
National Sovereignty in a Globalising World*

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Let me begin with a quick overview of international law. I would divide it into three categories. These are not the categories international lawyers commonly use but they are a useful division of the terrain for our purposes.

The first category we can call ‘customary law’. This was the subject of the great treatises on international law—the works of Grotius and Pufendorf in the Seventeenth Century, Vattel in the Eighteenth Century, Wheaton and Westlake in the Nineteenth Century, down to the works of Lawrence and Oppenheim in the early Twentieth Century.¹ The classic treatises start with the sovereignty of independent states as the first principle of international law and rely on customary practice—with some admixture of natural law reasoning—to elucidate the rights and duties of sovereign states in their dealings with each other. If a state wants others to respect its sovereign authority in its own territory, it should respect the comparable claims of other states

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¹ For scholars of international law, ‘customary law’ has a more precise and in some respects also a broader meaning than I intend to capture here. On the one hand, even the classic treatises often distinguished those norms which rest on nothing more than custom from those seen as resting on natural law principle. Yet the classic treatises, themselves, blurred this distinction by citing actual practice (in other words, ‘custom’) as proof that natural law obligations had been widely acknowledged by states. So perhaps ‘traditional international law’ might have been a better term for me to use for this category. On the other hand, modern treatises extend the term ‘customary law’ to practices of quite recent origin, such as the claim by coastal states to exercise control over fishing and mining within an ‘exclusive economic zone’ stretching as much as two hundred miles from the shoreline (a claim first advanced only in 1945). I do not mean to exclude all such modern developments from my category and that is my reason for avoiding a term like ‘traditional law’. But some things now claimed for ‘customary law’ seem to be quite contrary to the spirit of the classical treatises—such as the claim that there is now a developing ‘customary international law of human rights,’ a claim which supposes that we can infer ‘international custom’ from practices that have no actual inter-state content.

on their territory. That is the basic idea, at any rate. Much of this is now codified in treaties (on such subjects as the reach of national authority over coastal waters), but it is fair to say that the treaties derive their moral force from the sense that they do simply clarify long accepted practice.

A second category might be called contractual law. Countries often impose quite new obligations on themselves by treaties and these obligations are binding only so long as the other party or parties observe the terms. Military alliances are of this character. So are disarmament agreements. And most trade agreements have this character. Each party has a strong inducement to comply with the terms of the agreement, because if it violates those terms, the other party or parties may retaliate in kind—by withdrawing promised benefits or concessions. The enforcement potential is built into the nature of the undertaking: you fail to remove trade barriers, as promised, and we will restore a trade barrier against you.²

A third category of international law might be called ‘constitutive’. It erects some new authority, empowered to impose specific, new obligations on the signatories, without their consent. The pre-eminent example, of course, is the European Union (EU). By a succession of treaties, the member states have established a whole series of supranational authorities, whose decisions and directives take direct effect in the domestic law of the member states and can even overrule parliamentary enactments of the member states. If you like, you may say that the UN Charter was a ‘constitutive’ treaty, since, on paper at least, it authorised the Security Council to impose binding directives on non-consenting states (and even on non-member states of the UN), when the Council judged such measures necessary to ensure international peace. But the framers of the United Nations Charter put a strong brake on this authority. Any one of the five permanent members (US, UK, France, China, Russia) may veto a Security Council resolution, so genuinely intrusive resolutions are quite rare.

I doubt it is worthwhile to think of any other treaties or trends in international law as ‘constitutive’ in this sense. Accordingly, I think we should acknowledge a fourth

² Here again, scholars of international law may see complications that are not acknowledged in the text. Trade agreements are unusually clean examples of contractual treaties, even when they involve multiple parties, as with the agreements negotiated in connection with the World Trade Organisation. If Japan, for example, imposes a trade barrier against imports, contrary to the promises it made in the latest round of international trade agreements, exporting states can complain—and if they do not get satisfaction, each exporting state may impose a proportionate trade burden on Japanese imports (or in other words, withdraw promised concessions to Japan to a proportional extent). Not every agreement allows for such individualised and neatly reciprocal methods of self-enforcement. If most countries in a particular region are committed to a certain agreement—as for example, to limit pollution discharges into a shared waterway—they may not find it easy to enforce compliance on a single delinquent, by acting in kind (as here, by increasing their own pollution practices). But countries do not devote great efforts into cajoling delinquents into complying with their pledges unless they do feel some direct self-interest in maintaining the general terms of the agreement—and unless they feel they do have some reasonable prospect of cajoling delinquents into better behaviour. So agreements designed to ensure conservation of marine resources (such as particular kinds of fish) have not worked very well, because countries are not much inclined to honour agreements in this area when they are widely flouted by others. For useful illustrations, see Peter Haas, ‘Protecting the Baltic and North Seas’ in contrast with M.J. Peterson, ‘International Fisheries Management’ in Peter M. Haas, Robert O. Keohane, and Marc A. Levy, *Institutions for the Earth, Sources of Effective International Environmental Protection*, MIT Press, Cambridge, Mass., 1993.

