

NAVIGATING THE BACKLASH AGAINST GLOBAL LAW AND INSTITUTIONS

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Introduction

This article considers the recent ‘Backlash’ against global norms and institutions fuelled by various contemporary political developments within and between states. Understanding the shape, significance and drivers of this phenomenon better is a pre-requisite to developing and analysing possible responses by Australia and other states. The current global legal order was established after World War II and is underpinned by the United Nations Charter, international law in general, and the growing collection of multilateral international legal instruments by which states agree to conduct their international relations. The sweep of the global legal order is broad, encompassing norms and institutions that seek to foster international cooperation across a range of spheres, including development, the environment, finance, health, human rights, science, security and trade. The United States has historically been considered the leader and guarantor of the post-1945 legal order, playing host to its most important institutions. The US has provided key economic, political, and diplomatic backing throughout its time as one of two superpowers during the Cold War, and as the hegemonic power for most of the period since. Australia has also been a strong supporter of the liberal rules-based order, commitment to which explicitly underpins its current official foreign policy posture.¹ It was a founding member of the United Nations and has traditionally been involved in the drafting of, and been swift to sign on to, new international covenants that clarify and crystalise the heretofore expanding reach of international law.

The recent rise of populism and ‘illiberal democracy’ especially within major Western democracies has challenged the longstanding and widespread commitment of those states to the rules-based order.² These phenomena have also eroded the traditional global leadership, in multilateral forums, of key powers including UN permanent members the United States and the United Kingdom. The populations of these and other states have responded to perceptions of economic and political disempowerment by pressuring political representatives to focus their energies domestically. In order both to appeal and respond to domestic political forces, leaders in these states have sought to target or sometimes scapegoat the international institutions that have hitherto been so useful to their foreign policy agenda. Seen this way, ‘Backlash’ behaviours do not necessarily signal that a government is contesting the political utility *in foreign policy terms* of continuing to play by the global rulebook. These behaviours may show that the government has calculated that the domestic political gain from contesting international mechanisms and rules outweighs the damage done to those systems in terms of external

¹ Australian Government, ‘Foreign Policy White Paper 2017’ (Canberra, 2017), 3, 6-7, 79-97. One of five objectives listed to be “of fundamental importance to Australia’s security and prosperity” is to “promote and protect the international rules that support stability and prosperity and enable cooperation to tackle global challenges.”

² The 2017 White Paper provides one succinct and authoritative summary of some of these trends, noting a period of “sharper challenge” to international rules and institutions (ibid, 1, 6).

influence and leverage. President Trump's initial rejection of any mention of the 'rules-based international order' during negotiations towards a December 2018 G20 joint communique provides a stark illustration of the sharp decline of the value and compliance-pull of global norms and institutions for a country that has long been their traditional cheerleader.³ While the communiqué ultimately did contain the 'rules-based order' term, Trump only acquiesced to this once other G20 members agreed to include reference to the need for urgent reform of the World Trade Organisation.⁴

One way of understanding the shift in the postures of leaders and governments in the UK, US, Brazil, Italy and other states is as part of a broader Backlash against the Post-World War II framework of liberal norms and institutions. This article examines the utility and implications of such an understanding. It also explores how states and global institutions might respond to this Backlash. The article's central argument is that while it is tempting to view the Backlash as a new phenomenon that poses a clear and present existential threat to global law and institutions, we should not imagine that this is the first time that states have either disrupted international institutions or sought in more robust ways to shake up internationalist ideas. The challenge is to diagnose accurately what is distinct about this moment and to identify the ramifications for future efforts to build and promote peaceful and cooperative international relations. In addition, we should of course be conscious that factors other than populist Backlash may account for changes in state behaviour towards international institutions.⁵

The article proceeds in five sections. Section I examines the consequences of understanding the current populist moment as part of a Backlash against global law and institutions. Section II examines the ramifications of the Backlash frame for international peace and security. Section III considers the implications of the Backlash frame for the international human rights system. Section IV explores the impact of the turn inward for global trade and finance. Section V discusses the Backlash against environmental norms. The final section gathers together the article's main themes on this research agenda.

I. Framing the Backlash: Contours and Consequences

In this article, we explore the concept of a Backlash as one way of understanding the sustained challenge that populist movements in countries around the world have posed to global norms and institutions. We seek to trace the causes, contours and consequences of this Backlash, as well as what responses are being made in support of global law and institutions. According to a Backlash narrative, the challenge to global law and institutions can be interpreted as a kneejerk reaction against and away from the global, and in particular globalisation, towards the local and the national. Many populists view globalisation and global norms and institutions as having changed the world in a negative way, leaving them and their societies disempowered economically and politically.⁶ These populists, whom we might call Trumpian, Dutertean or Boslonaroan populists, tend to yearn for a bygone era when borders were watertight and events in faraway places had a much less direct effect on events in their own countries. They blame

³ See <https://www.theguardian.com/world/2018/dec/01/g20-leaders-donald-trump-rules-based-order-wto-reform>.

⁴ For the text of the communique, see: <https://www.consilium.europa.eu/en/press/press-releases/2018/12/01/g20-leaders-declaration/>.

⁵ The White Paper (n 1 above, 6) notes that along with anti-globalisation and protectionism other issues are challenging the international order, notably geopolitical competition and changes in the balance of global power.

⁶ For thoughtful analysis of different motivations for, and manifestations of, populism, see Mark A. Graber, 'Thick and Thin: Interdisciplinary Conversations on Populism, Law, Political Science, and Constitutional Change', 90 *Georgetown Law Journal* 233 (2001).

globalisation for a range of social and economic ills, such as slowing GDP, decreasing employment opportunities, and stagnating wages. They view globalisation, once welcomed as a ‘rising tide that would lift all boats’,⁷ as decreasing, rather than increasing, national and personal prosperity.

Contours

The concept of Backlash tends to beg as many questions as it answers. What action constitutes a Backlash? What motivates such action and who participates in it? Is the concept value-neutral or does it imply a positive or negative view of those taking Backlash action and the forces that motivate them? What are the implications of the term for the actors, institutions or forces against which Backlash action is taken? Does Backlash connote (or is it confined to) a particular moment in time, or can it relate to or comprise a more long-term phenomenon?

Some scholars see Backlash as an inevitability of the international system itself.⁸ Others question its utility as a tool of analysis, describing it as ‘a common language of recoil’ rather than an analytical concept.⁹ Yet others caution against rushing to the gloomy conclusion that this is the end of the internationalist era, arguing in Wildean terms that the reports of international law’s death are exaggerated.¹⁰

Despite these different perspectives on the utility and ramifications of framing as a ‘Backlash’ the current challenge posed by populism to globalism, it is clear that the notion of Backlash resonates with twenty-first century international legal scholars. Some of these observe a rising number of national governments retreating from longstanding commitments to international norms and institutions in a variety of contexts, such as investment law,¹¹ human rights,¹² and the activities of international courts.¹³

These international legal scholars do not share a commonly agreed or accepted definition of Backlash, and indeed acts described as a ‘Backlash’ can take many forms. Yet some commentators have identified central ingredients that tend to feature in most descriptions

⁷ Gene Sperling, ‘Rising-Tide Economics’, available at: <https://democracyjournal.org/magazine/6/rising-tide-economics/> (last checked 10 Sept 2019). The phrase ‘a rising tide lifts all boats’ was used by President John Fitzgerald Kennedy in a speech on 3 October 1963: John Fitzgerald Kennedy, ‘Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam’ (3 October 1963). Available at: <https://www.presidency.ucsb.edu/node/236260> (last checked 10 September 2019).

⁸ See e.g. Eric A Posner, ‘Liberal Internationalism and the Populist Backlash’ (2017) 49 *Arizona State Law Journal* 795.

⁹ Mikael Rask Madsen, Pola Cebulak and Micha Wiebusch, ‘Backlash against international courts: explaining the forms and patterns of resistance to international courts’ (2018) 14 *International Journal in Context* 197.

¹⁰ See e.g. Philip Alston, ‘The Populist Challenge to Human Rights’ (2017) 9 *Journal of Human Rights* 1.

¹¹ See e.g. David Caron and Esmé Shirlow, ‘Dissecting Backlash: The Unarticulated Causes of Backlash and its Unintended Consequences’ in Andreas Follesdal and Geir Ulfstein, ‘The Judicialization of International Law: A Mixed Blessing?’ (Oxford University Press, 2018) 159; Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2018) 29(2) *European Journal of International Law* 551.

¹² See e.g. Ian Siederman, ‘The UN High Commissioner for Human Rights in the age of global Backlash’ (2019) 37(1) *Netherlands Quarterly of Human Rights* 5; Laurence R Helfer, ‘Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’ (2002) 102 *Columbia Law Review* 1832.

¹³ See e.g. Erik Voeten, ‘Populism and Backlashes against International Courts’ (2019) *Perspectives on Politics* available at <https://doi.org/10.1017/S1537592719000975>; Madsen et al above n9; Karen J. Alter, James T Gathii and Laurence R Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’ (2016) 27(2) *European Journal of International Law* 293.

addressing Backlash contexts. Here we take our lead from Caron and Shirlow, who draw on Sunstein to define Backlash as “intense and sustained public disapproval of a system accompanied by aggressive steps to resist the system and to remove its legal force”.¹⁴ It is thus more than simple critique or discontent. It represents a fundamental resistance to and rejection of a system or institution of law.¹⁵

Our project centres on actions taken in opposition to the global legal system and the institutions within it: a Backlash against the *international legal order* itself. In the initial stages of our project we have targeted four key areas where the phenomenon of Backlash can be identified: peace and security, human rights, environmental concerns and international economic law. Madsen *et al* have suggested that Backlash contains ‘a reaction to a development with the goal of reversing that development’.¹⁶ In one sense, the development that leads to resistance against the international legal order is shared across all these areas: increasing globalism.¹⁷ This resistance may take the form of political interdependence and fears of loss of identity – as seen in the Brexit debate; new treaty obligations leading to fears of loss of sovereignty – as seen in the US withdrawal from the Paris Agreement; or more general concerns stemming from increased economic interdependence and the domestic consequences of movements of labour and industry as a consequence of free trade. Whatever manifestation, the central core is the same: a rebuff of integration and internationalisation, leading to acts of resistance against the system of international law and its institutions.

