international summitry, the practices of key developed states on the ground demonstrates a tendency to retreat into sovereignty as a response to migration crises, whether real or manufactured.' I agree. But I would even add that even during the international summitry, the retreat into sovereignty was on display. The text of the Global Compact for Migration was negotiated by states over a period of 18 months with the final text formally adopted in December 2018. By contrast, the Office of the United Nations High Commissioner for Refugees (UNHCR) was given the task of developing the text of the Global Compact on Refugees in consultation with

governments and other stakeholders. The UNHCR released the final draft in June 2018 and it was adopted by the General Assembly in December 2018. In the case of both compacts, each of the drafts have been made and publicly available along the way, so at least full marks for transparency.

I have compared the zero draft of the Global Compact on Refugees dated 31 January 2018 with the first draft dated 9 March, the second draft dated 30 April, the third draft dated 4 June and the final draft dated 26 June. From draft one onwards, there was an express statement that the compact was not legally binding. In each new draft, there were increasing numbers of references to state sovereignty: the need for state consent, state request or variations thereof, and to 'national ownership and leadership', 'national priorities and policies' and so on. There was also increasing emphasis on the fact that the compact was not intended to be prescriptive.

I agree with what Pene says about the practice of the European Union (EU) and the United States. When she observes that in some of its recent practice the EU has been emulating Australia, that is true. What is also true, though, is that Western countries have a long history of looking to each other for ideas in how to achieve immigration and border control objectives. For example, the infamous dictation test, which is one of the administrative devices used to implement the White Australia Policy, was often referred to as the 'Natal formula' because it was borrowed from South Africa. Of more contemporary relevance is the fact that Australia borrowed the idea of extraterritorial processing from the United States before Europe borrowed it from Australia. It is also worth noting the existence of the Inter-Governmental Consultations on Asylum, Refugee and Migration policies in Europe, North America and Australia which was established in the 1980s

and continues to the present day. It basically serves as a forum to share best practice in keeping people out.

Highlights of Discussion

Moderated by Professor William Maley AM FASSA FAIIA, Founding Director of the Asia-Pacific College of Diplomacy, The Australian National University

International Cooperation

"There's a temptation to think that global governance will be associated with increasing respect for international norms, but the picture you paint of cooperation to keep people out suggests a slightly more sinister model. Perhaps closer to Anne-Marie Slaughter's notion of networked officials from different countries, but with unelected people driven by a kind of dirty togetherness who are trying to find ways to disrespect obligations voluntarily assumed when their states became parties to the 1951 Refugee Convention."

Professor William Maley AM FASSA FAIIA, Founding Director of the Asia-Pacific College of Diplomacy, The Australian National University

"I'm very much of the opinion that this whole compact process has highlighted the issues of vulnerability with an intense focus on refugees, migrants and human rights. The compacts might not be perfect, but this is a change we see in the global conversation. This is a very fluid area and I think fresh thinking, creative ideas and getting a clearer idea of what needs to be done would be a very important contribution Australia could make. I'll just say briefly that the International Organization for Migration is an organisation that's 97% field-based, while being very lean and mean, very responsive to states, very pragmatic, and with a huge global reach. I think we haven't focused enough on the IOM, is which now part of the UN system ... How can it do its job when it's been

criticised by other agencies who don't like it because it does things in an effective way and a responsive way?"

John Quinn
Former Ambassador and Permanent Representative to the United Nations in Geneva

Australia's Refugee Policy

"If you were drawing a blueprint for a government with a comfortable majority and capable of doing something quickly, what would it be that would combine both a degree of toughness to satisfy electorate expectations and some kind of effective deterrence to people smugglers – but also combine that with a degree of decency, which is manifestly lacking from Australia's current policy?"

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for Foreign Affairs

"I would go back to onshore processing and that will mean a very hard sell for politicians.... I don't quite fully understand this idea that some people are jumping a queue, because whether we accept onshore asylum-seekers or if we treat them badly, it does nothing about the thousands in camps and urban settings elsewhere... Article 31 of the Refugee Convention says people shouldn't be penalised simply for the fact that they've managed to get in to the country and don't have a legal migration status... I think, fundamentally, the message that Australia sends to other countries when we do tow-backs of spontaneous asylum seekers is that we're some kind of an exception to the rules. Someone else has to take spontaneous asylums seekers but not us. And I think the optics of that are all wrong and doesn't help us in international negotiations."

Professor Penelope Mathew
Dean of Auckland Law School, then Dean of Griffith Law
School

"I have in my office a photograph which was taken in Quetta in Pakistan in the immediate aftermath of a bombing which killed about 20 Hazara civilians, and in the background there's a big Australian poster which says, "Don't risk your life by getting on a boat." I think that it would be – among refugees in Indonesia and also people who came to Australia by boat – that not one of them actually wanted to get on a boat, but they were actually at a point where the people smugglers offer the only route for getting out of a situation which to them had become just hopeless and intolerable. [Unless] lawful resettlement is in place so that people actually have a safe route to find their way to a decent life, I think it's desperation that becomes the driving factor. In a sense, if you close down one route to people smugglers, they'll go somewhere else – they'll find another target audience."

Professor William Maley AM FASSA FAIIA, Founding
Director of the Asia-Pacific College of Diplomacy, The
Australian National University

"What I'm hearing is that the international order on people movement – that we created and that Australia was a big part of – is now breaking down. So the question is, what's coming next? Is a new order being built and is Australia part of building that new order?"

Melissa Conley Tyler FAIIA
Asia Institute, The University of Melbourne
Former National Executive Director, Australian Institute of
International Affairs

"I don't think that the Refugee Convention is broken. I think it needs to be supplemented and for some the fundamental gaps to be filled in. That is the positive part of the whole process and why I do have some hope. There is absolutely nothing broken or inept about the idea of *non-refoulement*... refugee status is the thing that you do when you can't or won't intervene militarily and you want to offer safety to people... So, I don't think that's broken and I really can't understand why people sometimes suggest we should just withdraw from the Refugee Convention and let people be returned to places of persecution. What it needs is supplementing. We need more responsibility-sharing. We do need more prevention. We need to think about funding protection properly and linking it to development. So, I think all the right moves are made, at least on paper, in these global compacts."

Professor Penelope Mathew
Dean of Auckland Law School, then Dean of Griffith Law School

"Australia is a huge resettlement country and a major donor for UNHCR, also with considerable, untied, multi-year donations which assist its crisis management and crisis prevention operations in the Middle East and Africa. So, there's a whole story that isn't really being told."

John Quinn
Former Ambassador and Permanent Representative to the United Nations in Geneva

"The axiom is that politics is basically the art of the possible. I'm actually a reluctant acceptor of the push-back policy. I wasn't at first but it has worked; it's not very nice but it's much better than what was happening before – and we

managed with the Indonesians without any cataclysmic results. The two things, two thoughts that I have had for some time: one, is it worth having another look at the Malaysian solution.... The second point is really could we have done more with the Rohingya issue?"

John McCarthy AO FAIIA
Former National President, Australian Institute of International Affairs and former Ambassador, Department of Foreign Affairs and Trade

Migration

"I think the migration issue is a very interesting one where we really need to think about what a multilateral system can do to help countries manage migration. There's an economic/development angle with migration which becomes a logical move for many for economic reasons.... So how do you get the private sector to the table because they are a key player in terms of the labour market? This is a really interesting area for fresh thinking where I think Australia is seen as a country that has lessons to be learned."

John Quinn
Former Ambassador and Permanent Representative to the United Nations in Geneva

"Where is the politician who can stand up and talk about the economic benefits of refugees and migrants and what they've added to the country? There's just been too much of a race to the bottom."

Professor Penelope Mathew
Dean of Auckland Law School, then Dean of Griffith Law School

"Seventeen years ago, I went and visited Syria... at that time, it was a stable country and had decent sized population but a very small GDP. It had over 1 million refugees, particularly from Palestine and from Iraq. And those refugees were, at least in part, assimilated into the national fabric of the country. More recently, I visited Iran and I learned that they have a refugee population somewhere between a million and two million, particularly from Afghanistan and similarly assimilated to an extent, not totally, but to an extent. Australia accepts very few refugees, whatever the number is, and has a GDP that is larger than either of those countries."