category, which I call ‘ceremonial’ or ‘consultative’ agreements. I do not think they should be considered ‘law’ because they impose no serious obligations, beyond the exchange of documents or dignitaries or ceremonial gestures. The British Commonwealth is an obvious example. It imposes almost no obligations on Australia and promises almost no benefits, because it does not seriously oblige the other members, either. Probably the OECD should be viewed in this light, as well, since membership offers no distinct benefits and imposes no meaningful duties.

I think most human rights agreements and at least some environmental agreements should be viewed in just this light. They are ceremonial or consultative. They cannot be taken seriously as law. To confuse them with serious treaties, such as trade agreements, is to misunderstand the nature of international law and of the ‘international community’ that sustains international law.

I believe this view would have won wide acceptance only a few decades ago. Now many people think that international law can be more ambitious. In effect, they think we are constituting new international legal authorities, somehow above the authority of nation-states, in a whole range of areas. Some legal scholars even speak of ‘constitutional law for the international system’.³ To me, this seems altogether fanciful.

To see why this is so, it is useful again to make some distinctions. If we think of globalisation as primarily a social phenomenon, then everyone agrees it is a fact—but nothing evidently follows from the fact. It is true, for example, that Chinese and Indian and Mexican food have started to appear in restaurants all around the world, along with Hollywood movies and a whole range of other cultural icons. We know more about each other than we used to and borrow more from each other in fashion and taste, as in technology and commercial practice. But none of this implies that we must submit to the same legal authorities.

Secondly, many observers emphasise the economic aspect of globalisation. We are not just sharing ideas but actual products. There is more trade and more foreign investment than there was only 20 years ago and much more than 50 years ago. Successive agreements on reciprocal lowering of tariffs, under the General Agreement on Tariffs and Trade (GATT) and more recently under the successor entity, the World Trade Organisation (WTO), have undoubtedly encouraged this development. But these are, in essence, contractual agreements. Do we need anything more?

³ See Louis Henkin, *International Law: Politics and Values*, M. Nijhoff, Dordrecht, Boston, Mass., 1995: the development of fundamental norms regarding human rights ‘can be explained and justified as something new—the growth of a *systemic constitutional law* [original emphasis] of fundamental values identified and adopted by the international system. As fundamental values, they do not derive from or depend on state practice, or on law made purposefully by the consent of the states.’ (p. 39). After Britain arrested former Chilean president Pinochet, for trial in Europe on charges of human rights abuses against Chileans, on Chilean soil, by the Chilean government, a British scholar hailed the event in these terms: ‘Contemporary international law recognises that there exists an international public order’ which ‘assigns and limits powers which may be exercised by states’ and an event like the arrest of Pinochet simply highlights an ongoing ‘transformation ... to an international constitutional system.’ Weller, ‘On the hazards of travel for dictators and other international criminals’, *International Affairs*, vol. 75, no. 3, July 1999, p. 599.

Critics of trade liberalisation say that it limits the policy choices of government, because it exposes domestic industry to more competition from other countries with different policies. The way to correct this, they say, is to standardise more policies within countries. We should all agree on common standards (or at least, minimal standards) for the treatment of labour, for environmental protection and perhaps for a range of other things.

But if goods are produced cheaply, purchasers have strong incentives to take the bargain and ignore questions about how the product was made. Formal requirements might be easily avoided by non-compliant or delinquent states by arranging to have their products repackaged or relabelled in other countries. How can the world enforce common standards, then, if importing countries do not have reliable incentives to insist upon them? The implicit answer is that we will establish new, constitutive treaties or elevate existing measures to this stature.⁴

We are often told that the world is ready for this because sovereignty has become less and less important. It is too bad this news has not reached the Palestinians and the Israelis. They could solve their disputes over Jerusalem and other places with no difficulty at all if sovereignty didn't matter and both or neither could be sovereign over the disputed territories. Are these Middle Eastern countries exceptional? I don't think so—at least, not in this respect. Let's look at some well-known trends in the English-speaking world.

The cohesiveness of the British Commonwealth has been dwindling throughout the Twentieth Century. Did Australia—or Canada or New Zealand—have more cultural exchange with Britain in the early part of the century than in later decades? In many ways, of course, movies and television and satellite communications made the exchange more intensive later on, but this did not make for closer political ties.