Taking Backlash as these acts of resistance against the international global legal order, our project seeks to ascertain and identify *what* these actions are – do they represent something novel, or are they part of a more longstanding historical dynamic shaped by oppositional forces that pull the populations of nation-states inwards, towards national identity, or outwards, towards international community. Put another way, is this Backlash a new tsunami threatening to overwhelm and sweep away international law: a rejection of the ideals of globalism and a retreat into national borders? Or is it more a case of the tide receding from the high water-mark of internationalisation in the 1990s, but still within bounds of the ebb and flow of the history of the evolving international legal order? It is to these questions we now turn.

Roots and Causes of Backlash

Since the birth and consolidation of the modern state system in the mid-seventeenth century, a particular understanding of the relationship between freedom and order has shaped international legal thought. The international legal imaginary is of a secular legal order of sovereign states possessing formal equality and equal freedom in the form of the rights, obligations and attributes of sovereignty. This vocabulary of state sovereignty and early modern natural law emerged at the moment of ‘Crisis of European Conscience’ following the Thirty Years War and European wars of religion. As Martti Koskenniemi has observed, at this moment a clash of new and old vocabularies occurred:

[O]n the one side, an anachronistic scholasticism, and an old elite clinging to its privileges; on the other side, complex technical words seeking to penetrate the tired surface of political life to give expression to

¹⁴ Caron and Shirlow, above n11, 160; Cass R Sunstein, ‘Backlash’s Travels’ (2007) 42 *Harvard Civil Rights – Civil Liberties Law Review* 435, 435.

¹⁵ *Ibid.*

¹⁶ Madsen, Cebulak and Wiebusch, above n9, 200.

¹⁷ Caron and Shirlow, above n11, 160.

the dynamic forces underneath. Modern international law was born from a defence of secular absolutism against theology and feudalism. The international world became an extension of sovereign rule.¹⁸

Today, we appear to be at another moment of great foment and turmoil as competing legal and moral vocabularies clash against each other and “the inherited language of the modern states-system, and of international law, no longer seems able to give voice to important groups and interests.”¹⁹ Today, however, it is political sovereignty itself that is challenged by the ‘new idioms’ of globalization and transnational governance:

In both moments, the ‘old’ seems artificial and fragmented while the ‘new’ appears natural and universal. Now, as then, change is represented as a natural necessity.²⁰

The current clash of vocabularies makes visible an ambiguity latent in the term ‘liberal international order.’ The Backlash moment has presented no concentrated attack on the premises of national sovereignty itself, or indeed on the Westphalian foundations of the United Nations Charter legal order grounded in the twin principles of sovereign equality and national self-determination.²¹ Rather, Backlash political movements have targeted their ire on the post-Cold War vocabulary of globalization and transnational governance and the implicit *critique* of national sovereignty internal to these discourses. Their target has thus been the rise since the 1990s of specialized governance regimes in functional areas such as trade, human rights, environment, security and migration and the ensuing proliferation of complex managerial vocabularies that speak “neither about sovereignty nor about rules but about the ‘objectives’, ‘values’ and ‘interests’ behind them.”²²

This global governance conception of liberal international legal order has become the mainstream or ‘Establishment’ narrative over the last thirty years. Consider the area of international trade. The dominant story told since the early 1990s is that everybody wins under an international trade regime because ‘free trade’ is a rising tide that lifts all boats,²³ or because it increases the overall size of the economic pie so that winners can compensate losers, leaving everyone better off. The result will be an increase in the prospects of both peace and prosperity: after all, have two countries that have a McDonalds ever gone to war with each other?²⁴

This thesis has been a key point of convergence for both neoliberal conservatives, who see no need to question relative gains or whether economic gains themselves are the right measure to be maximizing, and social democrats, who see only a modest role for redistributing gains. The

¹⁸ Martii Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law,’ (2009) 15 *European Journal of International Relations* 395, 396.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Article 2(1) of UN Charter provides that that the United Nations “is based on the principle of the sovereign equality of all its [Member States]”. The Charter thus begins from a presumption of initial State freedom. But once States are viewed as members of an international community, this initial State freedom is limited by the normative demands of the same “equal” freedom of other States. Conversely, Article 2(7) of the UN Charter provides that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”. While international law is normatively universal and binding on all States, it is thus limited by the national subjectivity and unique “internal” identity of and need for consent of each State. This dialectic structure creates the distinctive double-bind of modern international legal argument.

²² Koskenniemi, above n 188, at 406.

²³ See n. x above.

²⁴ The so-called “Golden Arches” theory: Thomas Friedman, ‘Foreign Affairs Big Mac I,’ *The New York Times*, 8 December 1996.

current populist moment has arisen in strong opposition to two interrelated faces of the global governance narrative of international law and institutions, in each case seeking a return to a more sovereignty-based model of international legal order.

As Michael Hardt and Antonio Negri argued in the mid-1990s, the first is the perception that these transformations in international law presage a project of empire.²⁵ On this account, empire is a form of sovereignty existing under the conditions of globalization that is “rescaled” from the level of the nation-state to the level of the global. What is viewed as replacing discourses of state sovereignty and public international law is “not a pluralistic, cooperative world political system under a new, impartial global *rule of law*, but rather a project of imperial world domination.”²⁶

Beginning in the 1970s, the neo-conservative project of employing American power and the use of force in the name of promoting democracy, human rights and the rule of law has deeply undermined the norms of sovereign equality, nonintervention and the UN Charter system of collective security.²⁷ As many now recognize, this imperial project accelerated with the invasion of Afghanistan in 2001, and reached its apex with the 2003 intervention in Iraq. Exalting the preemptive attack, Michael Ignatieff argued that the “21st century imperium is a new invention in the annals of political science, an empire lite, a global hegemony whose grace notes are free markets, human rights and democracy, enforced by the most awesome military power the world has ever known.”²⁸

It is possible to chart a direct line from this moment in 2003 to the rise of populist political movements on both the right and left in Western democracies now opposing neoconservative foreign policies as imperial overreach in the pursuit of unwise or costly “liberal” American empire. In his 2019 speech to the 74th Session of the United Nations General Assembly, President Donald Trump thus bellicosely proclaimed that the “free world” must now embrace its “national foundations”:

If you want freedom, take pride in your country. If you want democracy, hold on to your sovereignty. And if you want peace, love your nation. Wise leaders always put the good of their own people and their own country first. The future does not belong to globalists. The future belongs to patriots. The future belongs to sovereign and independent nations who protect their citizens, respect their neighbors, and honor the differences that make each country special and unique.²⁹

²⁵ Michael Hardt and Antonio Negri, *Empire* (2000).

²⁶ Jean L. Cohen, ‘Whose Sovereignty? Empire Versus International Law,’ 18 *Ethics & International Affairs* 1, 2 (2004). As Cohen suggests, on this view “governance, soft law, self-regulation, societal constitutionalism, trans-governmental networks, human rights talk, and the very concept of ‘humanitarian intervention’ are simply discourses and deformed mechanisms by which empire aims to rule (and to legitimate its rule) rather than ways to limit and orient power by law.” *Id.*

²⁷ Of course, the use of force by Great Powers to transform the internal political identity of so-called “rogue” or “outlaw” states in the name of civilization and progress has a long pedigree in the history of international law: see, e.g., Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004).

²⁸ Michael Ignatieff, ‘The American Empire; the Burden,’ *New York Times Magazine*, 5 June 2003.

²⁹ Remarks by President Donald J. Trump to the 74th Session of the United Nations General Assembly, 25 September 2019.

At the same time, the scope of American disengagement from traditional treaty and multilateral legal regimes has been staggering. From arms control,³⁰ to international criminal law,³¹ to environmental regulation and the law of the sea,³² to human rights treaties,³³ the U.S. has either rejected or withdrawn from a vast number of contemporary treaties and their supervisory mechanisms.

The second and arguably a more complex face of Backlash, however, has been visceral opposition to the project of *cosmopolitan law*, and in particular the perception of international human rights and individual freedom as a new hegemonic language of global morality.³⁴ As Jean Cohen makes the point:

The emergence of human rights law based on consensus apparently implies that global cosmopolitan law trumps the will of states and their international treaties (consent). Today the very category “international” appears outdated. The question thus becomes: What is to be the new ‘nomos’ of the earth and how should we understand globalized law?³⁵

From the time of Immanuel Kant’s 1784 essay *Idea for a Universal History with a Cosmopolitan Purpose*,³⁶ the general theoretical claim has been that the world is witnessing a move to cosmopolitan law and that “sovereignty talk and the old forms of public international law based on the sovereignty paradigm have to go.”³⁷ As Louis Henkin argued in 1999, “I don’t like the ‘S’ word. It’s birth is illegitimate, and it has not aged well. The meaning of ‘sovereignty’ is confused and its uses are various, some of them unworthy, some even destructive of human values.”³⁸ On the basis of solely optimistic and progressive implications, Henkin thus suggested that “suddenly, or perhaps slowly, the realization is sinking in that sovereignty has lost its nerve, and sovereign states have realized that they are losing their control, that the state system is losing control.”³⁹

³⁰ The U.S. has refused to join the Anti-Personnel Mines Convention (Ottawa Convention) and the Comprehensive Nuclear Test Ban Treaty, and has rejected the Biological and Toxic Weapons Convention as well as the inspections regime of the Chemical Weapons Convention. It replaced the Treaty on Anti-Ballistic Missiles with a bilateral negotiating framework and recently announced U.S. withdrawal from the Intermediate-Range Nuclear Forces Treaty with Russia.

³¹ The U.S. failed to ratify and in fact “unsigned” the Rome Statute of the International Criminal Court. It is party to neither Additional Protocol I nor II to the Geneva Conventions of 1949.

³² The U.S. refused to sign the Kyoto Protocol or became party to the Convention on Biological Diversity. It has failed to ratify the 1982 UN Convention on the Law of the Sea (UNCLOS) and has recently announced U.S. withdrawal from the Paris Climate Agreement.

³³ The U.S. has rejected most human rights treaties and their supervisory bodies, including the ICESCR (i.e. half of the International Bill of Rights), CEDAW and CRC. Those few treaties it has ratified, it has done so subject to extensive reservations, declarations and understandings (including declaring that such treaties are non-self-executing in U.S. domestic law).

³⁴ For an influential account of the rise of human rights since the early 1970s as the ultimate arbiter of international conduct, see Samuel Moyn, *The Last Utopia: Human Rights in History* (2012).

³⁵ Cohen, above n 25, at 1-2. The term “nomos of the earth” is from Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen (2003). Cohen raises the question of Schmitt’s *Nomos der Erde* in the context of the fact that the “world’s superpower has invaded and occupied Iraq.”

³⁶ Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, ed. Amelie Oksenberg Rorty and James Schmidt (2009).

³⁷ *Ibid.*, 2.