Andrew Ritchie
AIIA NSW

Chapter 8:
Australia and the International Structures of the Rules-Based Order

Australia and the International Structures of the Rules-Based Order

Panel Discussion

- Professor Richard Rowe PSM, former Senior Legal Advisor, Department of Foreign Affairs and Trade
- Emeritus Professor Steven Freeland, Former Dean, School of Law, Western Sydney University
- Major General (Retd) Michael Smith AO, National President of the United Nations Association of Australia

Richard Rowe

The international structures of the rules-based order are underpinned and forged essentially through agreements reached between states. These agreements have mostly been multilateral, although some have been plurilateral, trilateral and bilateral. The structures have, on the whole, been created as a result of negotiations from the end of the Second World War. As Allan Gyngell mentions in *Fear of Abandonment*,[1] that was the starting point for the new international order, with the negotiation of the UN Charter and the establishment of the United Nations. Australia was "present at the creation".[2] Allan Gyngell mentioned that H.V. Evatt, as Attorney-General and Minister for External Affairs at the time, played a very significant role in the negotiation of the UN Charter. So too did Sir Kenneth Bailey, a distinguished

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[1] Allan Gyngell, *Fear of Abandonment: Australia in the World Since 1942* (La Trobe University Press, 2017).
[2] To quote the title of Dean Acheson's memoirs *Present at the Creation: My Years in the State Department* (W.W. Norton and Company, 1969).

lawyer, who as a member of the Australian delegation contributed to the drafting of both the Charter and the Statute of the International Court of Justice.

Since the establishment of the United Nations Australia has continued to be actively involved in building the rules-based order in a number of areas. I will comment briefly on some of these. For example, in his chapter John Quinn has mentioned that Australia has been very active in the field of arms control and non-proliferation: in negotiating key components of that regime, such as the 1992 Chemical Weapons Convention, the 1996 Comprehensive Nuclear Test Ban Treaty, the 1997 Ottawa Landmines Convention, the 2008 Cluster Munitions Convention and the 2013 Arms Trade Treaty.

In the field of international law Australia was engaged in the development of the Geneva Conventions and Protocols of 1949 and 1977 which form the core of international humanitarian law; in the negotiations on the 1982 United Nations Convention on the Law of the Sea (UNCLOS), at nine years one of the longest and most complex law-making projects in history; and in the drafting of the Rome Statute in 1998 which established the International Criminal Court (ICC).

The ICC is a relatively recent addition to the rules-based order. There had long been the aspiration, for more than 150 years, to establish such a court which was regarded as the "missing link" in the international judicial system: an independent court that would deal with individuals who were accused of the most serious crimes known to humanity: namely genocide, crimes against humanity, war crimes and the crime of aggression. This is a court that deals with individual criminal responsibility, whereas the International Court of Justice (ICJ) deals with disputes between states and

an advisory opinion role in relation to legal questions referred to it.

The ICC was a project that came together at a point in time when there was a coalescence in the international political landscape: a realisation that after the atrocities committed in Rwanda, the Balkans and Cambodia and the establishment by the UN Security Council of Ad Hoc Tribunals for the former Yugoslavia and Rwanda, there should be a real effort to establish a stand-alone court. I should mention that Australia's involvement in the process owes much to Judge James Crawford who now sits on the International Court of Justice. As rapporteur in the International Law Commission James prepared a draft set of articles which were subsequently developed into a statute which was adopted in 1998 at the conclusion of a five-week diplomatic conference in Rome ("Rome Statute"). The story of Rome is a long one; it was a very complex legally- and politically-charged negotiating environment. There was a coalition of more than 1,000 non-government organisations (NGOs) that was very active and influential throughout the conference. From an Australian perspective, we were very committed to the establishment of the ICC and engaged closely with a group of like-minded states to achieve a substantive Statute.

Another area in which Australia has been active in contributing to international structures has been trade, for example through involvement in the Uruguay Round which led to the creation of the World Trade Organization.

One other treaty that I'd like to refer to, which is of vital importance to Australia, is the Antarctic Treaty which was concluded in 1959. Australia played a major role in the negotiation of the Treaty – as well as in the subsequent Protocol on Environmental Protection – which ensures that

Antarctica is used for peaceful purposes only, with an emphasis on scientific activities. Significantly, the Treaty bans the testing of any type of weapons, including nuclear weapons. It is, in effect, the first arms control agreement that was negotiated in the framework of the Cold War. Significantly, too, decision-making is by consensus of the Treaty Parties when they meet annually: a model for international governance?

In relation to all these agreements that have been realised since the end of the Second World War, Australian involvement and representation has very much reflected a whole of government approach: delegations have comprised officers from the Department of Foreign Affairs and Trade, the Attorney General's Department, the Department of Defence, and Environment and Treasury at times, as well as other agencies linked to the specific subject matter being covered in the negotiations. Academics have also been included in delegations; at the International Criminal Court Conference we had two academics as part of the team. On occasion there have been representatives from Australian States and from NGOs.

Australia is very serious about its treaty commitments and obligations. Australia supports the dispute resolution mechanisms which have been established by various international agreements and engages with them when required, such as the conciliation process with Timor-Leste under UNCLOS.

Australia is also committed to ensuring that the international structures with which it engages, and which it supports, operate effectively. One example, in the context of addressing contemporary security problems, with a focus on the United Nations, is *Cooperating for Peace*, which was a major

initiative of Minister for Foreign Affairs Gareth Evans in the 1990s.[3]

Two quick points on challenges that we face in relation to the international structures of the rules-based order. DFAT's Foreign Policy White Paper says much of the institutional architecture of the international order has proven resilient and is valued by countries, large and small.[4] I agree with that, but I would say we cannot be complacent. We need to protect what we have achieved and we should aim to strengthen the Order we have helped establish. This is vital given the new geo-political dynamics and challenges, globally and regionally, which currently exist. This requires adept diplomacy by Australia including effective advocacy of our interests and a focus on consolidating and building coalitions with like-minded states. We should also call out non-compliant states.

There is an opportunity for Australia to enhance its standing in the multilateral sphere through unequivocal support and commitment to the rules-based order.

Finally, I think one of the greatest challenges lying ahead is the need to strengthen compliance with International Humanitarian Law (IHL) in a world in which there are so many armed conflicts. Too many civilians are being killed and maimed through non-compliance with IHL, particularly by non-state actors. It is a massive issue, how to get non-state

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[3] Gareth Evans, *Cooperating for peace: the global agenda for the 1990s and beyond* (St. Leonards: Allen & Unwin, 1993).
[4] Department of Foreign Affairs and Trade, *2017 Foreign Policy White Paper* (Commonwealth of Australia, 2017), available online: https://www.dfat.gov.au/publications/minisite/2017-foreign-policy-white-paper/fpwhitepaper/index.html, chapter 2.

actors to abide by the rules and norms of IHL, but it is one which must be addressed.

Steven Freeland

I speak about the International Criminal Court as a practitioner who has had the privilege of working for 12 years with a number of judges at the ICC.

The ICC had been in the making for a long time, and in one sense is a climax of this second phase towards the internationalisation of criminal justice, which started with the *ad hoc* tribunals and then a few hybrid tribunals, and then there was this momentum which climaxed with the five weeks of negotiations in Rome in 1998. The ICC is different from the other mechanisms of international justice because, by-and-large, all the *ad hoc* and other tribunals are 'reactive'. They are mainly ring-fenced around particular events, timelines and conflicts and therefore those with the most influence in international politics can say, "Look, we've done the right thing", and yet they themselves are not in any danger of having any of their nationals prosecuted.

The ICC is a permanent court that will look at things that haven't yet happened, and it has an interesting mandate. Its establishment was by way of a treaty to give states the option as to whether or not they would subscribe to the court. And – this is crucial – it was set up with this notion of complementarity; if you compare that with the *ad hoc* tribunals, it is one of the checks and balances. That's the safety valve for states. Without complementarity, we would have never had the court because it might have been too threatening, given that it's looking at things that have yet to happen.

Australia was an incredible supporter of the court during the 1990s. Minister for Foreign Affairs Alexander Downer made a number of high-profile speeches about supporting the court. Australia was a chair of the group of like-minded states in the negotiations. Richard Rowe led the team in Rome and played an important role. When, four years later, the court is about to go into operation with 60 ratifications, a decision had to be made about Australia's position on ratification. And then, at almost the last moment this became a major domestic issue when all of a sudden the argument was that this court, with all the checks and balances it had, was somehow considered as a 'threat' to Australian sovereignty.

And this is ironic because at the very same time, the very same government was deeming some parts of Australia to be not Australia for the purpose of refugee claims and migration, so there was this flexible and politicised idea of what sovereignty was. But there was this very considerable public debate about the ICC. I remember that I had a debate with Bronwyn Bishop, a senator who was one of the leaders in the anti-ratification movement when she said, "Professor Freeland, you are an internationalist." I wear this as a badge of honour!

Australia thus became a reluctant ratifier, but it did ultimately ratify the Rome Statute. Part of this reluctance was, as I mentioned, a perception that the ICC represented an infringement of sovereignty, and that we would not want an 'outside' institution adjudicating the actions of Australian nationals. So, to take advantage of complementarity should the need arise, Australia had to ensure that within its national laws there were appropriate legal mechanisms to allow for prosecution. Thus, as a consequence of ratifying, a number of pieces of Australian legislation were passed, including the *International Criminal Court Act* –which covers cooperation

with the court – and the *International Criminal Court (Consequential Amendments) Act* – which incorporates into Australian law crimes of genocide, crimes of war crimes and crimes against humanity.