Internally, the Canadian confederation seemed quite solid in the early decades of the Twentieth Century. Since the early 1980s, Canada has been in a continual constitutional crisis, culminating in the bizarre situation where the role of the principal opposition party in Ottawa—the 'loyal opposition'—fell to the Parti Quebecois, the Quebec separatist party, whose central purpose is to break up the country. Was there more trade between Quebec and the Anglo provinces in the earlier decades of the Twentieth Century? Of course there was less, because the Quebec economy was so predominantly agricultural.

⁴ Of course, many advocates for such standards are simply looking for ways to constrain competition from producers in other countries in order to help producers (or their employees) in their own country. For such advocates, international production standards are simply a cover for protectionist policies which they would favour for their own domestic reasons, whatever the policy impact on other countries. But for people who really want to improve labour conditions or environmental conditions in other countries, it is not enough to arrange trade sanctions by one importing state; sanctions are not likely to have much effect unless many countries go along. And how do we force them to go along if they actually want the benefits of free trade? One has to imagine some way of coercing these third states—perhaps by secondary sanctions. What kind of organisation is in a position to organise and impose such secondary sanctions? It is not a power which the WTO is now organised to exercise. We would have to have something much more ambitious.

Or look at the trend in local government. Thirty years ago, observers predicted a trend toward the establishment of metropolitan governments. We would have more regional governments in large urban centres, because this was the logical way to handle regional problems. It has not happened at all in the United States, and I am told it has not happened in Australia. People who live in suburbs are very well aware of what goes on in the cities and usually depend on the neighbouring city for their livelihood. There is far more intense and sustained and intimate interaction across city-suburban boundaries than across any international boundary. Still, people in suburbs want to retain as much political autonomy as they can. They think they are better off. And maybe they are right. Perhaps it is selfish of them not to want to share their tax base and their local services with the neighbouring city. At any rate, it is a common enough reaction that it can't be dismissed as a quirk.

But there is surely more disposition to share resources and accommodate common institutions within countries than between them. The powers on the Security Council cannot even agree on measures to disarm Iraq—which threatens to use weapons of mass destruction as soon as it can lay its hands on them. Mass killing in Rwanda did not stir the world to action. Is it plausible to claim that countries which won't extend themselves in the face of such horrors will nevertheless make significant sacrifices for the 'international community'—even when they get no clear or immediate return for such sacrifices?

It is true that the European Union has imposed remarkable sorts of discipline on member states and the member states do accept such supranational controls. But this is the exception that proves the rule. The European Union has a European Court of Justice (ECJ), which can hear cases brought by citizens against their own governments, overrule the decisions of national courts, overturn enactments of national parliaments and impose fines on national governments. These are enforcement powers beyond anything known in any other 'international' body.

Moreover, the ECJ purports to be enforcing rules laid down by European Union authorities. How are they made? The European Union now has decision rules in its Council of Ministers by which national representatives get extra votes, in rough proportion to their relative population. In the European Union Parliament, the apportionment of seats among the member states is also roughly proportionate to population. The European Union is in many ways organised as a federal super-state rather than an international organisation, and it already acts as a single, sovereign entity in international negotiations on trade and environment and a few other issues.

Is Australia ready to enter into anything at all like this with its neighbours? Would it agree to proportional representation (by population) in a system with neighbouring Indonesia—with more than ten times its population? Or with China—which has more than 60 times the population of Australia? If not regionally, would Australia agree to submit itself to the disciplines of the EU? If not, you must draw the logical conclusions. Let me sketch them for each category of international law, in the same order as I initially presented them.

First, then, if you want to protect your own sovereignty, you have a stake in restraining the growth—or distortion—of customary international law. You have a

stake in ensuring that customary law does not generate amorphous new claims that encroach on traditional notions of sovereignty. Already, the UN's Human Rights Committee claims that customary international law has come to embody human rights norms of various kinds. Thus, it claims that even countries which have not signed particular human rights conventions (or have signed them with relevant reservations) are bound by these norms—as articulated by the Human Rights Committee.⁵

The government of the United States has largely ignored such pronouncements. But a great many American legal scholars claim that customary international law of this kind should be enforced by American courts as law of the land—that is, enforced by American courts even on American officials. As it is, similar constructions of customary law have been invoked by American courts in suits which seek to hold companies liable in American courts for alleged abuses in other countries—under standards not accepted by those other countries.⁶

Meanwhile, Britain's House of Lords has decided, in the Pinochet case, that national prosecutors may use their own national courts to prosecute heads of states of other countries for injuries which the latter committed against their own people in their own territory. Only a decade ago, such practices would have been considered a form of international aggression. All countries have a stake in limiting such unaccountable and unwarranted extensions of 'customary' law, which allow countries to be bound without formal consent and bound even without a record of actual state practice over a long period (which was usually taken as signifying tacit consent in classical treaties).