³⁸ Louis Henkin, “The “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera,” (1999) 68 *Fordham Law Review* 1. Henkin leaves no doubt as to his thesis: “the sovereignty of states in international relations is essentially a mistake, an illegitimate offspring.” *Id.* 2.

³⁹ *Ibid.*, 7. For an early articulation of this view, see Hersch Lauterpacht, *The Function of Law in the International Community* (1933) (celebrating international law against the arbitrariness of sovereignty). In the

At the core of the cosmopolitan legal project is a radical transformation of 'domestic jurisdiction' in Article 2(7) of the UN Charter, now viewed as an anachronism from an older time whose invocation is merely an attempt to shield leaders from legitimate and necessary international action. Koskenniemi suggests that under conditions of global law, 'sovereignty' has today lost its normative and descriptive meaning in the face of relentless moral, sociological and functional arguments made in the name of *international* or *global* approaches, now claimed to operate across 'artificial' national boundaries free of territorial limitation.⁴⁰

This shift to a cosmopolitan understanding of international law has paradoxically generated great anxiety in national political communities. Indeed, the question today arises: on what grounds, if at all, can the putative supremacy of the sovereign nation-state be justified?⁴¹ This anxiety is evident in a palpable fear of loss of white male privilege as new cultural and political hierarchies emerge. There is a discernable sense that the key concerns are not whether the British economy retracts following Brexit, or whether the American heartland loses ground under the Trump administration. Rather, the sense is that "we" are now at the bottom and need to "take back control" not only at the domestic level in terms of political authority, but also at the international level in terms of national sovereignty.

If correct, this diagnosis of the roots of Backlash helps to explain several of the "nonliberal" and "antiglobal" positions we see articulated today. Two primary developments, in particular, laid the ground for these developments. The first is the much-discussed "fragmentation" of international law as incommensurable trade, investment, environmental and human rights law regimes generated the rise of global governance by experts while at the same time not providing any means by which to determine the jurisdiction of the competing regimes in particular cases.⁴²

The second is the emergence of universal human rights as a purported global morality, often invoked by public lawyers as a response to the experience of delegalization and as a means by which to override technocratic expert calculation.⁴³ But paradoxically this has had the effect

post-World War II period, see Wolfgang Friedmann, *The Changing Structure of International Law* (1964) (arguing that the international law of coexistence was moving towards a world of cooperation as states were gradually being united by the emergence of specialized fields designed to manage global problems in areas such as law and technology, development and international trade).

⁴⁰ From a *moral* perspective, sovereignty "upholds egoistic interests of limited communities against the world at large, providing unlimited opportunities for oppression at home"; from a *sociological* perspective, it "fails to articulate the economic, environmental, technological and ideological interdependencies that link humans all across the globe"; and from a *functional* perspective, it fails to "deal with global threats such as climate change, criminality, or terrorism, while obstructing such beneficial projects such as furthering free trade and protecting human rights." Martti Koskenniemi, 'What Use for Sovereignty Today?', 1 *Asian Journal of International Law* 61, 61 (2011).

⁴¹ As Raz has argued, the striking function of human rights law today is precisely to disable or overcome arguments about sovereignty: Joseph Raz, 'Human Rights Without Foundations,' Oxford Legal Studies Research Paper Series, Working Paper No. 14/2007. *More recently*, see Joseph Raz, 'The Future of State Sovereignty,' Oxford Legal Studies Research Paper Series, Working Paper No. 16/2017.

⁴² Martti Koskenniemi, 'Global governance and public international law,' 37 *Kritische Justiz* 241, 243 (2004) (discussing the "division of international regulation into specialized branches, deferring to special interests and managed by technical experts.") Koskenniemi notes that both Auguste Comte and Emile Durkheim prophesized a future of interdependence which would "turn an ultimately pre-modern system of sovereignties into a single world society, governed by a single rationality, mastered by technical experts." *Id.* 242.

⁴³ Paradoxically, human rights law arose to "counteract the transfer of political power to 'regulators' and managers, scientific and economic experts, and professional negotiators" and its emergence "gives expression to the search for absolutes in a world whose complexity has created the danger of unfettered relativism and

of translating all preferences into the rights claims of a preference holder. As proliferating committees and tribunals have sought to balance conflicting rights claims, the result has been competing regimes of knowledge and clashing vocabularies of justice which stand in conflict with each other. In order to resolve such conflicts, international bodies and tribunals increasingly have:

developed complex balancing practices and rights-exceptions schemes that defer to general considerations of administrative policy, public interest, economic efficiency, and so on—precisely the kind of criteria that rights were once introduced to limit. From providing limits to administrative and bureaucratic discretion, rights became dependent on it.⁴⁴

Together, these developments of regime fragmentation, deformalization and norm conflict have led to increasing levels of cynicism regarding the chasm between expectation and experience. Expert knowledge is summarily rejected as mere elite privilege, while mainstream legal institutions are viewed as undemocratic and representative of nothing other than either illegitimate impersonal morality or an instrument for somebody else's purposes.

These trend lines reached crisis levels following the 2008 Global Financial Crisis. In combination with the Backlash against American neoconservative foreign policy, the devastating effects of decades of neoliberal economic policy became ever more starkly visible with the steady erosion of democratic norms and institutional forms of social justice at both the domestic and international levels. Forms of neoliberal legal order have always depended on and embedded powerful interests, while state sovereignty is always contingent on and reflects relative power among states. The rise of economic nationalism and Trump's America First policies towards liberal international order were simply saying out loud what everyone already knew: America would pursue her own interests, and would aggressively mobilize economic and military power to do so. In the words of Pankaj Mishra, the "most objectionable thing about Trump may be his discarding of the veil that conceals the scramble for power and wealth among the traditional ruling classes."⁴⁵

Consequences

In addition to charting these contours and causes of the Backlash, we also speculate as to what consequences are likely to follow. We thus ask *how* actors committed to the international rules-based order, such as nation-states, civil society and international organisations, are likely to respond to this Backlash. Moreover, what will the impact of such responses be for the international legal system and its global institutions?

When a dominant political, legal or social order is under assault, the members of the community within that order tend to have one or more of three instinctive responses. First, to strengthen, reinforce and renew the existing order. Second, to withdraw from the order and retreat to smaller, more proximate orders that are perceived to be less dysfunctional and more

bureaucratic abuse." Martti Koskenniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power,' *Humanity* 47, 47-8 (2010).

⁴⁴ *Ibid.* 49. The intractable difficulty is that since "every significant rights claim involves the imposition of a burden on some other person, the latter may likewise invoke their preference to be free from such burden in rights terms" with the result that "rights" end up supporting both sides. *Id.* As technical expert bodies seek to resolve conflicting claims, some group's interests will inevitably be better reflected in the exercise of discretion than others. Politically, this will trigger a Backlash in the form of "novel claims for absolute, nonnegotiable rules to limit bureaucratic discretion." *Id.* 48.

⁴⁵ Pankaj Mishra, 'The Mask it Wears,' *London Review of Books*, 21 June 2018.

advantageous to one's own interests. Third, to imagine and pursue an altogether different type of order, with greater capacity to minimise the threats posed and maximise the opportunities presented by the current challenges to the existing order.

In this article we explore these three scenarios across the four focus areas noted above, namely peace and security; human rights; trade and finance; and human rights. For each focus area, we explore what steps Australia and other actors might take to strengthen, reinforce and renew the existing global legal order, norms and institutions. In the process, we examine what risks and opportunities these steps would create, as well as what strategies might be employed to minimise the risks and maximise the opportunities of taking such steps. We then explore across each area what steps Australia and other actors might take to retreat from the global order and engage in smaller, more proximate orders that better promote their core interests. Finally, we consider what measures Australia and other actors might take to reimagine and create a new, more effective and more resilient global order.

Here we set out how these three general response scenarios have unfolded in Western democracies following the interrelated failures of the neoconservative and neoliberal projects discussed above.

Reform and renew

The first has been to seek to strengthen, reinforce and renew the existing global legal and political order. This impulse is especially evident in mainstream academic and policy responses to Backlash. There is a tendency to explain the entirety of Backlash phenomena solely in terms of economic factors and material well-being. This usually involves the invocation of Christoph Lakner and Branko Milanovic's "elephant chart" first published in 2013 illustrating the changes in income distribution (so-called "winners and losers of globalization") in the world between 1998 and 2008.⁴⁶

The chart shows four groups of people, two of whom have prospered enormously and two of whom have stagnated. The first group is comprised of the middle classes in the emerging economies of China and India, while the second is comprised of the top 0.1%. The third, however, is the middle and lower-middle classes of the developed world which have seen income stagnate with zero growth, while the fourth is the poorest of the poor in developing states. As Koskenniemi has observed, the mainstream liberal understanding is to see the current Backlash as a kind of sociological pathology the solution to which is to double-down and seek to reform and renew existing international legal institutions.⁴⁷

This renewal is said to focus on the need for more principled policy-making, the re-articulation of shared global values, and the reform of existing regimes and institutions to make them more effective and efficient. The analogy is to globalization as a sort of train ride where both the destination and tracks are already preset and the only problem is that some passengers have been left behind, whether unintentionally or unjustly. The impulse to reform is thus to go back and ensure that everyone gets on the train.⁴⁸

⁴⁶ Christoph Lakner and Branko Milanovic, 'Global income distribution: from the fall of the Berlin Wall to the Great Recession,' 30 *World Bank Policy Research Working Paper No. 6719* (2013); see also Branko Milanovic, *Global Inequality: A New Approach for the Age of Globalization* (2016).

⁴⁷ Martti Koskenniemi, 'International Law and the Far Right: Reflections on Law and Cynicism,' Fourth Annual T.M.C. Asser Lecture, The Hague, 13 December 2018.

⁴⁸ *Ibid.*

The underlying premise of this view is a recognition of the disastrous consequences over the last few decades of the conjoining of neoliberalism with unending economic austerity. Beginning with the Reagan administration in the 1980s, and accelerating with the Blair and Clinton administrations in the 1990s, we have witnessed the steady collapse of Western social democracy. In the sphere of human rights, a notable feature of this post-Cold War era has been the framing of rights claims in terms solely of civil and political rights while at the same time uncritically accepting the vocabulary of privatization, markets and austerity. Until recently, the language of economic, social and cultural rights had been almost completely marginalized in politics in the United States.⁴⁹ Human rights discourse has thus been relentlessly individualist, focused on self-realization and measured in terms of prosperity, as opposed to advancing any substantive account of economic equality or fairness.⁵⁰

Retreat and realign

The impulse to reform and renew existing international arrangements is hoped to forestall current threats by states to retreat from global engagement and realign into smaller, more proximate orders or new bilateral relations. What this logic ignores, however, is the need for a *political* analysis of the roots and premises of these reactionary developments. Consider, for example, the following four narratives that have been advanced in the current Backlash context.