As a by-product of the ratification, for the first time the crime of genocide is introduced into Australian law, and that's an important symbolic issue given that Australia had never brought genocide into Australian law following its ratification of the Genocide Convention in 1949. As recently as the late 1990s, there were cases brought against the Commonwealth, claiming that the Commonwealth, through various actions historically and more recently, had been guilty of acts of genocide; the Federal Court's decision (by majority) was that genocide did not exist as a crime in Australia at the relevant time, and it wasn't proven to exist as a common law crime as well. Now there is the crime of genocide from 2002 going forward. By way of comparison, New Zealand's implementation of legislation has some differences. First, New Zealand incorporated universal jurisdiction into its national law. Secondly, New Zealand incorporated an element of retrospectivity into its legislation with respect to crimes against humanity and genocide, backdating it to when the treaties were ratified by the country. It's an interesting comparison.

After the initial embarrassing hiccup, Australia has been a solid supporter of the ICC: it provides financing and extra money for its trust fund. There hasn't been as much Australian involvement in various chambers and sections of the court as with the *ad hoc* tribunals, but maybe that's just coincidental.

The long and the short of it is that Australia is a great supporter of these structures but, in this case, mountains were

made out of very small molehills. We sometimes look at the international structures of the rules-based order too much with domestic eyes and that could impact on the way that Australia is perceived as an international citizen. I think the damage that was done by that rather embarrassing interlude is now forgotten internationally, but I think it's a salient lesson that, on the one hand it's great to say "Yes, we'll do it", but then internal politics plays its part.

Michael Smith

I have three very simple points. The first is that the United Nations is central to the rules-based international order. The second is that the rules-based international order is under extreme strain and it could collapse. And, third, although Australia has been a long-term supporter of the United Nations and has done some fantastic things, it needs to do a lot more moving forward.

Let me go into the first point about the rules-based international order and the United Nations being central to it. The UN Charter was built on the bodies of 60 million people. For very good reason, it's stood the test of time, accompanied by the Universal Declaration of Human Rights. I don't think we could achieve that today.

The United Nations Association of Australia (UNAA) has published *United Nations and the Rules-Based International Order*[5] as a precursor to a submission to the Foreign Policy

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[5] United Nations Association of Australia, *United Nations and the Rules-Based International Order* (UNAA, 2017), available online https://www.unaa.org.au/wp-content/uploads/2015/07/UNAA_RulesBasedOrder_ARTweb3.pdf

White Paper. After reading the Defence White Paper[6], which mentioned the rules-based global order 56 times, it hardly mentioned the United Nations at all, which was rather worrying. So, the UNAA's submission to the Foreign Policy White Paper was all about the role of the UN in the rules-based order and why we need it. It's very, very important I think whenever we talk about rules-based international order to think about the United Nations because the treaties and norms are really embedded somewhere in the United Nations.

The UNAA recently held a seminar in Adelaide for around 400 people about space; and most people had no idea of the role of the United Nations in space, yet it's been there for many years. Things that we take for granted – aviation, telecommunications, a whole range of things – wherever you look the United Nations is somewhere there, and without the United Nations it is much harder to maintain this rules-based international order.

But the order is under strain, which is my second point. There are so many players now, both states and non-state actors; the roughly 50 states that formed the United Nations have mushroomed into 193 states, so it's very complex. We only have to see the latest tweet from the President of the United States to wonder, "I wonder just how reliable this rules-based international order is?" In fact, I wonder if we might be sleepwalking to war.

So, what should we do? What should we do about this system, which we've relied on and that's now under strain? I think in

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[6] Department of Defence, 2016 Defence White Paper (Commonwealth of Australia, 2016), available online https://www.defence.gov.au/whitepaper/Docs/2016-Defence-White-Paper.pdf

Australia we need to do three things quickly. The first thing we need to do is to have a national security strategy because we don't have one. We were talking about silos before, and as much as Defence and Foreign Affairs talk to each other, there are silos still. We need a national security framework which clearly understands where our priorities are.

The next thing we need to do, particularly in the Department of Foreign Affairs and Trade, but also within Defence and our other government agencies, is to devote far more resources to the multilateral engagements in which we need to be involved. We need to do this urgently. The number of people in those two key departments – Defence and DFAT –working on the United Nations and multinational issues is surprisingly small and extremely worrying. It doesn't cost much to put people into those things. This reflects the third thing that we need to do: change our culture. I hate to say it, but multilateral culture within our government departments is not that strong. We need good leaders to change it. And if you don't believe that, then look at the farewell speech from former Secretary of the Department of Foreign Affairs Peter Varghese, whom I have absolute admiration for, that didn't mention the United Nations once.[7] I certainly think we need to be doing more in the United Nations.

On my third point, Australia has been a really good UN citizen. As a small to medium power, the United Nations represents, I believe, a great force multiplier. I don't mean that in a military sense. There are lessons we can learn from the Nordics in the way that they use the United Nations to

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[7] Peter Varghese, "Parting Reflections", Speech to IPAA, 9 June 2016, available online:
https://www.dfat.gov.au/news/speeches/Pages/parting-reflections-secretarys-speech-to-ipaa

their advantage, and I think we could do the same. The United Nations might often be frustrating and it might often take more time, but as an ex-military person, I can tell you "jaw-jaw" not "war-war" is definitely the way to go. The United Nations is very cost effective. Australia has to work out how to navigate its biggest military alliance with the United States and its relationship with the biggest economic power, China. The United Nations provides a hedging strategy. Apart from the fact that Australia should do it for the global good of the world, it is also in its self-interest to engage with the United Nations.

I often hear parliamentarians and government officials whinging about the fact that the United Nations needs more reform; of course it needs more reform. But if you look at the United Nations back when it was created and now, it has had significant reform. Reform does happen, but it's slow. With 193 member states, it takes time: the United Nations can only be as effective as the willingness of the 193 member states that support it.

We've recently got some additional funding for the UNAA to start an Alumni register of Australians who have served in the United Nations. The UNAA thinks that this might be very useful to connect people and to tell more Australians about what the United Nations does because, quite frankly, a lot of people are quite ignorant, including government officials.

So, what are some of the other things that Australia can do? It can appoint ambassadors, not just for disarmament, but for a whole range of different specialist areas. My specialist area is security sector reform, which is critical because peacebuilding and development doesn't work very well unless you have good security sector reform. That's just one area, but there's a

whole range of areas where Australia needs more ambassadors working for us.

In the peace, security and justice pillar of the UN, we need to do some very practical things, and do so quickly. As of 2018, Australian has only about 40 military peacekeepers and zero police deployed. This is despite the fact that Australia has made sensational contributions in the past to the reform and effectiveness of peacekeeping. A peacekeeper is how you show what you can do on the ground. It shows your support to the United Nations.

I think it's quite scary that Australia is not doing more in the United Nations. It's extremely cost effective. I think it's fantastic that Australia is serving on the Human Rights Council.[8] I think the agenda that Australia put up to get selected was very compelling, and UNAA is certainly supporting that tenure.

In terms of the humanitarian agencies, could you imagine what the world's situation would be if those humanitarian agencies were not supported? Thankfully Australia has continued to support those, but with a declining aid budget – which is the lowest it's been for many, many years – I think this is worrying.

So fundamentally I think Australia is a good UN citizen, but it really needs to put its shoulder to the wheel and do a hell of a lot more.

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[8] In 2017 Australia was elected to serve on the UN Human Rights Council for the 2018-20 term:
https://www.dfat.gov.au/international-relations/international-organisations/un/unhrc-2018-2020/Pages/australias-membership-unhrc-2018-2020

Highlights of Discussion

Moderated by Ruth Pearce, Former Ambassador to Poland, the Philippines and the Russian Federation and former High Commissioner to the Solomon Islands

Rules-Based International Order

"I suspect that part of the reason for the urgency of the discussion about the rules-based global order is that it's taking place at this historical juncture. We've had since November 2017 extreme anxiety about China, beginning with the Dastyari affair and then continuing on with the publication of Clive Hamilton's *Silent Invasion*. The rules-based global order is an esoteric intellectual debate, but it's become something of a meme or a framing device around which a form of identity politics is being played out, and it's taking place very much outside the people who are intimately acquainted with the nuances of where Australia sits in the rules-based global order, where there is debate, where there is contestation and where there is continuity. We know it's a complex picture, but there is a meme that the rules-based global order is under threat and crumbling. Though Donald Trump has become a late-addition threat to the global order, the threat of China is much more significant. If you read articles by commentators like John Fitzgerald, who says that China has used the same arguments that it's used in claiming the South China Sea to make a territorial claim to Australia, you can see that there's the potential for a great deal of panic, and concern exists around this term rules-based global order."