Second, as you recall, there are the sorts of agreements I have called contractual agreements. You have some stake in contractual treaties like the trade agreements in the WTO. You may have considerable stake in such agreements, if you doubt your bargaining power in a world where all rules break down. There may be some environmental agreements of this kind. The US has environmental border agreements with both Canada and Mexico where both sides have strong incentives to honour their commitments, in order to secure promised efforts from the other party.

But you should not pursue such agreements when they do not seem to serve your interests. If you get little in return for the concessions you offer, it is not very sensible to make such concessions in the hope that, later on, others will be encouraged by your example to become more cooperative. Your willingness to make sacrifices for international cooperation does not, in itself, seem to make much difference to countries that are not disposed to be cooperative. After all, other countries have to deal not only with Australia but with lots of others—and they have no reason to think others will make policy based on such fond hopes in the power of moral leadership.

⁵ See 'General Comment, No. 24,' UN Document CCPR/C/21/Rev.1/Add.6 (1994). In effect, the Committee claims the authority to determine when states can be bound to human rights norms without their actual consent. The US government has objected to this claimed authority: 'Observations by the United States of America on General Comment No. 24,' UN GAOR, 50th Sess., at 131–32, UN Document A/50/40 (1995). But the Committee has not retracted its claim.

⁶ For example, *Beanal v. Freepport-McMoRan, Inc.*, 969 F.Supp. 362 (E.D. La., 1997), on behalf of workers in Indonesia; *Doe v. Unicol*, 963 F. Supp. 880 (C.D. Cal, 1997), on behalf of workers in Burma; *Aguinda v. Texaco*, 850 F. Supp. 282 (S.D. N.Y., 1994), on behalf of workers in Ecuador.

If you try to escape from this problem, you may be tempted to participate in the construction of stronger international projects—those treaty schemes that I have called ‘constitutive’ because they do seek, in a serious way, to constitute some authority above sovereign states. Supranational authority may reassure you that other states will be forced to conform to the same standards that Australia agrees to accept. I do not think the record suggests that such institutions have much hope of success, outside regional groupings of like-minded states. But you may not be very pleased, even if they do prove somewhat effective in coercing member states. The more such institutions depart from contractual or reciprocal undertakings, the more likely they are to respond to the promptings of the strongest powers.⁷ For all its fine qualities, Australia is not likely to emerge as one of the strongest powers.

This danger is not an entirely hypothetical challenge for Australia. The Appellate Body (AB) of the WTO, a kind of standing court of appeals for trade disputes, should be watched carefully. In principle, the AB is supposed simply to interpret the actual provisions of trade agreements. Since the shrimp-turtle decision, however, the AB (with many commentators cheering it on) has suggested that it may interpret actual trade agreements in the light of ‘background’ agreements on environmental protection and other matters, even when these agreements make no direct reference to obligations under existing trade agreements. So you may start by thinking you have made certain trade concessions in return for similar concessions from others—and then find that the obligations of your trade partners can be modified by a handful of judges, building up an independent body of law to which you have not, in those terms, actually consented.

In a different context, the proposed new International Criminal Court (ICC) (for which Australia has thus far expressed considerable support) would not likely assert itself against British or French suspects—much less Americans—because the ICC will have to rely on these powers to enforce its subpoenas and arrest warrants. Small countries like Australia would be much more plausible targets for its efforts to score points with suspicious audiences in the less developed world. And you face the prospect here, too, that the ICC judges drift from the terms of the actual ICC treaty and begin to incorporate into their reasonings the precedents developed by activist courts in larger countries, like Britain or France (or, it may be, the US).⁸

Finally, let me address the last category—what I have called ‘ceremonial’ or ‘constitutive’ agreements. Here we come to the issues most recently raised by the Australian government itself, when it announced its decision to limit future

⁷ Some analysts insist, for example, that despite all its efforts to develop common European policies, the European Union still tends to develop policies that cater to the priorities of the strongest states, whose governments view the European Union as a mechanism for extending their own national preferences on their partners. See, for example, Andrew Moravcsik, *The Choice for Europe*, Cornell University Press, Ithaca, NY, 1998.

⁸ The Preamble to the ICC Statute admonishes that ‘it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes’—without limiting the admonition to crimes defined in the Statute, itself. Moreover, the Statute provides that the defined crimes can be extended and amended by a two-thirds vote of the signatory states. And there is no shortage of suggestions for enlarging the reach of ‘international crimes’. It was recently suggested at a UN forum, for example, that manufacture and sale of tobacco products, given the health hazards they present, should be considered a ‘crime against humanity’.

cooperation with UN human rights monitoring. I would say you have a stake in making clear that ceremonial institutions remain just that. And that is, in essence, what the Howard government has now done.

