Special Issue
The Backlash against International Law:
Australian Perspectives

Introduction

The Backlash against International Law: Australian Perspectives

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We write this introduction working from our homes in Canberra while the COVID-19 pandemic escalates around the globe. This is already a very different world to the one in which the contributions to this volume of the *Australian Year Book of International Law* first took shape. Indeed, the articles in this special edition of the *Year Book* all began as papers presented to a June 2019 workshop at the Australian National University (ANU) on the topic ‘Navigating the Backlash against Global Law and Institutions: Australian Perspectives’.

The Canberra Backlash workshop launched a global research partnership project between scholars at ANU, Indiana University and the University of Maryland. It brought together a dynamic blend of international legal and interdisciplinary scholars from these three institutions, as well as Australian government practitioners, including from the Attorney General’s Department, the Department of Environment and Energy, and the Department of Foreign Affairs and Trade. A series of engaging panel discussions examined the scope and ramifications of the backlash against International Law in relation to four thematic areas: peace and security, human rights, trade and finance, and the environment.

The articles published in this special edition provide thoughtful perspectives on the nature and impact of the backlash against International Law. Some of these perspectives are distinctly Australian. Others focus on international actors and themes. All were shaped by the workshop discussions in Australia and with Australian academics and practitioners. In the first article, ‘Navigating the Backlash against Global Law and Institutions’, Peter G Danchin, Jeremy Farrall, Jolyon Ford, Shruti Rana, Imogen Saunders and Daan Verhoeven set the stage by framing the contours and consequences of the backlash against international law and institutions. After interrogating the strengths and shortcomings of the backlash concept to describe the contemporary challenges facing international law and institutions, Danchin et al propose three different ways that Australia and other states are likely to respond to the backlash. These are to *reform and renew*, to *retreat and realign*, or to *reimagine and recreate*. The article then explores how these different responses might play out across

the thematic areas of peace and security, human rights, trade and finance, and the environment.

The second and third articles address the impact of the backlash on international peace and security. In 'Collective Security and the Prohibition on the Use of Force in Times of Global Transition', Christopher Michaelsen examines whether the current threats to the international legal order present a novel challenge to the normative framework regulating the use of force, or rather represent the latest manifestation of longstanding challenges. After surveying seven decades of threats to the prohibition on the use of force, Michaelsen suggests that the current backlash amounts to a new iteration of dynamics that have always been present. In 'The Status of Human Protection in International Law and Institutions: the United Nations Prevention and Protection Agenda', Cecilia Jacob examines whether international norms and institutions are facing a backlash in the specific area of human protection, including the prevention of violent conflict and mass atrocities. Drawing on her analysis of developments and dynamics in the core protection agendas of the protection of civilians in UN peacekeeping and the responsibility to protect, Jacob argues that while there is turbulence in the normative, institutional, and political contexts in which states engage with protection norms, this dynamic of contestation promotes the 'reconstituting', rather than the 'unravelling', of international order. Jacob views reform and renewal as the most pragmatic and productive of the three response scenarios to harness this reconstituting potential in relation to human protection. By contrast, she warns that the two alternative scenarios, of retreat and realign and reimagine and recreate, would lead to a lowest common denominator unravelling of such norms.

The fourth and fifth articles in the special edition concern trade and build upon one phenomenon identified in the first article—the fragmentation of international law. In 'Navigating the Backlash: Re-Integrating WTO and Public International Law?', Imogen Saunders argues that the siloisation of international trade law is *itself* a backlash against public international law: and that this backlash is causing states to withdraw from the multilateral trade system. States are retreating from World Trade Organisation negotiations and realigning by forming Regional Trade Agreements ('RTAs') which more easily meet their trade and non-trade objectives. By contrast, in 'Navigating the "Backlash" against International Trade and Investment Liberalisation: Economic Perspectives on the Future of Regional Trade Agreements in Uncertain Times', Martin Richardson argues that RTAs are themselves facing a decline in popularity. While this unpopularity may not rise to the level of a backlash, States are nonetheless showing less enthusiasm to enter into RTAs. As a consequence of this trade scepticism, States enter into RTAs with the possibility of exit in