Dr Greg Raymond
Strategic and Defence Studies Centre, The Australian National University

"If you went out into mainstream Australia and said, 'What do you think about the rules-based international order?', they would say, 'What the hell are you talking about?'. I know this because Geraldine Doogue asked me that on her ABC breakfast program. I thought I was able to explain it, but it's something that unfortunately doesn't resonate with most Australians. That's why I think we need a national security document that clearly articulates our way forward. We all know that for Australia we do want the UN Charter, we want rules and for people to play by them – and if anybody breaks those rules, we want that to be contested through the various channels that we have, rather than going to war. The threat is that some are now going outside that rules-based international order. I think that the US is going outside it as much as anyone else, quite frankly, but that's just my view."

Major General (Retd) Michael Smith AO
National President, United Nations Association of Australia

"I find the term 'rules-based international order' okay because nation states, particularly in a multilateral context, need to have a framework to understand what rules apply and what the terms are as the basis for their interaction; so putting this together in a composite way seems to me reasonable. Of course, there'll always be national interests that are brought to the fore. I am not saying that the rules-based international order means that everyone agrees with everyone else: that's obviously not the case and it never has been. But there can arguably be a more stable international environment if we have a set of rules that provide a framework in which states can interact with each other."

Professor Richard Rowe PSM
Former Senior Legal Advisor, Department of Foreign Affairs and Trade

"The problem I see in any Australian national security strategy, however good the bureaucrats are at putting it together, is that it's very difficult in our ecological system right now to deal with the elephant in the room: the United States. How do you deal with the perspective of a United States which is very active and wants to do things in the Asia Pacific that we don't want to do? The case in point that I noticed last year was when there were plans being made to do something about North Korea... We said that we would do whatever the United States planned to do with North Korea when we didn't know what the United States was going to do."

John McCarthy AO FAIIA
Former National President, Australian Institute of
International Affairs and former Ambassador, Department of
Foreign Affairs and Trade

Multilateralism

"I'm a bit pollyannaish on this, but I think multilateralism continues to work well in most cases. Let's not panic, but let's be vigilant. We don't have to change everything because these underlying principles work quite well, but we clearly have some difficult issues to address."

Emeritus Professor Steven Freeland
Former Dean, School of Law, Western Sydney University

"I agree that our commitment to multilateral institutions is crucial. It's a major concern that we're not devoting more resources to multilateral institutions, but the lack of resources isn't the only problem. Another related problem is that a number of the bilateral and trilateral arrangements that we're

becoming involved with either conflict with or undermine the multilateral ones.... We almost have two orders emerging: the multilateral order and the bilateral and plurilateral order. How are we grappling with the conflict between these two? Is it an issue of silos within government? Is it a lack of coordination between the different arms of Foreign Affairs and other agencies?"

Associate Professor Elizabeth Thurbon
School of Social Sciences, University of New South Wales

"I think part of the turn towards the bilateral has been because of blockages in the multilateral. I don't think that's just a question of resources, I think it's because so much of the institutional structures of the post-Second World War decades were inequitable. It's the timeless question of efficacy versus fairness. If they are stalled because of the inequities built into them, it's difficult to overcome that to get to something else. Whether the turn to bilateralism is the answer, I'm not sure – but I do think those who are wanting to discuss this are looking at how we can get a change in the core agreements that underpin the rules-based international order: that is the big question."

Professor Shirley Scott FAIIA
Head of the School of Humanities and Social Sciences, UNSW Canberra at the Australian Defence Force Academy

International Criminal Court

"I wonder whether there is a slightly different attitude to the crime of aggression because it is very different to other crimes on the roster? For a start, it is prosecuting an act of aggression, which can only be committed by states, not by individuals. It also necessarily involves a head of state

because they're the only ones that can orchestrate it, and the amendment agreed to in 2010 gives the crime of aggression a much narrower jurisdictional reach than other crimes.... So who on earth is going to raise the crime of aggression because all of those who might have found themselves responsible would have opted themselves out?"

Associate Professor Anthea Roberts
School of Regulation and Global Governance, The Australian National University

"About the International Criminal Court – and indeed the broader aspects of our notion of international criminal justice – what should our framework be to decide whether the billions of dollars and political energy that's been spent in setting up this system over the past two-plus decades has been worth it? Imagine if we didn't have some of the human rights-related institutions within the United Nations. We only have one generation of experience in international criminal justice, and of course there are mistakes. Given some of the things we know now and the level of consciousness we have about atrocity crimes, imagine where we would be without it: we would be back in that period of impunity that occurred between the close of the Nuremberg Tribunal and the fall of the Berlin Wall, where it's been estimated about 180 million people were killed in various conflicts, many to atrocity crimes, with absolutely no accountability, but for the very odd exception. We can't go backwards to that level of total impunity, even though the system is by no way no means flawless and perfect."

Emeritus Professor Steven Freeland
Former Dean, School of Law, Western Sydney University

"I think the need for an end to impunity could arguably be said to be even greater today than it was 20 years ago when the ICC was established, given what is happening in Africa and in the Middle East, particularly in Syria... I would say too that while it's only been 20 years it is nonetheless clear that there are aspects of how the ICC operates that can be improved. More and more states recognise and take comfort in the fact that, provided they have the legislation in place, complementarity kicks in: that's a reassurance to them, as it is key to protecting their sovereign interests. Australia has, of course, such legislation in place.

Professor Richard Rowe PSM
Former Senior Legal Advisor, Department of Foreign Affairs and Trade

Chapter 9:
Where is the Order Heading and How Should Australia Respond?

Where is the Order Heading and How Should Australia Respond?

Panel Discussion

- Professor the Hon Gareth Evans AC QC FAIIA, former Chancellor of the ANU, President of the International Crisis Group and Minister for Foreign Affairs
- John McCarthy AO FAIIA, former National President of the Australian Institute of International Affairs and Ambassador/High Commissioner to the US, Japan, Indonesia, Mexico, Thailand and India
- Martine Letts FAIIA, CEO of the Committee for Melbourne, former Deputy Director of the Lowy Institute and former Secretary-General of the Australian Red Cross
- Professor Anthea Roberts, School of Regulation and Global Governance, The Australian National University

Gareth Evans

Where are we heading with the rules-based order, and how should Australia respond?

First, where are we heading? Well, not all the news is bad. Chapters in this volume – such as on Antarctica and on maritime rules generally (perhaps with the exception of what China is up to in the South China Sea) – show rules-based systems that are working pretty well. Regulatory regimes that are not strategically contested – like civil aviation and international telecommunications – are all absolutely fine. Much of the United Nations' social and environmental policy responses to global health crises and pandemics have been admirable exercises: we have seen cooperation and effective operation in the international order. For the most part,

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peacekeeping has been working reasonably well; numbers are certainly as high as they've ever been. Efforts on conflict prevention – in a number of locations that go unrecognised and unnoticed – have not been bad: there has been successful cooperation against ISIS[1] and the general enterprise against terrorism has been, again, a not bad example of the world working cooperatively together. Some sanctions have been effectively applied through the existing global institutional apparatus.

All that said, there is still obviously a ton of bad news to go around. Most of it is currently deriving from the United States under the Trump Administration, tearing up much of the post-Second World War order that it did so much to create. So far as formal rules and norms are concerned, we have Trump initiating trade wars; we have him regarding multilateral institutions with manifest contempt; and we have him walking away from painfully-negotiated international agreements – most notably the Joint Comprehensive Plan of Action with Iran, and the Paris Climate Accords. We also have a fairly direct and fundamental challenge by the President of the United States to some of the liberal underpinnings of the global rules-based order in his manifest preference for despots over democrats, and his willingness to treat allies as irritating encumbrances rather than assets in the endeavour to keep the global order, such as it is, essentially liberal in character.

Of course, in this enterprise, it hasn't just been the United States; it has been aided by others. China hasemerged from its "hiding and biding" period into much more global assertiveness; it is clearly wanting to wield a fair amount of political and strategic influence regionally and globally so that

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[1] Islamic State of Iraq and the Levant (also known as ISIS and Daesh).

it can be a rule-maker rather than just a rule-taker. But in the process, China has clearly breached some well-established rules, conspicuously in the South China Sea. Russia under Putin, after a long period of post-Cold War quiescence, is clearly playing itself back into the role of regional would-be hegemon and bully, as well as spoiler on the larger international stage to the extent that it gets an opportunity to do so, which it often does on the UN Security Council. The European Union is divided and troubled at a time when regional organisations like it have never been more necessary to recapture momentum in the rules-based system. And few other intergovernmental regional organisations, including ASEAN, are punching at anything like their necessary weight.