Human rights treaties are a classic example of ceremonial agreements pretending to be something larger. The UN has no means of enforcing the terms of these treaties, even on the signatories, and they are, as everyone knows, widely flouted or simply ignored by most signatories. They certainly do not establish contractual or reciprocal obligations which would give any other country clear incentive (let alone the legal warrant) to enforce these obligations on delinquents. Australia may or may not conform with all the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women. But where Australia does conform, it is not going to renege on its current practice to punish Libya or Saudi Arabia—both now signatories, as well—for failing to conform. There is no real connection between the conduct of others in this area and your own conduct within your own territory. To pretend that such ceremonial agreements are a serious source of ‘international law’ is not only delusory but dangerous. And that, for at least three reasons.

First, if you take such agreements too seriously, you are at great risk of being played for suckers. The Howard government protested, with some justice, that the oversight committee under the Convention on the Elimination of Racial Discrimination was more critical of Australia than of Pakistan, China and other repressive regimes that had representatives on the committee. But this is not an isolated case. It is what you should expect. Unlike the policy-making organs of the EU, UN treaty structures have no credible enforcement machinery for their rulings or admonitions. Those states that do take these rulings seriously are often the very states that attract most attention from international monitors—precisely because they are soft targets.

You have had the same experience with a similar ceremonial treaty, the World Heritage Convention. Australia got in trouble when it sought to authorise uranium mining in the vicinity of Kakadu Park, a listed Heritage site. UNESCO’s World Heritage Committee, which oversees this list, warned that if mining plans went forward, this site might be removed from the World Heritage list, and many advocates in Australia insisted that the government here must halt the mining operation or else appear an international outlaw. But in the quarter century history of this program, no site has ever been removed from the list (except at the request of the host country). I believe that Australia got in trouble not only because local activists were eager to stop the mining there (for unrelated reasons) but also because the World Heritage Committee viewed Australia as unusually accommodating. To put strong pressure on a less accommodating country would risk exposing the whole scheme as an empty shell—because there is, fundamentally, no regulatory power in the hands of the

Heritage Committee and no serious sanction for ignoring its recommendations.⁹ A famous site will not be less so because UNESCO fails to recognise it as such.

⁹ Ecuador asked the World Heritage Committee to provide international financial assistance for conservation efforts in the Galapagos Islands, a ‘World Heritage site’ under Ecuadorian control. The Ecuadorians conceded that they could not protect endangered species on the islands without help but asked that the site not be classified as ‘in danger’, lest this interfere with tourism. The World Heritage Committee readily complied with this request.

Things get more serious with treaties that seem on their face to be more ambitious. The wildly ambitious Kyoto Protocol ought to be recognised as a ceremonial venture, dressed up with impressive sounding ‘commitments’ and the suggestion of a supranational authority to enforce them. The evident truth is that few countries will achieve the targets they have pledged for reducing their emission of greenhouse gases by 2012, because this would require dramatic cut-backs in energy use in a period when all countries (outside the devastated economies of successor states to the former Soviet Union) have been increasing energy use. And even if some countries make more ambitious efforts, there is no serious mechanism to enforce such efforts on others. It is dangerous to treat an international affirmation of good intentions as if it were a serious commitment—as you may find you do not have much company when you start fulfilling those commitments.

It is also dangerous to treat ceremonial agreements as serious law for a second and rather different reason. You have some areas of international law where you do want rules to be honoured. The more you treat ceremonial affirmations as real law, the more you entangle real law with distractions and excuses, with complications and uncertainties. You make certain concessions in trade agreements in the expectation that others will respond in kind. Do you want these relatively hard agreements to be eroded by claims that other standards must be merged with them? You multiply the opportunities for others to evade their agreements with you and leave everyone more cynical and distrustful that anything is law in any real sense.

Finally, it is dangerous to pump up ceremonial agreements into supranational authorities, because this threatens your constitutional authority at home. That is serious, because the constitutional authority of your own government is the most reliable authority you have. To imply that your own government needs help from UN monitors suggests that it can’t quite be trusted otherwise. Perhaps it can’t be. Democratic governments do make mistakes and do sometimes perpetrate abuses. But even if you think outside governments or outside experts know better, is it plausible to think they care more about Australia than does the Australian government itself—or the Australian voters who hold their own government to account? If not, you should be clear about who has the final say on particular policy disputes and why.

Earlier this year, back in Britain, Prince Charles voiced some sharp criticism of genetically modified foods. But no one pretends that Australia must change its policies to conform to the Prince’s standards. That question—regarding the monarch’s authority—was settled in 1688. Pope John Paul II has made very emphatic appeals to prohibit all abortions, so your laws in Australia are in violation of papal teaching. Very few people say you are obliged to change your laws for that reason alone. In English-speaking countries, that question was settled much before 1688. Having insisted that government is not bound by monarchical or papal decrees, do you really want to say it is bound by UN Poo-Bahs?