The first is a recognition of the Janus-faced nature of populism. Today, we are witnessing the rise of various forms of authoritarian populism in constitutional democracies around the world. But other forms of populism are possible, including democratic and antiestablishment populism. The idea that populism itself undermines the very substance of constitutional (liberal) democracy is not only historically inaccurate but also normatively flawed.⁵¹ As Bojan Bugarcic has argued, populist parties are the only ones to “protest against the ‘consensus at the center’ among the center-right and center-left around the idea that there is no alternative to neoliberal globalization.”⁵²

This is related to a second narrative of protectionism and harsh anti-immigration policies. In his inaugural address as President, Donald Trump invoked images of shuttered factories strewn like tombstones across the American heartland and of millions of manufacturing and middle-class jobs lost to other countries leaving behind broken communities and families. On this basis, Trump’s “nationalist, authoritarian populism, combined with either economic protectionism or almost left-wing-oriented social policy, promises to protect the ordinary people abandoned by the liberal elites ‘The populist surge is an illiberal democratic response to decades of undemocratic liberal policies.’”⁵³

⁴⁹ Thus, Aryeh Neier, founder of Human Rights Watch and former president of the Open Society Foundations, notoriously argued that, unlike civil and political rights, economic and social rights are not “really” human, and “the effort to achieve fairer distribution has to take place through the political process.” Aryeh Neier, ‘Social and Economic Rights: A Critique,’ 13 *Human Rights Brief* 1 (2006).

⁵⁰ Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (2018) (observing that “the rise of human rights has occurred alongside enduring and exploding inequality” in today’s neoliberal economic globalization).

⁵¹ Bojan Bugarcic, ‘Could Populism Be Good for Constitutional Democracy?’, 15 *Annual Review of Law and Social Science* 41 (2019).

⁵² *Ibid.* 43. See also David Fontana, ‘Unbundling Populism,’ 65 *UCLA Law Review* 1482 (2018) (discussing the relationship between authoritarian and antiestablishment populism).

⁵³ *Ibid.*

Looking outward at the international level, we see parallel developments. The third narrative concerns geoeconomics and the return of great power competition, in particular between the United States and China. As Anthea Roberts observes, a striking reversal today defines the new geoeconomic order: on the one hand, there is an increasing *securitization* of economic policy, i.e. a greater focus on relative economic gains in view of security implications; while on the other, there is an increasing *economization* of strategic policy, i.e. heightened concern over the security risks posed by interdependence and connectivity.⁵⁴ This in turn relates to a fourth narrative of ever-increasing corporate power and the extractive role of multinational corporations in the global economy, reflecting again ongoing efforts to project Western power in the name of universal values and norms.

The primary concern of all four narratives is the notion of distribution in relative terms. Each tells a different story regarding which actors have lost and which should be blamed as inequality grows within states and between states. Each of the narratives raises further critical questions and doubts regarding whether any attempt to reform and renew the existing liberal international order can succeed. This is because today's populist movements are not ultimately interested in the reform of institutions they view as illegitimate. As several international legal commentators have observed, these movements feel *defeated*: they have lost and someone else has won. On this view, the analogy of globalization to a train ride with some passengers left behind is fatally flawed. These political movements hate the idea of the train itself and would not get onboard even if their ticket was prepaid.

All four of these narratives tend to have the effect of prompting states to retreat from the type of global collective action that is accused of creating an unfair distribution of the spoils of globalisation. Once globalisation loses its lustre and is perceived to carry risks that outweigh opportunities, the logical 'plan B' is to withdraw into more proximate, strategic arrangements that offer the promise of more profitable economic, trade and security alliances. But these arrangements tend to be piecemeal, opportunistic and low on longevity. Moreover, the more unequal the relations are between participants, the more they are themselves susceptible to the same uncomplimentary cost-benefit analysis that led to the unravelling of the great globalisation myth.

There is therefore something else driving resentment against the liberal international order and its core constitutional form of liberal democracy. For both Weiler and Koskeniemi, this resentment derives from an existential crisis of *values*. Beyond the appealing and seductive idea that individuals have autonomy to choose the destiny of their own lives, values such as patriotism and a sense of identity grounded in nationalist discourses, and obligation and responsibility grounded in religious traditions, each provide sources of meaning beyond mere self-interest. Modern liberal regimes provide the conditions for individual and collective action in the procedural language of democracy, human rights and the rule of law, but they say little about their underlying meaning or content beyond the master value of individual choice. For Weiler therefore, our "historical mistake was to fail to understand the importance of collective values and to adapt them to a modern progressive narrative."⁵⁵

⁵⁴ Anthea Roberts, Henrique Choer Moraes and Victor Ferguson, 'Toward a Geoeconomic Order,' *22 Journal of International Economic Law* 4 (2019). See also Anthea Roberts, *Winners and Losers in an Age of Economic Globalization*, Public Lecture, ANU School of Law, 17 June 2019.

⁵⁵ Joseph H. H. Weiler, 'The European Culture Wars and the Decay of European Democracy,' Public Lecture, Graduate Institute of Geneva, 26 September 2019. While it is possible to "respect love of society and country, and couple rights and duties, and have healthy respect for one's collective identity and culture," this has not been part of mainstream political discourse.

Reimagine and recreate

Faced with these two fraught alternatives, a third possibility is to seek to reimagine and develop an entirely new and different type of international order. The impulse to reform and renew faces the dilemma of how to secure freedom, security and happiness given the managerial critique of international law under conditions of globalization. Conversely, Backlash movements seek an apparently nostalgic return and retreat to a more sovereigntist conception of international legal order, one that is arguably no longer possible under these conditions. The enormous challenge then is how to reclaim international legal contestation as a conversation about global justice and as a non-instrumental standard of criticism of the projects of others.

This possibility can be illustrated regarding the question of environmental sustainability. Even if GDP growth under the mainstream narrative is pursued relentlessly, everybody will ultimately lose, especially given the effects of climate change. Instead of accepting that economic growth is the primary goal of the system while seeking to distribute economic gains more fairly, we need instead to rethink and reimagine the system's goals themselves. When transnational companies pollute the environment, powerful states engage in imperial wars or globalization dislocates communities, we hear appeals to international law as the only public vocabulary connected with a horizon of transcendence. What can international legal history and the narratives embedded in the fabric of modern international law tell us about this puzzle? Do we need to move beyond linear liberal narratives of international law towards greater value pluralist ways of thinking about the relation of freedom and order?

This kind of imaginative work is being pursued today by political theorists and legal philosophers alike. Jean Cohen has thus proposed an approach whereby legal cosmopolitanism can be linked to a project that is distinct from both empire and pure power politics, i.e. the democratization of international relations and updating of international law:

[This] project entails acknowledging the existence and value of a dualistic world order whose core remains the international society of states embedded within (suitably reformed) international institutions and international law, but that also has important cosmopolitan elements and cosmopolitan legal principles (human rights norms) upon which the discourse of transnationalism and governance relies, if inadequately.⁵⁶

In a more philosophical register, Joseph Raz has similarly suggested that

[t]he best we can hope for is ... [an] ... international regime of relatively sovereign states subject to extensive international organisations and laws. That requires a pluralistic jurisprudence of international organisations, allowing for great local diversity, of which we have so far seen only small beginnings.⁵⁷

In order to address these questions, there is a need for disciplines of mind and practice that can forestall the premature push towards political closure and seek instead to hold open political judgment to different, even opposing, alternatives. At the same time, there is a need to develop a praxis of international law that is non-instrumentalist, but rather constitutionalist in its aspiration to universality. Critical to these two ideals of political freedom is the need for a deep engagement with comparative law and legal history and a self-critical willingness to engage with the conditions of modernity and modern legal rationality.

⁵⁶ Cohen, *supra* note 25, at 3.

⁵⁷ Raz, *supra* note 41, at 1.

II. Peace and Security

*“Our principles and values... are best served in an international system based on rules and on multilateralism... Our foreign and security policy has to handle global pressures and local dynamics, it has to cope with super-powers as well as with increasingly fractured identities.”*⁵⁸

A. Key global norms and institutions

The UN Charter created an international peace and security system with unprecedented reach and ambition. At the San Francisco Conference on International Organization in 1945, the founders of the United Nations were motivated by the need to secure active participation of the most powerful states, thus creating an international organization that ‘would not stand idly by in the face of threats to international peace and security’.⁵⁹ The UN Charter created an international peace and security system with unprecedented reach and ambition. While the system has never fulfilled its prefatory aspirational objective of ridding the world of the ‘scourge of conflict’, it has proven remarkably resilient.⁶⁰

Unlike its predecessor, the League of Nations, which failed to attract all key players into its membership, then lost existing key members when international friction escalated through the 1930s, the UN system has attracted and retained great and small powers alike, achieving practically universal membership.⁶¹ An important part of this resilience of the UN collective security system has been the way it has scaffolded global collective action on various regional organisations and arrangements envisaged by Chapter VIII of the UN Charter. Thus organisations such as the African Union, the Association of South-East Asian Nations, the European Union, the North Atlantic Treaty Organization, and the Organization of American States have promoted norms of behaviour and charters of rights that have the effect of promoting peace and security.

The UN Charter created the Security Council as not just one of the six principal UN organs, but then tasked it with taking action to maintain international peace and security. Chapter V of the Charter sets out the composition, functions and procedures of the Council. Article 23 thus lists the five permanent members of the United Nations, namely China, France, Russia, the United Kingdom and the United States, and notes that the UNGA shall elect the ten remaining members non-permanent members that round out the Council’s current membership of fifteen.⁶² Article 24 bestows upon the Council primary responsibility for the maintenance of international peace and security.⁶³ Article 25 then reinforces the power of the Security Council to take decisive and meaningful action by specifying that the Council’s decisions are binding on all UN member states.⁶⁴ Chapter V is also significant for the way in which it shapes the Security Council’s decision-making dynamics by granting the permanent members under Article 27 the power to veto any prospective substantive decision.⁶⁵

⁵⁸ <https://europa.eu/globalstrategy/en/global-strategy-foreign-and-security-policy-european-union>

⁵⁹ Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge University Press, 2007), 58.

⁶⁰ UN Charter, preface.

⁶¹ On the League of Nations and its shortcomings, see *Kennedy, Paul, The Parliament of Man: The Past, Present, and Future of the United Nations* (Random House, 2006), 8-24.