The UN Security Council has been completely impotent in responding to Russian transgressions in Ukraine and Georgia and in dealing with Syria – with the failure of the Responsibility to Protect (R2P) post-Libya to make any difference at all in the international community's willingness through the Security Council to respond effectively even to the early stage depredations by the Assad regime. China has been staring down the international law of the sea in the South China Sea. There has been no movement on nuclear disarmament, and the Non-Proliferation Treaty is again very much at risk with the 2020 Review Conference coming up. Iran is back on the brink with the United States walking away from the nuclear agreement. And so far as North Korea is concerned, well, who knows where that's going to end up at the moment given Trump's personality, defects of character and incapacity to concentrate on any policy issue for more than three and a half seconds and the presence of John Bolton in the wings. If this thing does result in any kind of sustained, effectivediplomacy, that will be a miracle; but let's hope that it occurs.

In the economic area, we have the World Trade Organization in real strife at the moment, not just because of the trade war that Trump has initiated, but also because of his refusal to make appointments to the appellate body of the WTO. And on a larger bunch of global and regional public goods issues, cooperation on climate change is looking a bit better post-Paris, even with the US walkout. But refugee issues are manifestly not being addressed well at all by the global order; atrocity crimes are not being effectively responded to, even with the new normative R2P environment; and human rights and democracy are clearly having a bad case of the wobbles in terms of any kind of serious global commitment to putting pressure on countries that are defaulting, including in Australia's region.

Overall, there's a desperately urgent need to restore commitment and momentum. What we need are collective solutions to global problems and the capacity to knock the rough edges off the great powers. That's essentially what the idea of the rules-based order is all about.

So, how should Australia respond to all of this? I agree totally that Australia has been a huge beneficiary of the rules-based order with its liberal underpinnings as supplied by the United States since the Second World War. As a middle power with little capacity to impose our own will on anybody else, we do depend – for our own security, prosperity and other objectives – on operating in that rules-based environment.

Australia has had an incredibly strong track record in this area. True, this has varied government to government, but less due to changes of party and more to do with the preferences and instincts of different political leaders at the time. Over and again Australia has demonstrated a capacity to contribute to that order, both in developing the rules themselves and

implementing them with real commitment. Australia has a significant reputation as a creative, energetic and capable player on the global scene. My message is that it really is time for us to recover our mojo because I think we can play a significant role.

On security issues, I don't think we should be too spooked by the United States' retreat from alliance responsibilities. We probably always had an overreliance on that alliance relationship. Although it has contributed intelligence and logistics support, and the veiled threat of deterrent retaliatory capability, I suspect that its value has always been overstated. To the extent there is now real doubt as to whether the United States is a serious ally when we are in serious strife, this does require us to change our approach, but it doesn't require us to get too spooked. I've said over and over again that I think the appropriate response to this should be less America, more self-reliance and more Asia. In the context of more Asia, it certainly means closer and more substantial relations with countries in our region: Japan, South Korea, Singapore, Malaysia –particularly now that it has its democratic act, hopefully, back together again – and Indonesia, Vietnam and India as well.

We also need to develop with China a much more multidimensional relationship than the one-dimensional economic one we have at the moment. The area of global public goods is one way forward in restoring less of a dog-house diplomacy relationship than we are in at the moment. I don't think we should be too afraid to push back against China when it is manifestly overreaching, as it clearly is in the South China Sea, or when it's unacceptably interfering in (as distinct from trying to influence) our domestic affairs. We should be very careful not to make things worse by using incautious and intemperate language of the kind that we've

seen happen rather too often from senior ministers, but that doesn't mean in any way we need step away from protecting our own legitimate interests.

In the context of security issues, we have to articulate – in the way that we did, I think, fairly effectively back in the 1990s – a really comprehensive security agenda. This involves articulating what we mean by comprehensive security with its core element of common security – security with others, rather than against them – and really getting out there as a voice in the wider international community with that basic frame of reference to argue for the strategies which would effectively implement that.

When it comes to trade and economic issues, I think we have to fight very hard for open trading regimes being as multilateral as possible. We should, in the context of China and the Belt and Road Initiative, recognise the essential legitimacy of that enterprise while at the same time working to try to improve Beijing's transparency and responsibility.

We should recognise the legitimacy of China's desire to be a rule-maker rather than just a rule-taker. There has been serious unwillingness until now from the United States to give China space in that respect. This is not just Trump; even Obama in his State of the Union address in February 2016 in the context of Trans-Pacific Partnership said, "China does not set the rules in that region, we do."[2] It's an incredible degree of arrogance and it's still embedded in the American psyche – this notion of dominance, pre-eminence – I think in the economic space as well as in the security space. In lots of other ways, Americans are going to have to step back a bit

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[2] Transcript available online at https://www.c-span.org/video/?402620-1/2016-state-union-address

while not taking any pressure off the Chinese when they are behaving badly.

On transnational global engagement issues, Australia needs to be a central and up-front player on environment and climate. We should not hold back when it comes to values issues and human rights representations. The only rule of my lexicon is that you try to do that which is productive; you don't mind doing things which are unproductive if you're sowing the seeds or demonstrating your own commitment – but please try and avoid doing something which is counterproductive and which is going to make things worse for the people you're trying to help. There's an awful lot you can do in human rights and democracy promotion while still being on the right side of history. When it comes to democracy promotion, of course you have to handle that with care. We can be very strong on the core human rights values that are embedded in Universal Declaration and the Covenants while still recognising the inevitability of differences when it comes to institutional political arrangements. We need to recognise also in this context that hypocrisy, double standards and backsliding do not help your credibility, and there is much to be said about the ways in which Australia has put its credibility at risk in recent years. If we are going to be a serious player in re-energising the rules-based order momentum, we have to be absolutely squeaky clean ourselves.

There are three things in particular that I want us to focus on that reflect my own current policy priorities. One is nuclear disarmament, which has frankly gone to sleep as an international issue. I am not talking about nuclear non-proliferation, I'm talking about actual disarmament: getting some movement on winding down the stockpiles, building on

the work that we did with the Canberra Commission[3] and the International Commission that I co-chaired under Kevin Rudd[4] and the general credibility we had in the arms control area with chemical weapons; building on that credibility to get out there and try and perform a bridging role between purists on the one hand and the absolute do-nothings on the other – which includes all the current nuclear armed states. There is a step-by-step practical minimisation agenda which is very well-articulated in the International Commission's report. I think Australia could play a genuine leadership role in building an international coalition through multiple different mechanisms to get that agenda out there and taken seriously in a way that it is not at the moment.

Secondly, you'd expect me to say something about the Responsibility to Protect (R2P) since I've been passionate about this for a number of years. The present government has been extraordinarily helpful on that in Geneva and in New York, for example in leading the group of Friends of R2P, getting a decent debate going in the General Assembly, and trying to get that agenda moving forward in Geneva. It has been one area where I've been totally happy with the Australian response. There's lots more to do, however, to get R2P effectively implemented, not just in better prevention, but least when the rubber really hits the road with effective reaction to atrocity crimes actually occurring. There are

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[3] Report of the Canberra Commission on the Elimination of Nuclear Weapons (Commonwealth of Australia, 1996), available online: https://www.dfat.gov.au/about-us/publications/international-relations/Pages/the-canberra-commission-on-the-elimination-of-nuclear-weapons

[4] Gareth Evans and Yoriko Kawaguchi, *Eliminating Nuclear Threats - A Practical Agenda for Global Policymakers* (International Commission on Nuclear Non-proliferation and Disarmament, 2009), available online: http://www.icnnd.org/.

strategies which are available which I have written about at length,[5] and I think Australia could play a leading role in articulating and advocating these a bit more.

The final area is on refugees and migration policy. This is an area where the world is looking at Australia, not always with an awful lot of approbation and respect for some of the hard political choices that have been made. What we have to do if we are going to be any kind of role model for the rest of the world is somehow to marry the necessary toughness that is involved in effective sovereign border protection with a bit of decency when it comes to the treatment of those who come to our shores, without putting them through the indefensible horrors of Manus and Nauru. There are policy ways through this. Nobody wants to talk about them much in Australia at the moment, at least until after the next election. But in that context, given that we have had so much experience over so many years on migration policy and how to cope with refugees, I think we can get our act together on an effective way of responding to this dilemma in good policy terms. We could make a major global contribution to restoring a bit of decency and content to that part of the rules-based order.

So, there are three priorities to think about. There is lots more we could do, but I suspect that will be more than any conceivable government could cope with for the foreseeable future.

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[5] Gareth Evans, *The Responsibility to Protecy: Ending Mass Atrocity Crimes Once and For All* (Brookings Institution Press, 2008), Chapters 4-7.