Does this sound overwrought? I remind you that a previous federal cabinet secured federal legislation to nullify Tasmania’s law on sexual morality on the grounds that it conflicted with the UN’s Covenant on Civil and Political Rights. This treaty was drafted in the 1950s and early 1960s and no one seriously claims that the drafters

imagined it was securing rights to sexual autonomy. This interpretation was supplied by a ruling of the UN's Human Rights Committee and an Australian government conceived this ruling as sufficient reason to circumvent the regular distribution of powers between state and federal authorities, as set out in the Australian Constitution. A few more episodes of this kind and people will reasonably wonder whether the Australian Constitution does not, after all, contain a secret or invisible provision, which provides that, alongside the House of Representatives, the Senate and the High Court, certain powers are reserved for UN committees meeting in Geneva.

Of course, your government is in no real danger of being taken over by bureaucrats in Geneva. But with a few more of these episodes, voters may reasonably wonder if the government can be trusted to exercise the powers it is granted under the Constitution and at minimum, you may face a new round of constitutional reform initiatives that complicate your domestic politics.¹⁰ Is it really worth risking new strains on your constitutional architecture, just to keep up the pretence that a ceremonial or consultative treaty scheme is a source of genuine legal obligations?

Before concluding, let me say a few words about where this vision of international law leaves other countries. If you acknowledge that human rights agreements are merely ceremonial or consultative, does that mean that you abandon other countries to their own devices? At some level, the answer must be yes—that is the price you pay for telling other countries (or international councils) to stay out of your own domestic affairs.

But you might recall that in an era of globalisation, all other countries—or at least, their elites—see and hear a lot about successful liberal democracies. Your example is powerful. People are rioting to get into Australia (or to be allowed to stay here). They are not rioting to get into neighbouring countries. And people understand, around the world, that investors feel more secure (and consequently invest more readily) in countries with reliable legal protection for individual rights. It does not require a UN treaty to make this point.

Around the world, people would like to emulate liberal democracies. But many countries have severe problems with ethnic and religious divisions, breeding murderous fanaticism. Many countries face extremes of poverty and vast economic disparities, breeding resentment and confusion. Many countries have little or no democratic tradition to fall back on when fanaticism or resentment explodes into civil

¹⁰ Australian MP Andrew Thomson, Chair of the Joint Committee on Treaties, has proposed that serious consideration be given to amending the Australian Constitution to provide that treaties must be ratified by the Australian Senate before they are viewed as binding on Australia. Though the proposal seems to parallel the treaty provisions of the US Constitution, the United States actually has developed ways of binding itself without formal Senate ratification. So, for example, neither the North American Free Trade Agreement nor the global trade agreement establishing the World Trade Organisation were presented to the Senate as formal treaties (and did not, in fact, secure two-thirds majorities there, so they would not have been ratified if formulated as treaties). The United States has adopted alternate devices because trade agreements are difficult to negotiate with other countries if the US is known to have high barriers to ultimate ratification. Whether Australia would do well to impose a distinctively high barrier to negotiating or ratifying trade agreements is a question that deserves careful consideration. But it would be unfortunate if this consideration were distracted by popular resistance to unrelated treaties.

strife. The best minds at ANU—or at Harvard or Stanford—do not agree on what Indonesia or China or Egypt or Russia ought to do now, to move toward stable democratic institutions. Let us acknowledge this and then recall that the delegates who preside over UN human rights forums are not quite our best minds.

The first duty of every national government is to take care of its own country. It is certainly in your country's interest—as it is in the interests of almost all countries—to have a more peaceful world, where relations between states are more orderly and predictable. But we will not secure a more peaceful and orderly world by pretending that our present world offers more opportunity for supranational authority or global governance than it actually does.

International law, insofar as it deserves to be considered a serious body of law, is a set of rules for the interactions of peoples who are foreign to each other and often indeed strangers to each other. In smaller communities, there is scope for common authority, so much greater sharing of burdens and benefits can be enforced by communal law. But in a world of foreigners and strangers, you cannot expect others to take care of you. Your first duty, as an independent country, is to look after yourselves. If you want to set a moral example, you might do so most effectively by standing up for your own national rights in a calm, clear and confident spirit—in a world that is too often confused about what international law actually can require or what it must allow.

Most of the world already respects Australia's achievements, especially its success in maintaining a prosperous and stable constitutional democracy. The world will not respect you any less if you display a greater degree of self-respect.



Question — In this part of the world, decolonisation left behind some rather small micro states which in some cases are becoming failed states or failing states. And in a sense that's their business under international law, they have the right to degenerate if they wish. But do we have no alternative other than to put up the shutters and put another lock on the door, if, for example, organised crime operates under national sovereignty in those places?