⁶² Article 23.

⁶³ Art. 24(1).

⁶⁴ Art. 25.

⁶⁵ Art. 27(3).

The Council's substantive powers are laid out in Chapters VI, VII & VIII of the Charter. Chapter VI sets out the Council's peaceful settlement powers, including the ability to call on member states to resolve their disputes peacefully through a range of dispute resolution mechanisms such as negotiation, enquiry, mediation, arbitration, conciliation and judicial settlement.⁶⁶ Chapter VII provides that the Council shall determine the existence of threats to the peace, breaches of the peace and acts of aggression,⁶⁷ and take action accordingly to maintain or restore international peace and security, including applying sanctions short of force,⁶⁸ or authorizing the use of force itself.⁶⁹ Chapter VIII of the Charter encourages the Council to make use of regional arrangements or agencies in meeting its responsibilities and exercising its powers under Chapters VI and VII.⁷⁰

B. Examples of Backlash

The dramatic Post-Cold War increase in the UN Security Council's capacity to meet its UN Charter responsibilities generated optimism that the Council and the UN system more broadly could finally deliver on the promise of effective global conflict management. But points of difference within the permanent five members have intensified following the divisive 2003 Iraq War and the problematic 2011 NATO intervention in Libya. At the same time, the growing confidence of China and Russia to pursue more aggressive foreign policies in the South China Sea and the Crimea, combined with the turn inward on the part of the United States and the United Kingdom, has rendered Security Council relations more contentious than ever. Meanwhile, the value of the alliance system, which maintained stability during the Cold War and continues to play an important role today, is being fundamentally questioned by sceptics in the US and Europe. In this context, some states are turning to alternative multilateral security constellations to pursue their security interests.

C. Possible responses

Reform and renew: Proposals to reform the Security Council have been on the UNGA agenda since 1979.⁷¹ Most of these efforts have focused on expanding membership to provide greater geographic representation of the full UN membership.⁷² However, as Langmore and Thakur have noted, while most UN members can agree in the abstract that expansion should take place, they are not inclined to agree when it becomes clear precisely how concrete proposals will not benefit them.⁷³ For this reason, some reformist scholars and diplomats have advanced reform initiatives designed to improve the legitimacy, efficacy and credibility of Security Council within the constraints of the Council's current composition and mandate. Some of these initiatives promote procedural modifications that would improve the Council's

⁶⁶ Art. 33.

⁶⁷ Art. 39.

⁶⁸ Art. 41.

⁶⁹ Art. 42.

⁷⁰ Arts. 52-54.

⁷¹ For helpful background, see Peter Nardin, *UN Security Council Reform* (Routledge, 2016).

⁷² Perhaps the most sophisticated Security Council reform proposal was made by UN Secretary-General Kofi Annan, who advocated expansion to 24 members, with 6 seats would be allocated to Africa, Asia/Pacific, Europe and the Americas. He further requested member states to choose between two models. Model A would create six new permanent seats without veto and three new two-year seats, divided among the major regions. Model B would add eight four-year renewable seats and one new two-year, non-renewable seat. Ultimately neither option was endorsed by the 2005 World Summit. For further details, see 'In Larger Freedom'.

⁷³ John Langmore and Ramesh Thakur, 'The Elected but Neglected Security Council Members' 39(2) *The Washington Quarterly*, 99-114, 103.

accountability to the general UN membership.⁷⁴ Others seek to advance recommendations to strengthen the extent to which Security Council decision-making promotes the rule of law,⁷⁵ or to increase the capacity of elected members to provide a check on the exercise of power by the permanent five.⁷⁶

Retreat and realign: The second scenario would involve states responding to the Backlash by disengaging from the Security Council and the UN Charter collective security framework it serves. According to this scenario, states might retreat and realign with like-minded and/or regional neighbor states to cooperate on, or at least reach a mutual understanding about the parameters of, more proximate frameworks of principles to manage the risk of future violent conflict within and between such states. There are a number of examples of regional or sub-regional security arrangements, including the Organization for Security and Cooperation in Europe, the North Atlantic Treaty Organization, the Association of South-East Asian Nations Regional Forum. These arrangements are traditionally viewed as falling within and complementing the UN Charter framework for security. But it is likely that these arrangements would form the first port of call for states who become disenchanted with the Security Council.

Reimagine and recreate: This third scenario is both the most fascinating and the most challenging to flesh out. If the global community were to start from scratch with the mission of creating a new, fit-for-purpose framework of norms and institutions for maintaining global peace and security, what would they look like? Who would sit at the most important decision-making tables, for how long, and with what powers? What structures, mechanisms, norms and resources would be required to guarantee the responsiveness, credibility and resourcefulness of the new system? It is beyond the scope of this brief article to speculate in any meaningful way on the likely substance of such new peace and security norms and institutions. But in terms of process, a starting-point would be the lessons derived from UN efforts to facilitate peacemaking at the national level. The *UN Guidance for Effective Mediation* identifies the concept of *inclusivity* as one of seven mediation fundamentals, which increases the prospects of a sustainable peace agreement.⁷⁷ In a peacemaking context, *inclusivity* refers to the need to consider not just the views of the parties to recently concluded conflict, typically former government and rebel groups, but critically to take into account the perspectives of the many stakeholders in post-conflict society.⁷⁸ These might be women's groups, religious communities, civil society organizations, or private sector corporations. Strategies to promote inclusivity include engaging different perspectives throughout the various phases of a peacemaking process, by using social media and opinion polls, to inform and engage a wide range of participants.⁷⁹ It should be possible in an increasingly interconnected world to devise a consultative process that provides an opportunity for not just 'all the Peoples of the United Nations', but *all people* in the world to feel included in the new process and therefore to hold a sense of ownership over and commitment to the new rules and institutions that emerge from the global constitution-making process.

⁷⁴ See for instance, the activities by the 'Accountability, Coherence and Transparency' group (ACT), comprising predominantly smaller states.

⁷⁵ Jeremy Farrall and Hilary Charlesworth, *Strengthening the Rule of Law through the UN Security Council* (Routledge, 2016).

⁷⁶ Jeremy Farrall, Marie-Eve Loiselle, Christopher Michaelsen, Jochen Prantl & Jeni Whalan, 'Elected Member Influence in the UN Security Council' (2020) 33(1) *Leiden Journal of International Law* 101-115.

⁷⁷ United Nations, New York, *The United Nations Guidance for Effective Mediation*: UN Doc. A/66/811 (25 June 2012), Annex I, pp. 20-31, paras. 16-52.

⁷⁸ *Ibid*, para. 29.

⁷⁹ *Ibid*, para. 34.

III. Human Rights

A. Key global norms and institutions

The universalisation after 1945 (and especially post-1989) of human rights discourses and frameworks is often seen as either a metaphor for or indicator of some wider globalisation processes. On this account, if anything appears to have globalised during the late 20th / early 21st century era of globalisation it was norms (if not institutions) of human rights, and the human rights vernacular itself. One of the greatest achievements of the United Nations has been the creation, codification or adoption by states, acting largely together, of a new corpus of international norms and institutions dedicated to the promotion and protection of human rights. The progressive advancement of human rights norms, instrumentalities and institutions proceeded relatively smoothly throughout the second half of the 20th century. For better or worse -- and perhaps partly due to their inherent susceptibility to appropriation by diverse sets of actors -- human rights became a key feature and language of political discourse and engagement at local, national and international levels. After the 1948 *Universal Declaration of Human Rights*, the entry into force in the mid-1970s of the widely-ratified twin core international covenants has been followed by a whole array of subject-specific international instruments (and associated treaty mechanisms and other architectures) on issues ranging from racial discrimination to disability to the rights of children. Moreover, coming into being alongside the UN human rights system have been certain regional charters, conventions, judicial and other mechanisms, notably the European, African and Inter-American regional systems.

Of course, this trajectory of institutionalisation of human rights in politics and international relations has not necessarily yielded the substantive rights outcomes aspired to, or indeed even manifested in formal domestic implementation measures consequent upon international commitments on human rights.⁸⁰ Meanwhile, among other things many voices have consistently challenged the claimed cultural universality and non-relativity of the human rights agenda and normative scheme, or criticised its alleged use as a tool or justification for illegitimate and imperial external interference in other societies. There have also been -- and remain -- notable systemic weaknesses in the UN human rights system, including the underperformance of the Human Rights Commission leading to the creation of the Human Rights Council out of the 2005 round of UN reforms endorsed by the World Summit Outcome document.⁸¹ The UN system's legitimacy and effectiveness can be subject to a range of other critiques, notably that their sometimes undemanding nature has helped promote shallow, ritualistic 'compliance' and engagement patterns by states whose substantive human rights record is at odds with their stated commitments to the scheme.⁸² Nevertheless, even if one claims that human rights norms and systems do not constitute even a notional constraining and

⁸⁰ See for example Douglass Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law* 121; Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; Eric Neumayer, 'Do International Human Rights Treaties Improve Respect for Human Rights?' (2005) 49 *Journal of Conflict Resolution* 925; Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (Oxford University Press, 2005); Wade M Cole, 'Human Rights as Myth and Ceremony? Reevaluating the Effectiveness of Human Rights Treaties, 1981-2007' (2012) 117 *American Journal of Sociology* 1131.

⁸¹ 'World Summit Outcome' UN Doc. A/Res/60/1, United Nations General Assembly, New York, 20 October 2005 (adopted 16 September 2005), [119]-[131].

⁸² Hilary Charlesworth and Emma Larking, 'Introduction: The Regulatory Power of the Universal Periodic Review' in Hilary Charlesworth and Emma Larking (eds), *Human Rights and the Universal Periodic Review: Rights and Ritualism* (Cambridge University Press, 2014) 1.

remediating factor on the exercise of raw power, the international human rights phenomenon and its forums indisputably provided a language and some channels by which to challenge power. Thus despite the enduring critiques sketched above (and many others), it is possible to describe in broad terms a narrative whereby human rights became a dialect and currency of politics in which it was possible to engage with injustice and contest (if not always constrain) power, and so became a key part of a rules-based international order.