mind: and this itself necessarily decreases cooperation between them. Both Richardson and Saunders see problems with RTAs. Saunders highlights the increased fragmentation of international law and resulting complexity, while Richardson points to ambivalence of evidence of economic benefit from RTAs. While State scepticism of RTAs may be a recent phenomenon, that of economists is not. Ultimately, Saunders offers suggested solutions to allow a reform of international trade law to reintegrate public international law, while Richardson suggests States will still engage with RTAs: albeit with less cooperation and established exit strategies.

The final three articles comprise rather diverse reflections on the backlash theme in the context of the international system for the promotion and protection of human rights. In 'Backlash against a Rules-Based International Human Rights Order? An Australian Perspective', Jolyon Ford evaluates the merits of characterising recent Australian government postures towards that system as 'backlash' in the particular sense of system-threatening or anti-system behaviours. Ford zooms out to ask whether it is the very idea of the international rule of law, not compliance or engagement with particular elements of the overall system, that is at issue. On a broader global canvas, in 'Amidst Simmering Tensions: Improving the Effectiveness and Coherence of the International Human Rights System's Response to Mass Human Rights Violations', Annemarie Devereux argues that the backlash concept risks presenting mere continuity (of intra-system tensions) as change. Moreover, Devereux warns that framing contemporary dynamics as part of a backlash distracts attention from deeper structural challenges in the international human rights system. In 'Backlashes against International Commitments and Organisations: Asylum as Restorative Justice', Kate Ogg explores the backlash motif from a different perspective: vulnerable populations under the care of an international organisation and who may be more directly affected than most by the forces and consequences of politically-driven backlash against such organisations. In doing so, Ogg joins Devereux on common ground, by reflecting on the risk that in focussing on more dramatic moments of apparent flux (as backlash-thinking may lead us to do), we may not see the more subtle, systemic and entrenched ways in which states backpedal from their international commitments or responsibilities. Indeed, all three authors may be interpreted as concerned to explore, and ultimately question, whether there is anything particularly distinctive about recent instances of states 'pushing back' at the system that they have helped to build. In doing so, and if one accepts that backlash implies a noticeably new phenomenon, the authors raise a question apposite to the wider project as a whole: what if the structural continuities and state incentives for maintaining the approximate systemic status quo in fact outweigh the apparent shifts

underway, including those attributable to domestic populist backlash? If so, how and when might we know whether developments that appear to represent crisis-driven '*reform and renewal*' in fact amount only to cosmetic changes to the global institutional map, missed opportunities to bolster the legitimacy, inclusivity and effectiveness of international law?

Taken as a collective, the eight articles in this special edition provide a series of rich reflections on the challenges facing international law and institutions as we move into the third decade of the 21st century. Each article sheds fresh light on the tensions that underpin and enliven both critical academic reflection on, as well as pragmatic policy responses to, the pronounced recent disengagement from international treaties and institutions by powerful states, such as the United States, which were traditionally active supporters and defenders of global cooperation. These tensions include whether the contemporary challenges facing international law and institutions represent something new, such as a populist backlash, or rather the latest manifestation of something old; and whether these challenges are caused by the external pressure of changing global dynamics or by the internal pressure of structural weakness. The manner in which contributors engage with these central tensions tends to shape their preferences in terms of which of the three response scenarios described by Danchin et al in the first article, namely *reform and renew*, *retreat and realign*, or *reimagine and recreate*, holds the greatest promise.

As a postscript, it is noteworthy that, although the articles in this special issue evolved prior to the outbreak of COVID-19, the critical analysis and pragmatic proposals they advance have become even more cogent in the COVID-19 era. If it has done nothing else, the rapid spread of the COVID-19 pandemic has graphically demonstrated the vital need for effective collective action to prevent and manage grave global threats. The constructive engagement of all states in improving the international law and institutions that support such action is as important now as it ever was.