Jeremy Rabkin — I understand the question, and I think there's a real challenge there. If you think you can encourage them to co-operate in some scheme for controlling international crime, good luck. But I think you would probably do better by putting up the shutters—and I say this not out of cynicism or ideological bias.

Here's the American counterpart: all over Latin America we have these people, *narco traficantes*—drug dealers. And some of them are heads of governments, and we sign agreements with them. There is so much money to be made from drug dealing, that our foreign assistance is not a real inducement for them to stop. It is very, very hard to stop them. There are a lot of people in America who want to keep going with this, and I don't begrudge the money we spend on it, and I don't even feel too bad about militarising our relations with Colombia and Peru—but I think everyone admits it has

not been effective. Is it different if you're dealing with these islands in the Pacific? It would be nice if there were responsible, respectable, cooperating states.

An example which is a little bit different, but similar, is that we're going to boycott diamonds from people like Foday Sankoh or his friends in Sierra Leone who got control of a diamond mine and made themselves a state. So what the United States is doing, and what other countries around the world are doing, is saying, 'Wait a minute, we don't want you to be an off-shore haven for laundering money.' Money is easier to control than diamonds, because you can track the movement of money. Maybe you can have—and in fact we do have now—cooperative agreements to try to deal with money laundering, and the important thing is not that you get the Cayman Islands to agree, it's that you get the Swiss to agree. And maybe the Swiss won't really cooperate; they'll sign and they won't really do it. You could try, but in the end you have to decide how much it's worth to you—and if it's really important to you, you have your own controls at your own border. People underestimate how many things you can control at your own border.

Question — You say that a world government is fanciful, and that may be so, but I would ask you to comment on the fact that we already have a *de facto* commercial government, with some multinational corporations having budgets bigger than some national budgets. And could you comment on the dichotomy of capitalism's globalisation as opposed to what most western countries laud, free market theory, which supposedly follows Adam Smith's tenets, which are not being followed at all.

Jeremy Rabkin — Let me just say as a disclaimer that I do not work for a multinational corporation. I just work for a non-profit university, and they don't pay me that much. And I am not one of those people who are gung ho on more free trade. I think that national sovereignty is important because I think many countries want to have more controls, and they should be allowed to. I'm not saying we should have a free trade utopia or a libertarian utopia, but it seems the common sense of the matter is—and you can say it now more confidently than you could 30 years ago—the countries that have liberalised their economy and allowed more free exchange, have done better, domestically. That seems to be the consensus of most governments in the world, which I think tells you something.

The people who are afraid of being thrown out of office at an election or because of a revolution are going in that direction, because they think that is the way to make their countries more prosperous and therefore their citizens, their voters or their would-be revolutionaries more content. It just seems to be a fact that countries do better when they have freer markets.

Now, if you suggest that this is a system of global capitalism, I think you're caught in a Marxist time warp. There are a lot of different companies competing with each other, and it's just silly to lump them all together and say, 'they just look like different companies, but really they are global capital.' They are different companies, some of whom are making money and some who are losing money. They are competing. And what comes out of that may be better for some companies than others, and for some countries than others, but that's what a free economy is. If you free up trade across the

world—and maybe you don't want to do it all the way—most people think the net result is that you will do better.

Even if you are sceptical of that, look at it from the other point of view: what is your alternative? Well, one alternative, which is perfectly legal, is to just say: 'This is a bunker, we're not trading with anyone, and that's the way we're going to get rich.' No one believes that. Australia's certainly not going to do that. So you want to have trade. Well, if you're going to have trade, then what's your alternative? You don't like the way trade is going, you want to try to have an international institution manage things? If you suggest that global capital is already managing it, you're giving yourself a really false analogy, because global capital is not organised to manage. But if you talk about what global capital is organised to manage, then it sounds plausible that—since global capital is organised—global labour should be organised, and global environmental advocacy should be organised, and on and on. Those things are really collective, they really have to be organised, and there is not that potential for collective organisation in the world, which is why trade and markets are flourishing, because they don't require as much organisation. You are talking about something that requires a lot of organisation, and I just ask you, is the world really in a position to sustain that? And finally, in the remote chance that it could actually be organised, do you really want to live there? Because if it is organised it's not going to be a democracy—and even if it is a democracy, it's not going to be a democracy in which Australia counts very much, because you are a very small part of the world's population. So why does that attract you? I don't get it.

Question — You have argued against global government largely on what I call 'pragmatic' reasons. What about philosophical reasons? Where should government reside? Both the United States and Australia are blessed with a federal system, but why should those lines on a map count somehow differently to the lines around other countries in a coloured-in map of the world? California is about the eighth biggest economy in the world—why should it be subsumed in something else?