John McCarthy

Looking at these issues – international rules and the international rules-based order – it can very easily get amorphous. For the sake of my own thinking, I like to look at the issues in three frameworks. The first is the framework that basically emanates from after the Second World War: the creation of the United Nations, Bretton Woods and so on. The second one is what is happening in the North Atlantic. And the third is what's happening in the Asia-Pacific, in our own region, because I think when we talk about rules in all three contexts, they are slightly different.

What's happening to the international order? Most of the debate that we're currently seeing is around what the United States is doing to the international order. It's not really what the Germans, the Chinese or the Russians are doing, it's more about what is happening under Trump. I think the areas that directly affect us on this – the World Trade Organization, immigration and climate change – are the things that have come to the fore. And the issues arising from that are quite clearly causing enormous concern in the international community. What we, as Australia, do about it, I think is fairly clear from the role that we've taken since the post-war period. The fact that, as a middle power, we are dependent to a greater degree than great powers are on a smoothly working rules-based order. We can't throw our weight around to get what we want to the same degree as a great power would.

What should out approach be? My eyes were caught by an article by Gideon Rachman in the *Financial Times*[6] in which

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[6] Gideon Rachman, "Mid-sized powers must unite to preserve world order", *Financial Times*, 28 May 2018, available online:

he argued that, even without the United States, with perhaps China playing a slightly different role and Russia in a different role again, there is still a lot to be said for those powers that put a lot of importance rules-based order: the major European countries, Canada, Australia and of course countries like Japan and India – and China has tended to respect the rules-based order to some extent. All these countries could work in a sort of cogent and coherent way, not through major conferences, but through normal diplomacy to see what could be done to strengthen what we aspire to in terms of the rules-based order.

The other point that I make is on trade and international economic issues; on these issues, we have always had a role which is much greater than our size would dictate. And I think you need to look at the role we played in WTO negotiations in the last 40 years, ever since Havana. In the Cairns Group, quite clearly, we were a significant voice. When you see a situation in which the US President is playing havoc with the rules-based order, it's incumbent on us to stand up and be counted. I have to say that our response has been less than satisfactory. On US steel tariffs, Prime Minister Morrison has said, quite understandably, that we would argue that no one wins from a trade war. That's totally acceptable. He went on to say that Australia has ensured the doors to trade remain open, which is not what it's all about. It's not about what we have been able to achieve to please the United States in order to escape from the steel tariffs which impacted other countries; it's about defending a regime which we have always seen, right from the beginning, as being in our interest.

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The second area which we need to at least think about, if not get particularly involved in, is the North Atlantic. One thing that occurred to me watching what happened at both the G7 meeting in Canada and at the recent NATO meeting in Brussels is: what sort of problems will that cause for us if Trump behaves in the same way at the East Asia Summit or at APEC? I think we need to ponder on that. If he can be as destructive as he was at those other two meetings, what might he do in terms of the functioning, smooth running and productivity of meetings which take place in our own region? I think we should follow what is happening. It is obviously in our interests that NATO stays together and remains cogent; it is obviously in our interests that in the long-term we see some sort of effective dialogue taking place between the United States, NATO and Russia. This is not to excuse Putin's actions. At the end of the day, if you want to diminish tensions in Eastern or Central Europe, if you want to diminish tensions in the Middle East and if you want to deal with the major nuclear issues, progress in those areas multilaterally can't really take place in a significant way until you have an improved modus vivendi between the United States and Russia.

Finally, in our region I think the issues are somewhat different. The issue that we face is how we should deal, in terms of the rules-based order, with a rising and somewhat muscular China and a United States which tends to veer between very strong and robust restatements of its policy towards East Asia, but at the same time leaves with you a doubt about its long-term commitment, not because of what the Secretary of Defence says, not because of what admirals in Honolulu say, but because of doubts at the end of the day about the President's views. We tend to avoid thinking about that sufficiently in Australia. During the Obama tenure, there was already a movement away from overseas engagement, in

particular because of the cost of Iraq and Afghanistan. Obama recognised that. It's reflected very much in the mood that emanates from the White House at present. There are contradictions: on one hand, the White House, and particularly Trump, is talking about "Making America Great Again"; on the other hand, in the American electorate, there is a fatigue with overseas engagement.

The second aspect is how to do deal with China. What seems to come through most in terms of Australia's criticisms of Chinese muscularity is, "Our understanding of what you mean by the rules-based order is a preservation of the strategic status quo." And that quite clearly is not as China sees its future over the next 10 or 20 years. It seems to me that what you are talking about is not the negotiation of a new structure. New structures tend to be negotiated after wars, and that's quite clearly something that neither China nor the United States nor anybody else aspires to. What you're probably seeking to do is create various levels of interdependence between China and remaining countries of the Asia-Pacific which will lower tensions. Now, part of this might be, for example, acceptance of a code of conduct in the South China Sea; that hasn't gone too well, thus far, but it doesn't mean that it shouldn't be aimed at. It also means that there is room for countries dealing with China in areas that are of interest to China, such as the Belt and Road Initiative, to work with the Chinese in order to get acceptable standards, rules and understandings of how that particular initiative should proceed. A major area that will cause concern will be is how the Indians and the Chinese work through that issue because it has implications for Kashmir. What I'm seeking to argue is that the whole region should work with the Chinese.

This brings me to another point. We have talked quite legitimately of a need to improve our relationships with India,

Japan and Southeast Asia and to put more ballast into those relationships. I would argue that is totally acceptable. But the best arguments about quasi-strategic relationships or quasi-security relationships, I think, become very hard to sustain in the long-term. We have to appreciate that countries like India and Japan have very complex dealings and complex national interests with China which are different to the national interests we have with China. There is a commonality of view that we have to find an acceptable way of dealing with a rising China, but there are different perspectives on just how to do that. Now, there is a lot of merit in dealing with those countries to get common diplomatic methodology in dealing with China. It is a different thing to suggest that there should be security arrangements to deal with China because at the end of the day I don't think they will want that. I think the same sort of arguments apply to all of Southeast Asia.

The danger as I see it is the way that we have dealt with China in the past nine months or so could leave us exposed when it is not in our interest to be exposed and clutching around for policies to deal with China. Now, I think there is some recognition of that in government. There's certainly recognition of those issues, I think, within the bureaucracy, or at least a large part of bureaucracy.

My final point on our relationship with the United States is that it is one thing to be an ally, and it is another thing to have a situation which I would argue has obtained since 9/11 where there is essentially no daylight between our security policies and the security policies of the United States. Our credibility for arguing for diplomatic change is impacted because our interlocutors see our perspectives on security as no different from a United States which is going through huge changes of its own and whose interests may not necessarily be consistent with theirs.

Martine Letts

The international order is under challenge on numerous fronts, including challenges we cannot even fully assess, such as the impact of technologies.

I have three propositions. First, we should protect what we have got: this has an external as well as internal, or domestic dimension. Second, notwithstanding the fact that the order has largely been created and managed by sovereign states, there are other actors which wield as much power today as states and whose influence and support will play a key role in managing the old system as well as the new rules. Third, not only are our borders challenged by technology, the very philosophical underpinning of our value system and terms of our co-existence are being challenged by the rise of artificial intelligence.

First, the case for protecting what we've got. I will cite one example from arms control. In the Lowy Institute's Voters' Guide to International Policy[7] published ahead of the 2007 Federal Election, my piece "Non-proliferation and Arms Control: Creative and uncomfortable policy choices ahead" caused a minor stir in the arms control and disarmament community because it was read as advocating for Australia to consider the nuclear weapons option.

The offending concluding paragraph followed a lengthy exposition of what Australia could be doing to strengthen the international non-proliferation regime, which was already

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[77] Lowy Institute, Voters' Guide to International Policy (Lowy Institute, October 2007), available online: https://archive.lowyinstitute.org/publications/voters-guide-international-policy

severely under strain in the years leading up to 2007. The offending paragraph read as follows:

> "A thorough nuclear policy review should also consider which strategic circumstances might lead to Australia's revisiting the nuclear weapons option. As extreme as this may sound, failure to sustain and strengthen our current non-proliferation regime may force us to consider such an option. In the current strategic circumstances, no government could leave such an eventuality entirely out of mind."[8]

Hugh White floated this proposition in a different context in his 2017 Quarterly Essay *Without America: Australia in the New Asia*.[9] The argument is that the inability of the United States to maintain the strategic weight required to protect Australia raises the possibility for Australia to consider nuclear weapons for its self-defence. Commenting in the Lowy Institute's *The Interpreter*, Sam Roggeveen's review[10] notes that:

> "Perhaps the reason White struggles to come up with concrete ideas about what to do is that, other than increasing our defence spending and debating the merits of nuclear weapons (granted, these are not trivial issues), there may not be much Australia needs to change specifically to meet the great foreign-policy challenge of

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[8] Ibid., p 15.