B. *Examples of Backlash*

The rise of populist and/or illiberal politics in Western democracies and the renewed confidence and brazen approaches of autocracies and ‘cosmetic democracies’ threatens to undermine and unravel the achievements represented by the multilateral human rights framework. That system was built -- including during key periods first of decolonisation and later of post-Soviet democratisation -- on the leadership and example of various countries, with the US at the forefront of championing human rights. It follows that perhaps the single most significant possible example of Backlash against the global human rights system was the June 2018 US withdrawal from membership of the UN Human Rights Council.⁸³ Is this action best characterised as mere strong critique or discontent, or as evincing ‘fundamental resistance to and rejection of’ the multilateral law-based system and its institutions, of which the Human Rights Council is the peak body?⁸⁴ One question is whether the human rights context illustrates the rigidity of conceiving ‘Backlash’ as rejection in an all-or-nothing sense of the rules-based system. This is because the Council is only one part of that system, and because the US will probably continue (even if just for calculated foreign policy strategy reasons) to frame values-based positions in international affairs by reference to universal human rights. It will simply do so outside of the Council.

Meanwhile, one important aspect of the pro-Brexit message in the UK has arguably been a severe reaction to the perceived legal imperialism of the Strasbourg courts on immigration-related issues such as the UK’s legal ability to extradite or deport individuals engaged in jihadist incitement and hate-speech.⁸⁵ Again, some Brexiteers’ demand was not for reform of the European Convention system but for existentialist exit from it and from the 1988 *Human Rights Act* that implemented the Convention. More generally, state respect for and protection of civil and political rights in particular have been degraded by the rise of so-called ‘illiberal democratic states’ in Central Europe and the backslide of democracy more broadly. Not all of those settings necessarily represent systemic Backlash, even if the permissive environment created by the US leadership vacuum has probably emboldened and enabled moves inimical to the ‘progressive realisation’ narrative described above. In Australia’s case, it remains an open question whether government postures on the international human rights system can properly be characterised as evincing incipient or substantive elements of a rejection, as such, of that

⁸³ ‘Remarks on the UN Human Rights Council’ Joint Statement, US Secretary of State Michael Pompeo and US Ambassador Nikki Haley, Washington DC, 19 June 2018 (<https://usun.usmission.gov/remarks-on-the-un-human-rights-council/>).

⁸⁴ See Jolyon Ford, ‘*The Multilateral Human Rights System: Systemic Challenge or Healthy Contestation?*’ in ‘Symposium: the Populist Challenge to the International Legal Order’ (2020) *Maryland Journal of International Law* (forthcoming).

⁸⁵ See for example Katja Ziegler, Elizabeth Wicks and Loveday Hodson (eds.) *The UK and European Human Rights: A Strained Relationship?* (Hart, Oxford, 2015). For an example of contemporary UK media treatment of this issue that arguably fed into sentiment in the years leading up to the Brexit referendum, see Martin Beckford, ‘ECHR blocks more deportations from the UK than any other country’ *Daily Telegraph* (online, 1 May 2012) <https://www.telegraph.co.uk/news/uknews/law-and-order/9239417/European-Court-of-Human-Rights-blocks-more-deportations-from-UK-than-any-other-country.html>.

rules-based system. One plausible characterisation might be that if anything there is some degree of continuity in the sense of Australian selectivity around international human rights: fulsome engagement in general, but reactivity or non-engagement (but not necessarily rejection and exit) in relation to some particular human rights themes, notably in relation to treatment of irregular migrants.⁸⁶

C. Possible responses

For the purposes of exploring possible responses to the patterns outlined above, we might take the Human Rights Council as the totemic and peak manifestation of the international human rights system.

Reform and renew: One connotation of ‘Backlash’ is the implied sense of desire by some constituencies for return to a previous equilibrium. Although the US was sceptical about the Human Rights Council from its creation (and well before Trumpism), one possible response is for states, including Australia, to revisit the governance of the Council and its mandate, agenda-setting and processes so as, in effect, to reform the Council such that the US feels comfortable engaging again and resuming its membership. In practical terms, any such a re-engagement probably lies on the other side of a Trump presidency. However, such reform and renewal might alienate other members, depending on what change in the Council’s current practices are required to appease the US. This reminds us that Backlash is not static, and may generate counter-acting forces.

Retreat and realign: As noted above, it is not obvious that Australia itself is an exemplar of rejection-level Backlash in the human rights context. Nevertheless, if the Council is perceived as ineffective, for example because of the US withdrawal, Australia might conceivably seek to realign its focus on institutional mechanisms by expanding the emphasis on human rights within regional mechanisms (principally ASEAN, Pacific Islands Forum, the Commonwealth) or country-specific bilateral human rights dialogues (e.g. the one with China since the 2000s). This ‘retreat’ to more proximate, smaller-scale institutions is easier said than done, of course. Australia’s membership or affiliation with regional groupings is relatively precarious. It may not seek to expend political capital on pushing human rights issues in these forums, for example in relation to Philippines where an illiberal democratic government remains a key partner in countering violent extremism.

Reimagine and recreate: The scale and embeddedness of the international human rights system makes it difficult to conceive of a wholesale reconstitution of that system. So do various other factors. Some relate to issues such as timing, given the prevailing global political climate for multilateral consensus, and the fact that (unlike the UN Security Council, for example) the UN human rights system underwent significant institutional reform comparatively recently, in the mid-2000s. Other factors are more confronting for those with a normative commitment to advancing human rights, such as the fact that while it has seen Backlash from some key players, this may be due to domestic political reasons other than the utility of the current system itself. Seen this way, the status quo is useful for states seeking to leverage human rights to influence others, as well as for states seeking to avoid human rights criticism by engaging in the rituals of participation and performance in the Council and Universal Periodic Review in particular.⁸⁷

⁸⁶ See Jolyon Ford, ‘Backlash against a Rules-based International Human Rights Order? An Australian Perspective’ (2020) 38 *Australian Yearbook of International Law*.

⁸⁷ See Charlesworth and Larking, n X above.

In this context, the ‘Backlash’ moment perhaps offers less of a challenge and more of an opportunity to refresh that status quo.

The above analysis has the inherent limitation that the Council is merely one artefact (albeit a significant one) of the wider international human rights and treaty-body system. Yet this distinction puts at issue reactions, by reference to ‘Backlash’ concepts, to the US withdrawal in 2018. This is because Washington framed its exit not in terms of a rejection of international human rights law, but as a principled position in the context of deep hypocrisy in the Council, a position calculated to engender reforms that would better advance the wider human rights project.⁸⁸ How, then, do we analyse a Backlash that is seen as weakening (and that de-funds) a key institution, yet is articulated in terms that reinforce, at least rhetorically, the validity and importance of the wider system?

IV. Trade and Finance

A. Key global norms and institutions

One of the perceived triumphs of the post-World War II global order was the creation and pursuit of an integrated global economy premised on an ideal of free trade. Trade liberalization, managed internationally by multilateral institutions and domestically by states, was to provide a pathway to “lift[ing] all boats” and growing the global pie.⁸⁹ It would also pay additional dividends in greater possibilities for peace, security, human rights, and global coordination to address challenges such as migration and climate change. Protectionism and economic or political fragmentation threatened all of these goals. If sometimes trade liberalization led to harsh impacts on certain industries or regions, the environment, or human rights, these impacts would be transitory or localized and were to be tempered or smoothed by overall gains in economic welfare and living standards.⁹⁰

The United States helped create and lead this postwar global economic order, leading other nations in constructing the foundations of this new liberal international economic system through multilateral institutions and agreements such as The International Monetary Fund (IMF), the World Bank, and the General Agreement on tariffs and Trade (GATT), and later the World Trade Organization (WTO). This system of “embedded liberalism,” spearheaded and dominated by a hegemonic United States, was intended to promote economic openness while providing governments with tools to regulate and manage domestic stability and policies.⁹¹ This framework succeeded in creating a liberal hegemonic order that helped foster unprecedented levels of economic growth throughout the post-war period and much of the Cold War. Trade liberalization and increased security and cooperation also appeared to foster shared norms and goals underpinning and sustaining the liberal international order, at least for those favourably positioned within this order.

While this system successfully expanded flows of capital and goods, it also suffered challenges and crises, exacerbated in part due to its successes in intertwining economies and liberalizing trade across the globe. New political alignments, power dynamics and economic stagnation contributed to the collapse of the Bretton Woods system and a re-ordering of the

⁸⁸ See n x above (June 2018 statement); Ford, ‘Systemic Challenge?’, n x above.

⁸⁹ See *supra* note 7, describing the origins of the phrase ‘a rising tide lifts all boats’ in reference to globalisation.

⁹⁰ Colgan and Keohane, *The Liberal Order is Rigged: Fix it Now or Watch It Wither*, 96 Foreign Affairs 36 (May/June 2017).

⁹¹ G. John Ikenberry, *The End of Liberal International Order?* 94 International Affairs (2017) at 15-17.

international monetary order in 1970s. While the collapse of the Cold War initially seemed to reinforce the spread of markets, liberal democracy, and greater interdependence among states, it also ultimately preceded the loosening of many of the foundations of this framework. The Asian financial Crisis in the late 1990s and the pain it rapidly inflicted further sparked critiques and conflicts about the framework, normative underpinnings, and uneven power distribution with the global economic framework.

The global financial crisis which began in 2007 struck a further devastating blow to the postwar global economic order. Public and elite support for a rules-based global economy across the globe has cratered in its wake, as globalisation appeared to unleash financial forces and spawn crises which seemed beyond the capacity of the actors and institutions of the international economic architecture to contain or address. In the U.S. and other industrialized countries, it demonstrated a fact of the financially globalised system that was already long apparent to citizens of emerging economies: when finance flows unburdened across borders, relatively small economic ripples can quickly become tsunamis, ruining whole economies. Scepticism has grown towards the specific multilateral economic institutions and trade agreements established to promote the rules-based economy.

Economists and policymakers have long warned that without mechanisms that soften the blow of trade agreements on specific groups of middle class workers and prevent the diversion of wealth to those who already have vast resources, popular discontent with open economic borders would multiply.⁹² This has proven to be the case in many developed economies, most notably the United States and the United Kingdom. Millions of manufacturing jobs have been lost to countries with cheaper labour and, moreover, improved access to those markets through multilateral trade agreements in the past few decades.

The sting of these developments has been exacerbated as the pushes towards deregulation and trade liberalization have been joined by the seemingly unstoppable advances of technology and financial innovation. Improved automation and other technological developments threaten to render jobs and industries just as obsolete as the prior technologies and processes they replace, in both developed and developing countries. They have also led to financial innovations that enhance capital mobility at the same time that these new instruments “transfer risk of all kinds on a far larger scale.”⁹³ As virtual facilities replace physical ones, globalisation now also means that “money can flow anywhere, instantly, regardless of national origin and boundaries, and once-exotic foreign markets have been able to dramatically increase their attractiveness as destinations for capital.”⁹⁴ Crucially, however, much of the wealth and benefits of these developments is flowing asymmetrically, crossing national borders but stratifying unevenly along divides such as class and urban/rural boundaries, while fueling populist and nativist demands.