[9] Hugh White, *Without America: Australia in the New Asia* (Quarterly Essay 68, November 2017), available online: https://www.quarterlyessay.com.au/essay/2017/11/without-america

[10] Sam Roggeveen, "Review: Hugh White's 'Without America'", *The Interpreter*, 12 December 2017, available online: https://www.lowyinstitute.org/the-interpreter/review-hugh-white-without-america-0

the new century. To negotiate the changes to our region, Australia must maintain its social cohesion, economic strength and political independence. Our political class and political system are in turmoil right now, but that should not disguise the fact that we are pretty well placed to face the new Asia and the decline of America."

So protecting what we've got means modelling respect for the order and protecting regimes like the NPT at home and internationally. It also means maintaining domestic social cohesion, economic strength and political independence to sustain respect for the order domestically.

The second proposition is that we need to recognise that there are other actors that wield as much power today as states. We will need their influence and support, even if the power to sign, commit and police continues to rest with states. How we actually do this is an open question – but the rules we enforce and the rules we make will increasingly need to factor this in to secure success.

It is worth recalling in this context the critical role that the world's chemical industry played in securing the 1993 Chemical Weapons Convention (CWC). The industry and its members were not just stakeholders to be managed, but subject matter experts who could provide advice on issues of lethality and verification of compliance. We know that there would not have been a CWC without the active involvement and support of the industry, in its design and its implementation.

It is difficult for states to get their heads around drawing business into a negotiating process, especially on matters of national security. The truth is that technological changes – such as access to information via the internet, artificial

intelligence and the phenomenon known as the Fourth Industrial Revolution or Industry 4.0 – are going to make it increasingly hard to keep these domains separate. Cyber security is one prominent and current example.

World Economic Forum Executive Chairman Klaus Schwab's proposition is as simple as it is challenging: the Fourth Industrial Revolution – "characterized by a fusion of technologies that is blurring the lines between the physical, digital, and biological spheres" – must bring a response that is "integrated and comprehensive, involving all stakeholders of the global polity, from the public and private sectors to academia and civil society."[11]

Cities are now major actors in the global economy and in international relations. They drive and shape national economies, with key roles played by technology and innovation-driven activity. Their reach and power already extend well beyond city limits and across borders. Cities, and especially mega-cities, are the new economic competitive unit not just within nations but between nations. This matters when we review the terms of our international co-existence.

Cities seem to be bucking the trend of many countries' retreat from global engagement – such as US city mayors continuing to observe the Paris Accords despite President Trump withdrawing the United States. There is now an active global network of smart cities and mayors which transcend national government-to-government relationships.

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[11] Klaus Schwab, "The Fourth Industrial Revolution: what it means, how to respond ", *World Economic* Forum, 14 January 2016, available online: https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/

Tech companies like Google are now wealthier, and more powerful, than many nation states and foreign policy actors in their own right, with power over elections and government policies as well as vast investments. In early 2017, Denmark responded to this trend by appointing the former Danish Ambassador to Indonesia as a dedicated ambassador based in Silicon Valley to engage with them, just as he would as Ambassador to a nation state.[12] The new job will have four key roles: building partnerships; shaping tech companies' opinions; spotting new trends; and overhauling the Foreign Ministry itself. The Ambassador's role is to provide the Danish government with advice on areas like cyber security, to discuss ethical issues – as start-ups grow into behemoths – and to engage in discussions on issues like data protection or usage.

The third proposition is that not only are our borders challenged by technology, the very philosophical underpinning of our value system is being challenged by the rise of artificial intelligence (AI). Even old war horses like Henry Kissinger are onto this, as his article in the *Atlantic Monthly* (June 2018) expressed this challenge:

> "Through all human history, civilizations have created ways to explain the world around them—in the Middle Ages, religion; in the Enlightenment, reason; in the 19th century, history; in the 20th century, ideology. The most difficult yet important question about the world into which we are headed is this: What will become of human consciousness if its own explanatory power is surpassed by

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[12] "The World's First Ambassador to the Tech Industry", *The New York Times*, 3 September 2019, available online: https://www.nytimes.com/2019/09/03/technology/denmark-tech-ambassador.html

> AI, and societies are no longer able to interpret the world
> they inhabit in terms that are meaningful to them?".[13]

Typically, these questions are left to technologists and to the
intelligentsia of related scientific fields. Philosophers and
others in the field of the humanities who helped shape
previous concepts of world order tend to be disadvantaged,
lacking knowledge of AI's mechanisms or being overawed by
its capacities. In contrast, the scientific world is impelled to
explore the technical possibilities of its achievements, and the
technological world is preoccupied with commercial vistas of
fabulous scale. The incentive of both these worlds is to push
the limits of discoveries rather than to comprehend them. And
governance, insofar as it deals with the subject, is more likely
to investigate AI's applications for security and intelligence
than to explore the transformation of the human condition that
it has begun to produce.

Kissinger notes that:

> "The Enlightenment started with essentially philosophical
> insights spread by a new technology. Our period is moving
> in the opposite direction. It has generated a potentially
> dominating technology in search of a guiding philosophy."

He notes that other countries have made AI a major national
project, and that the United States should do so.

To the best of my knowledge, Australia has not yet, as a
nation, systematically explored AI's full scope, studied its

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[13] Henry A. Kissinger, "How the Enlightenment Ends", *Atlantic Monthly*, June 2018, available online:
https://www.theatlantic.com/magazine/archive/2018/06/henry-kissinger-ai-could-mean-the-end-of-human-history/559124/

implications, including for the rules which govern the terms of our co-existence, or begun the process of ultimate learning. We should do so now.

Anthea Roberts

I have two observations about convergence. The first observation is that we are seeing in the geopolitical world a convergence between the power of Western states and non-Western states. One of the big questions we have going forward is: what does that degree of convergence between these powers mean for the international order? It seems to me that, at least historically in the last few generations and longer, we've had a system where there has been strong power by the West and much less power by the non-Western states. In that sense, we have had a much more of a vertical structure or a hierarchical structure. One of the outcomes of having a hierarchical structure is that those who are in the position of power – the Western states, and particularly the core Western states – have a much better ability to take their values and their interests and universalise them through the system. We are now moving away from that kind of vertical structure to a much more horizontal structure where there is much less ability for a dominant power in the core to spread its values and its approaches to define the international and define the universal. And so I think a lot of what we're starting to see is contestation about that convergence of power: some of the non-Western states are seeking a greater stake at the table, and some of the Western states are reluctant to give up their previous stake at the table, so we see tensions on both sides.

So for the global rules-based order to go forward, what do we need to give up? If you see a position where there is going to be a greater degree of horizontality between unlikeminded states, there are two different things that you can be looking

for. The first is that you can try to widen the consensus and widen the numbers of states and players who are going to be buying into the rules, but if you do that you are going to decrease the amount of content. There will be more agreement generally, but about a smaller number of rules. The flipside is that you can try and hold on to a larger level of content, as you have preferred to previously, but you're not going to have the same degree of consensus.

I would say that, moving forward, we're probably going to move into an age where we see more regional power relationships with hegemons in particular regions. We're probably going to see a much greater emphasis on state sovereignty, not just because some of the rising powers are more assertive about sovereignty, but also because some of the existing powers will become more protective of their sovereignty when things are against them. And we will also see more unusual issue alliances between states that that weren't normal bedfellows before. We see this happening in economics and the environment.

The second thing I want to talk about is something I see happening at the moment, which is a convergence between two fields: economics and national security. I'm an international lawyer, and I can tell you that in the international law field we tend to have extremely different people working on international economic law and national security. We have this also in the Department of Foreign Affairs and Trade and in other departments. We have this around the world. Siloing has been really problematic because we have grown up in very different communities with very different assumptions about, for example, trade and whether it is a win-win – or whether security is really limited to terrorists and Al Qaeda. There's been a problem of siloing, but now there's a problem of these two things coming together in a way that I think is

going to be very tense. And we see this very clearly in the United States at the moment: its 2017 national security strategy[14] redefines national security away from individual terrorists and the situation in Afghanistan and Iraq to geopolitics: specifically economics, economic security and China. What you see is not just these two fields coming together, but the national security field becoming the dominant framework. We see this now in trade, where the justification that the United States has given for its steel tariffs is national security. You see this in the rise of the foreign investment review boards. I think we're going see this much more.

I am not against bringing these two fields together: I think this is something that is really important and that we need to do. But I think we need to do it in a nuanced way that doesn't allow economic issues to be tainted by an "us versus them" mentality. We need to find a sensitive way to recognise that trade relationships present both great opportunities and sometimes significant threats, and we need to integrate those perspectives rather than treating them in silos, or allowing one to win out over the other.

So, with those two observations about convergence, where does that leave Australia? I think it is very clear at the moment that Australia is a middle power and that Australia needs to have some distance from what the closeness has had with the United States in the last generation. We have been extremely close to the approach of the US and have assumed that our values and interests are very much in line, including on the national security front. Some of what we are seeing out

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[14] *2017 National Security Strategy: A New National Security Strategy for a New Era*

of the US at the moment is deeply troubling for Australia and cannot simply be replicated by Australia.