B. Examples of Backlash

In the wake of these destabilizing forces, the international economic order is facing serious challenges that can be viewed as Backlash to the institutions, agreements, and normative goals of globalisation, with key players in this framework seeking to retreat from international institutions and global governance mechanisms and rules. Shortly after his

⁹² Straight Talk on Trade: Ideas for a Sane World Economy (2018). Dani Rodrik. Princeton University Press

⁹³ Chris Brummer, *How International Financial Law Works (and How it Doesn't)*, 99 Geo. L. J. 257 (2011), at 266.

⁹⁴ *Ibid.*

election, President Trump withdrew the United States from the Trans-Pacific Partnership (TPP), sought to replace the North American Free Trade Agreement (NAFTA), and thereafter continued to pursue protectionist trade policies and throw up trade barriers while rejecting multilateral institutions and approaches.⁹⁵ The United States, which once “pressed harder than any nation” for the establishment of the WTO,⁹⁶ subsequently blocked appointments to a key WTO dispute settlement mechanism that brought “certainty and predictability to the rules-based multilateral trading order,” sending it into “hibernation” and effectively paralysing it—flipping the previous political dynamic so completely that states that previously criticized the WTO’s coercive pressures to liberalize their markets are now “campaigning for its protection.”⁹⁷ Just weeks later, the United Kingdom began the formal withdrawal process from the European Union or “Brexit,” leaving a gaping hole in the bloc as it exits its single market and security and other governance arrangements.⁹⁸

Underscoring these developments are the ways in which the anti-globalisation rhetoric and nationalism deployed by the leaders of the U.S. and U.K. are being mirrored around the globe. Focusing on the claim that globalisation has been hijacked and “rigged” by “cosmopolitan elites,” leaders in countries as diverse as the Philippines, Poland, Turkey, and Australia, among others, are combining “a populist demand for a redistribution of gains” with “a nationalist move to reclaim sovereignty from international arrangements,”⁹⁹ while attempting to harden borders to migration as well as trade. These developments, challenging the core normative goals in addition to the frameworks of economic liberalisation, are playing out in a variety of ways with significant implications for future of the liberal global international economic order.

C. Possible responses

As the ground shifts below the global economic order, it is important to examine how and where this order might be remade or replaced.

Reform and renew: The commencement of Brexit has occurred with a finality that appears to mark the end of hopes that the U.K. and U.S.-led retreat from global economic institutions can be undone at the ballot box in future elections. At the same time, however, the retreat of these key players has in many ways strengthened the institutions they have left or threatened, at least in terms of the commitment levels of their remaining members. In Europe, “the shock of Brexit has produced a unity among the remaining 27 nations that is hard to find on any other issue” as the threat of other nations’ withdrawal has at least momentarily dissipated.¹⁰⁰ As noted above, in the wake of the U.S. attacks, nations who once questioned the WTO’s

⁹⁵ Mark Copelovitch and Jon C.W. Pevehouse, *International Organizations in a New Era of Populist Nationalism*, 14 THE REVIEW OF INTERNATIONAL ORGANIZATIONS 169, 170 (2019), available at <https://doi.org/10.1007/s11558-019-09353-1>.

⁹⁶ <https://www.nytimes.com/1994/12/02/us/senate-approves-pact-to-ease-trade-curbs-a-victory-for-clinton.html>

⁹⁷ See *WTO Appellate Body Going Into Slumber is a Serious Setback*, December 24, 2019, available at: <https://www.financialexpress.com/opinion/wto-appellate-body-going-into-slumber-is-a-serious-setback/1802397/> (noting that on December 11, 2019, the World Trade Organization’s Appellate Body (AB) “went into hibernation” as a result of US blocking new appointments, and describing this development as “a serious setback for the rules-based multilateral trading order” and the rule of law as new appeals would now plunge into a “void.”).

⁹⁸ Steven Erlanger, *A Texas-Size Defeat for the E.U.: Brexit is Here*, The New York Times, January 29, 2020, <https://www.nytimes.com/2020/01/29/world/europe/brexit-brussels-eu.html>.

⁹⁹ Copelovitch and Pevehouse, *supra* note 95.

¹⁰⁰ See *supra* note 98.

methods and impact are now pushing to strengthen or preserve at least its presence. Without the hegemonic dominance of the U.S., global economic institutions and mechanisms might new and reform along more globally inclusive and domestically protective (as opposed to protectionist) lines.

Retreat and realign: Much of the fate of the global international order rests on whether the current retreat from global governance remains one largely limited to an Anglo-American development, or whether nationalism, strengthened by populism and nativism as discussed above, succeeds in not just fraying but severing the formal and informal ties that form the global economic architecture. This would open up possibilities for re-alignment where the unipolar moment is finally subsumed in a world of shifting, smaller alliances with more globally modest goals but potentially more locally sustainable impacts. Whatever the outcome, this possibility may be more fraught as states would be forced to re-align with others with whom they may share certain strategic goals but not, for example, even superficially similar approaches to human rights or environmental protection. Much also depends on whether nations experiencing a rise in populism can maintain responsiveness to their own domestic populations or whether they will seek to shore up their own constituencies by stamping out the conduits for dissent and democracy, thereby narrowing both domestic and international spaces for alignment.

Reimagine and recreate: It is tempting to reimagine a future global economic order which addresses and escapes the failures of the past, perhaps supported and facilitated by technology and innovation. While it is unlikely that the previous order can simply be shored up and restored to its previous breadth with a few simple tweaks, the current moment could act as the crucible that leads to the creation of a new, more inclusive and socially and financially stable order.

Some current developments might prove to be glimmers of such a future. For example, after the U.S. withdrawal from TPP, other nations continued to negotiate for trade liberalization with the aim of creating a liberalized trade zone within the Asia-Pacific. Europe after Brexit might foster a new “‘container’ within which illiberal democracies could gain greater measures of security and protection’” to replace the one now fading, one that might sap the strength or forge greater resistance to excesses of the ideologues now in power. Even the U.S. under Trump renegotiated rather than torpedoed NAFTA, now branded the “U.S.M.C.A.,” and updated it with changes drafted with bipartisan domestic support intended to protect workers, patients in need of cheaper medications, and intellectual property in the U.S. Moreover, as the existing order erodes, globalisation or some of its normative goals might grow more visible and thicker in informal ties or norms than formal, institutional arrangements that might otherwise stifle flexibility and diversity. The crucibles created by the crises and challenges ahead may yet contain the seeds of a more sustainable international economic order.

V. The Environment

A. Key global norms and institutions

International environmental norms and institutions have developed more recently than some of the other international norms and institutions discussed in previous sections. Yet at the same time, global environmental challenges are stressing even these relatively new institutions and norms. We are living in the Anthropocene – the first era where human

activity significantly and irrevocably impacts the global environment.¹⁰¹ This impact brings significant challenges both for international environmental law and international law more generally. Rising sea levels will threaten the habitability of many low-lying States and island nations, polluting fresh water reserves and increasing salinity.¹⁰² Some States risk losing their territory to sea level rise entirely. It is predicted that the impact of these changes will be disproportionately borne by the developing world.¹⁰³

Although some earlier conventions and cases dealt with environmental issues,¹⁰⁴ it wasn't until 1972 that the foundations of modern environmental law were laid. The 1972 Stockholm Conference on the Human Environment was the first intergovernmental Conference and provided a catalysis for the rapid expansion of environmental law.¹⁰⁵ In the almost 50 years since the Stockholm Conference, many fundamental international environmental treaties have been negotiated, drafted and entered into force – including the UN Framework Convention on Climate Change (UNFCCC).¹⁰⁶ The move toward a framework approach for environmental law allows States to progressively negotiate new binding commitments: but this approach is ultimately only as successful as States are willing to allow. This is illustrated by the failure of the second commitment phase of the Kyoto Protocol, as set out in the Doha Amendment:¹⁰⁷ the amendment has never entered into force, and only 7 of the 37 countries with binding emissions targets under the Doha Amendment have ratified it.¹⁰⁸

Environmental concerns also bring challenges outside the field of international environmental law *per se*. Traditional and fundamental norms of international law may not be able to be easily reconciled with the realities of the impact of climate change. For example, conceptions of Statehood may struggle with a complete loss of territory: and traditional definitions of refugees would not cover those fleeing a land that has become uninhabitable through the impacts of climate change.¹⁰⁹ In addition to sea level rises, extreme weather events such as hurricanes, droughts and floods are set to intensify.¹¹⁰ Such disasters could dramatically increase the number of internally and internationally displaced people, at a scale previously unseen.

Further, there are intersections with international environmental norms and other areas of international law. The link between trade and the environment has long been recognised: and the UNFCCC contains a provision designed to protect domestic measures combatting climate change from falling foul of the chapeau of the exception provision of the *General Agreement*

¹⁰¹ See generally Jeremy Davies, *The Birth of the Anthropocene* (University of California Press, 2016).

¹⁰² Imogen Saunders, 'The limits of the natural state doctrine: Rocks, islands and artificial intervention in a changing world' in Don Rothwell and Dave Letts (eds) *The Law of the Sea in South East Asia* (Routledge, 2019) 118, 127.

¹⁰³ C B Fields et al (eds), Intergovernmental Panel on Climate Change, *Climate Change 2014: Impacts, Adaptation and Vulnerability* (Cambridge University Press, 2014), 1347.

¹⁰⁴ See for example *Trail Smelter Case (United States v Canada) (Awards)* (1935) 3 RIAA 1905.

¹⁰⁵ Edith Brown Weiss, 'The Evolution of International Environmental Law' (2011) 54 *Japanese YearBook of International Law* 1, 6.

¹⁰⁶ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC').

¹⁰⁷ *Doha Amendment to the Kyoto Protocol*, opened for signature 8 December 2012, not yet in force.

¹⁰⁸ <https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>

¹⁰⁹ Angela Williams, 'Turning the Tide: Recognising Climate Change Refugees in International Law' (2008) 30(4) *Law & Policy* 502, 507-8.

¹¹⁰ Tim Stephens, 'Disasters, International Law and the Anthropocene' in S C Breay and K L H Samuel (eds) *Research Handbook on Disasters and International Law* (2016), 153.

on *Tariffs and Trade*.¹¹¹ Yet the World Trade Organisation ('WTO') dispute settlement panels and Appellate Body have been reluctant to recognise the possibility of non-WTO treaties modifying WTO obligations¹¹² – it remains to be seen if, when such a measure is challenged, a WTO Panel or the Appellate Body would take the UNFCCC into account.