But I also think that Australia has a very particular role to play in this. I say this as an Australian who has spent almost my entire professional life – 14 years of it, at least – in Europe and the United States. One of the things I noticed coming back to Australia is how much better our position is because we can step back and see China and Asia, the US and Europe and not be caught up in the vortex of any one of them. We also have very high levels of immigration; we have much greater consciousness and ability to dialogue between East and West on some of these issues. This is something that we can bring to the table and something where we can be a real facilitator between some of these actors in Asia and the West.

We need to have dialogue rather than lecturing, we need to listen and we also need to be clear that we are being consistent. When we talk about a global rules-based order, we can't look like we are simply trying to protect existing hegemony and that we are applying it inconsistently; we will look hypocritical. If we believe in the rules-based order, then we need to apply that consistently to people that have traditionally been our friends and traditionally been our foes. And so that's where I would see Australia going in the next generation, given these two issues of convergence: of state power, and of economics and security.

Highlights of Discussion

Moderated by Caroline Millar, Deputy Secretary, Department of Foreign Affairs and Trade

Defence

"I agree 'Less America, more Asia, more self-reliance.' More Asia means we need to get the Australian Defence Force to stop being obsessed with the Middle East, where I'm not sure what our impact has been, frankly. We should be focusing on Southeast Asia, the South China Sea, the Eastern Indian Ocean, right up to the Cocos Islands, the South Pacific and the Southern Ocean. That's more than 10% of the Earth's surface, which for a country with 25 million people that spends 2% of GDP on defence is a serious challenge."

Emeritus Professor Paul Dibb AM
Strategic & Defence Studies Centre, The Australian National University

"I generally agree, but I would not wish to exclude altogether the possibility of Australian expedition involvement in peacekeeping operations in the UN-authorised context or even in military interventions properly authorised in atrocity crime situations. That is part and parcel of being a good global citizen; it has reputational and reciprocity advantages for us and it plays into a role of Australia as an effective coalition-building middle power doing creative and useful things."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for Foreign Affairs

International Institutions

"I think we're at a stage where we have to be more selective about what the United Nations does. It's also important that we mesh the global with the regional and the bilateral; I think there are occasions where the UN is overreaching. It's very hard to change an organisation, but I think pulling back from overreach is going to be very important. Our resources are limited, so we should focus our energy on areas... where we can make a difference. We have some choices to make about where we engage and what is value for money in terms of our national interest, but also making sure we sustain that investment."

John Quinn
Former Ambassador and Permanent Representative to the United Nations in Geneva

Climate Change

"On climate change and the opportunity or risk to the rules-based order, I think it's an opportunity. I'm an incorrigible optimist about those sorts of things. There is such a hunger around the world to get this one right, to get it fixed, that all sorts of players are coming into the equation, including non-state actors, city actors and so on in a way that's been quite unprecedented and quite fascinating, so I think that I'm bullish about good outcomes there."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for Foreign Affairs

"On climate, what's really interesting is to see that in some cases cities have stepped into the breach. When Trump

stepped away from the Paris accord, there were about a dozen mayors in the United States that said, "Well you may be stepping away, but we're going to get on with it anyway." It is an interesting example of non-state actors or different kinds of authorities... creating their own global network of resilient cities, for example. Climate is a really important issue that sets panic amongst politicians, but there are others that are picking up and running with the challenge."

Martine Letts FAIIA
CEO, Committee for Melbourne

"I haven't given up at all on China as being a responsible global player; they do want to be a serious player on the global scene. I don't think it was just cynical opportunism that led them to fill the climate gap when the United States abdicated it. There is scope in this context, without being too spooked by the military anxiety, to build more productive relationships and to embrace a cooperative security approach to diplomacy in the region."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for Foreign Affairs

Domestic Politics

"On politics and the need to secure and support the order domestically, I am wondering... about the future of the international order and all the factors that will determine its trajectory. How much do we need to convince the voters of Western Sydney, or Northeast Ohio or the English midlands about the international order and its uses to protect it and for it to evolve in a positive direction?"

Dr Darren Lim
Senior Lecturer, School of Politics and International
Relations, The Australian National University

"The famous saying is that "All politics is local," and that's pretty much right. If you look at the whole Trump phenomenon, you'd have to say that the rise of Trump and what we're seeing today, as most would argue, is a symptom rather than a cause. And what gave rise to Trump was a whole lot of political currents which were taking place in America arguably since 9/11, but certainly with the rise of the information age and everything that it brought with it. Including, of course, the failure of the United States' industrial base. Whenever you are trying to assess the way a country is going to go, you have to look at domestic politics. Hence on the United States' appetite for overseas engagement diminishing, you have to look at what's been happening as a result of the Afghan and Iraq wars since the beginning of the century. You can argue the same in Australia: if you look at the way our foreign policies are going right now on immigration and refugee issues, that is quite clearly driven by domestic dynamics. However unpleasant it may be, that is what it's about. It's not because we think it's a good foreign policy."

John McCarthy AO FAIIA
Former National President, Australian Institute of
International Affairs and former Ambassador, Department of
Foreign Affairs and Trade

"We shouldn't assume that our situation is the American situation. They've had much more drastic inequality of income before taxation and much less tax redistribution than we have; even though there has been growing inequality in this country, it is not of the same order of magnitude, which is

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probably why we have not seen the same pushback – and I say that as somebody who lived in the United States right up until Trump announced his run for the presidency. On a personal level, I was so unbelievably shocked by the level of inequality I saw around me on a daily basis in America that I just felt like it was an absolutely immoral social contract... If we want to do something about that though, I don't think it is just the case that we take the kind of trade and investment agreements that we've had and we sell them better. We need to make some changes so that we really understand whether we're getting the kind of redistribution we want – and that's not just redistribution after the fact, that's also thinking structurally about these agreements and who they favour and who they don't favour."

Professor Anthea Roberts
School of Regulation and Global Governance, The Australian National University

"On the impact of domestic issues on foreign policy, I frankly think that's more of an excuse than a real-world constraint. Politicians on both sides in Australia can afford to be a lot more courageous. I think that there are obvious dynamics at work in the community which are feeding into the foreign policy debate – a combination of economic anxiety, security anxiety (which is more domestic than international) and also cultural anxiety... – that are feeding on each other and creating an environment that is hostile to any kind of foreign policy adventurism. Nonetheless, I don't think it's a serious constraint. On our relationship with the United States, my experience was that we did our best and were most productive in our foreign policy relations with the United States when we showed a genuine spirit of independence on various issues.... That is my mantra now and I think that's perfectly saleable to

the Australian community. We could be a little bit more adventurous in the way which we articulate that reality."

Professor the Hon Gareth Evans AC QC FAIIA
Former Chancellor of the ANU and former Minister for Foreign Affairs

Building a New Rules-Based Order

"The building blocks for any new 'order' architecture could be developed gradually, but deliberately. One guiding principle might be to retain existing elements that work, or at least contribute in something close to the right way. Such as the Bretton Woods arrangements: but maybe in their case without the preferential positions of the United States and the European Union which are probably no longer deserved, as well as politically inappropriate. Retaining what works, and what we already have in place, also saves time and builds confidence."

Trevor Wilson
Visiting Fellow, Coral Bell School of Asia Pacific Affairs, The Australian National University
Former Ambassador to Myanmar, Department of Foreign Affairs and Trade

"It is essential to accept that the rules-based order to which Australia refers was drawn up by the United States, with United Kingdom support, after the Second World War. It is now essential to develop an updated rules-based order in which China, India, Russia, Vietnam, the Philippines and Indonesia – as well as the US and the UK – must be involved... My personal background would clearly be regarded as on the Right, and certainly not on the Left. l do find it difficult, therefore, to understand why we do not grasp

the nettle and accept the reality of the rise of China to great power status. China is a one-party state managed by the Communist Party of China. Australia is a multi-ethnic, multi-cultural democracy. But these great differences should not prevent Australia from acknowledging that China is expected in the near future to replace the US as the world's major global power."

Richard Woolcott AC FAIIA
Former Secretary, Department of Foreign Affairs and Trade

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As a middle power that possesses limited capacity to impose its will on other states, Australia has benefitted greatly from the international rules-based order. But that order is looking incredibly fragile, threatened by growing geopolitical competition and economic changes.

"Australia and the Rules-Based International Order" brings together leading scholars and practitioners in the field of international relations to investigate the meaning behind the idea of rules-based order, its role in Australia's foreign policy, and Australia's contribution to its development. Understanding the importance of this order and Australia's experience in helping to shape it, the authors of this collection lay a vital foundation for comprehending what Australia needs to do to preserve its most important elements in this changing period.

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