B. *Examples of Backlash*

Despite overwhelming international scientific evidence and consensus, contestation around the causes and consequences of the phenomenon of climate change has inhibited the development of effective global environmental regulatory mechanisms. International environmental law is facing a dual challenge. It aspires to prevent the worst impacts of climate change and its associated environmental catastrophes, or least to mitigate their effects and impacts. At the same time, it is constrained by State behaviour that prioritises short term national interest over longer term global needs.

The domestic political capital that can be gained by such strategies is perhaps best illustrated by the US's withdrawal from the Paris Agreement in 2017. In his official statement, President Trump positioned the withdrawal as a triumph of domestic protectionism against non-American internationalism:

The Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.¹¹³

This positioning did not result in popular support across party lines: but did achieve majority support from Republican voters.¹¹⁴

Recently, Brazil has responded to global concern over forest fires in the Amazon by characterising the matter as an issue of national sovereignty, while denying a 'climate change catastrophe'.¹¹⁵ The positioning of national interest in inherent opposition to environmental protection poses a great risk to the success of international environmental cooperative efforts: particularly in the context of populism and rising nationalism.

C. *Possible responses*

There are positive signs that States are embracing international environmental challenges through the structures of the Paris Agreement. The very structures of the Paris Agreement

¹¹¹ UNFCCC, art 3(5); *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('General Agreement on Tariffs and Trade 1994'), art XX.

¹¹² See further discussion in Imogen Saunders, 'Navigating the backlash: re-integrating WTO and public international law?' (2020) 38 *Australian Yearbook of International Law*.

¹¹³ 'Statement by President Trump on the Paris Climate Accord', 1 June 2017.

<https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>

¹¹⁴ Washington Post – ABC News Poll, June 2-4 2017. Available online at

http://apps.washingtonpost.com/g/page/politics/june-2-4-2017-post-abc-poll/2213/?itid=lk_inline_manual_80&tid=lk_inline_manual_80

¹¹⁵ 'There is no climate catastrophe': Brazil hits back as Amazon continues to burn' *SBS News* (online, 12 September 2019) <<https://www.sbs.com.au/news/there-is-no-climate-catastrophe-brazil-hits-back-as-amazon-continues-to-burn>>.

themselves act to minimise the negative effects of the US withdrawal:¹¹⁶ including allowing the US to easily re-join the Paris Agreement at a future date if there is a change of administration or US policy.¹¹⁷ In this way, the Paris Agreement itself can be seen as *reform and renewal* of international environmental law following the problems that beset the Kyoto Protocol. There, US non-participation caused a cascade effect, with both Australia and Canada citing it as a reason for their decisions to not participate (in the case of Australia) or withdraw (in the case of Canada) from the Protocol.¹¹⁸ In contrast, despite the US's withdrawal from the Paris Agreement, Australia, Canada and other major economies (and emitters) such as China, the EU and India have stood by their Paris commitments.

Interestingly, another 'Backlash' has been observed in international environmental law: an internal Backlash *against* the US, carried out by people, communities and cities.¹¹⁹ Following President Trump's withdrawal from the Paris Agreement, two initiatives were created. The United States Climate Alliance is an alliance of the Governors of 25 US States, committed to reaching Paris Agreement goals,¹²⁰ while the 'We Are Still In' initiative extends the same goal to commitments from local government as well as private institutions.¹²¹ Such initiatives are anticipated by the Paris Agreement, which allows registration of support for the Agreement under the UNFCCC's Non-State Actor Zone for Climate Action.¹²² This is, in a way, a *reimagining and recreation* of international law, in that it pivots action away from States, and redistributes it to state and local levels of government as well as private companies and institutions. Such actors are not considered traditional subjects of international law: yet are acting in coordination to uphold it, despite the actions of their national State.

Finally, the disproportionate impact of climate change has left smaller, more vulnerable States at risk of being marginalised. This was evident in the reporting following the 2019 Pacific Forum. Although the Forum released the Kainaki II Declaration which set out emission reduction goals and statements of support for the UNFCCC, the work of the Intergovernmental Panel on Climate Change and the commitments made under the Paris Agreement,¹²³ it also omitted any reference to coal, and watered down previously drafted language on zero-net emission and total global temperature warming goals¹²⁴ – at Australia's insistence. This led to outcry from Pacific Island States, with the Fijian Prime Minister Frank Bainimarama describing the Australian approach as 'very insulting and condescending',¹²⁵ and Tuvalu's prime minister, Enele Sopoaga, accusing Australia of being concerned with

¹¹⁶ See Johnathan Pickering, Jeffrey S McGee, Tim Stephens and Sylvia I. Karlsson-Vinkhuyzen, 'The Impact of the US Retreat from the Paris Agreement: Kyoto Revisited?' (2018) 18(7) *Climate Policy* 818.

¹¹⁷ Ibid, 822.

¹¹⁸ Ibid, 823.

¹¹⁹ Oliver Millman, 'Paris deal: a year after Trump announced US exit, a coalition fights to fill the gap' *The Guardian Online*, 1 June 2018.

¹²⁰ <https://www.usclimatealliance.org/alliance-principles>

¹²¹ <https://www.wearestillin.com/signatories>

¹²² United Nations Climate Change 'Data Partnerships for the Non-State Actor Zone for Climate Action (NAZCA) <https://unfccc.int/about-us/partnerships/current-calls-for-partnerships/data-partnerships-for-the-non-state-actor-zone-for-climate-action-nazca#eq-1>.

¹²³ 'Kainaki II Declaration for Urgent Climate Change Action Now' Pacific Islands Forum Secretariat, *Forum Communique: Fiftieth Pacific Islands Forum* (Tuvalu, 13 – 16 August 2019) 12-15,

<<https://www.forumsec.org/wp-content/uploads/2019/08/50th-Pacific-Islands-Forum-Communique.pdf>> .

¹²⁴ Ibid, ¶19(i) and (ii).

¹²⁵ Kate Lyons, 'Fiji PM accuses Scott Morrison of 'insulting' and alienating Pacific leaders' *The Guardian* (online, 17 August 2019), <https://www.theguardian.com/world/2019/aug/16/fiji-pm-frank-bainimarama-insulting-scott-morrison-rift-pacific-countries>.

saving its own economy rather than the people of Pacific Island States.¹²⁶ While such States may wish to retreat from discussions with less vulnerable nations and realign with other specially affected States, the reality is this is not an option: the only hope of mitigating catastrophic change for small island States is if the rest of the world acts in concert to limit global warming and reduce emissions drastically. As such, the vulnerable nations cannot afford to take an insular approach, and must continue to try and engage with larger, more developed nations that are more able to weather the effects of climate change. This approach has been evident in the actions of such States: from the formation of a coalition of Pacific Island States which successfully pushed a 1.5° temperature increase goal during Paris Agreement negotiations¹²⁷ to Fiji's successful bid to preside over the 2017 UN Climate Change Conference COP 23. As such, it is these States that are spearheading a push to embrace international environmental law: notwithstanding any Backlash from other, larger States.

Conclusions

In this article we have sought to understand the implications and consider the possible responses of states and international institutions to the current Backlash against the post-World War II international legal order in each of the four domains of peace and security, human rights, trade and finance and the environment. What emerges is a bewilderingly complex and quickly evolving normative and institutional picture. A central finding of our analysis is that the underlying root causes of the global Backlash lie in the conjoined effects of neoconservatism and imperial overreach on the one hand, and neoliberalism and cosmopolitan global governance on the other, which are perceived to have deeply undermined the norms of state sovereignty and non-intervention that define the post-war international legal order. The interrelated nature of these phenomena was shown to be vividly illustrated first in the Iraq war of 2003 and second in the global financial crisis of 2008.

If correct, the current Backlash should not be understood as a “new tsunami threatening to overwhelm and sweep away international law,” but instead as a decisive and foreseeable reaction to and retreat from the “high water-mark of internationalisation in the 1990s.”¹²⁸ Much work remains to be done to understand the full implications and extent of this post-Cold War series of developments and political movements. We have sought in the article to map some initial lines of inquiry in terms of the three general scenarios of reform and renewal, retreat and realignment, and reimagination and recreation. Of course, such idealised responses are not mutually exclusive and there will always be a combination of actions, policies and strategies that state and non-state actors alike will take in each category.

For a state such as Australia, each of these three scenarios poses significant and far-reaching consequences for its diplomatic, security, foreign policy and international legal interests. What, for example, would retreat by Australia from the UN Security Council, the WTO or the Human Rights Council and realignment towards more proximate regional mechanisms such as ASEAN, the Pacific Islands Forum and the Commonwealth mean in the long term for

¹²⁶ Kate Lyons, ‘Revealed: ‘fierce’ Pacific forum meeting almost collapsed over climate crisis’ *The Guardian* (online, 16 August 2019), <https://www.theguardian.com/environment/2019/aug/16/revealed-fierce-pacific-forum-meeting-almost-collapsed-over-climate-crisis>.

¹²⁷ Ian Fry, ‘The Paris Agreement: An Insider’s Perspective – The Role of Small Developing Island States’ (2016) 46(2) *Environmental Policy and Law* 105, 106.

¹²⁸ See *supra* Part I.

Australian foreign policy and Australia's role and participation in the global legal order? These are questions that international legal scholars and policymakers are today only beginning to address. In order to do so, the article has argued that there is a need for deeper engagement with comparative legal analysis and legal history, as well as a greater self-critical willingness to examine the conditions and contradictions of modernity and modern forms of legal rationality.

As Pankaj Mishra has observed, the question of liberalism's relationship with imperialism has "become particularly urgent as non-Western powers emerge and an endless economic and political crisis forces Western liberal democracies to expose their racial and inegalitarian structures, their leaders resorting to explicit appeals to white supremacy."¹²⁹ The notion that the rules-based international order has *itself* been the incubator for authoritarian populism and illiberal democracy over the last thirty years will strike many as implausible and destabilizing. But by adorning "the Bush administration's pre-emptive assault on Iraq with the kind of humanitarian rhetoric about freedom, democracy, and progress that we originally heard from European imperialists in the 19th century," and by making "human beings subordinate to the market, replacing social bonds with market relations and sanctifying greed,"¹³⁰ the liberal international order can be seen to have laid the ground for the current Backlash moment. In this paradox lie the seeds of its reimagination and recreation.

¹²⁹ Pankaj Mishra, 'The Liberal Order is the Incubator for Authoritarianism: A Conversation with Pankaj Mishra,' *Los Angeles Review of Books*, 15 November 2018.

¹³⁰ *Ibid.*