Jeremy Rabkin — I'm very interested in this, though most people aren't. I read a lot of these classic treatises—what did they think in the Seventeenth Century when they were first talking about 'sovereignty'? I think it's pretty clear that nobody ever thought that there was a universal formula which you could lay down and say: 'You should be a country, and you shouldn't be a country.' It is pragmatic—or I would say circumstantial—that people who are able to function together as countries can be countries. People who can't function together, shouldn't try.

Australia's doing pretty well—compared to Canada, it's doing great. I would suggest that one reason for this is that you all speak English, which is a big advantage, and you have really the same accents as far as I can hear. You have a lot in common, so you have some level of trust in each other, which is important and is not something you should take for granted, as it is very valuable. When the government changes hands, which I'm sure it will in a few years, the people who voted for the Liberal Party or the National Party will then be confronted with the Labor Party—and they are not going to leave the country, and they are not going to plan a revolution. They will trust that, although it may not be their preference, they can live with it because they trust that the Labor Party would not do something really terrible to them.

Question — So if you *feel* you are a country, you *are* a country?

Jeremy Rabkin — I think it's more than that, you have to be able to make it stick. I think the Palestinians feel that they are a country—good luck, let's see how it works. I don't think Indonesia is likely to remain as one country. I don't know how many countries it will be eventually. Somebody previously mentioned these little Pacific islands—I wonder whether they will continue to be these isolated communities? It's silly to try to have an external rule that says who is allowed to be a country. I think the classic works on this had it right—it comes from the inside out, not from the outside in. You have got to be able to organise yourself to be a functioning country and then the rest of the world says: 'Well, okay, you seem to be a functioning country.'

Question — Regarding your European example, I would have thought that Europe in the late 1940s was the most impossible place for any trans-national unity to come about, because France and Germany had fought three wars in 70 years. And yet they worked something out which has been a very important development. Now we are faced with a situation like global warming. I can understand the reasons why you knock the attempts to do something about it, and yet if the reality is that we are facing these things, we've got to do something. If we can't get all countries on side, at least getting some is a start. Surely there are many different situations like that, where we have to say: 'Yes, there's a lot of pragmatic things that don't work, and yet we have to move towards a system which in certain situations has got to lead us to supra-national decisions.' How do we do it?

Jeremy Rabkin — Quite a lot of people have your view, and they agree that it is extremely difficult and that we won't get all the way there but we have to make a start. I will briefly tell you why I think that is wrong. Start with global warming and the people who think that we may not be able to do it all, but that we have to make a start. That's like trying to dam a river and saying: 'Well, we can't dam it all the way across, but we could dam it part of the way'. That's pointless.

You would need to get India and China and Brazil to agree, and I don't think you can. They are really poor countries that are struggling to feed everyone, and you can't try to tell them that in a hundred years there may be problems so they should sacrifice this generation for the sake of their great-grandchildren. They've heard enough of that—that's what Mao was saying. They don't want to do that again. They want to develop as fast as they can now. So you're not going to get them on board, and I'm pretty confident that you're not going to get the United States on board. So you'll be playing a game with the Europeans, and that would mean you're not even damming the river halfway across, you're damming it a quarter of the way across—and you're telling yourself: 'Well, at least it's a start.'

Global warming is very much in dispute—certainly people agree that surface temperatures are warmer, but question whether this is really based on greenhouse emissions, and if they were controlled whether that would make a difference. If you believe this is going to be a problem 50 years from now, you should be thinking about defensive measures. If you think sea levels are rising, you should think about building dykes. People in the audience are reacting to that, but you are proposing such a

preposterous engineering project, suggesting that everyone in the world should get together to control the atmosphere of the Earth. That is so beyond us. You should be thinking about practical defensive measures that you can take for your own territory, if that's what you are worried about. If you are not really worried about it, let's not haggle about it.

On the European Union, I agree that it's rather remarkable, and I think part of the answer is in your premise. You say that these countries were at war so often, and they were. They were really shell-shocked and demoralised, and one of the things that always comes up whenever people need to be goaded into the next step of European integration is: 'You wouldn't want to be at war with Germany again, would you?' And the Germans are constantly told: 'You wouldn't want to be at war with our neighbours.' I think that's a little sad, because it is so irrelevant and preposterous. The idea that if they didn't have a common currency then they would be sending tanks across their borders is just insane. But the fact that it is said so often shows that in some psychological way they are really shell-shocked. They also have a lot of advantages that allow them to do this. Yes, they had all these historic enmities, but the fact is they're roughly comparable in size; at least the founding members were roughly comparable in wealth; and they do have, in spite of all these enmities, quite a lot of shared cultural background.

It's more feasible to do it in Europe, but let's see how well it works. There is a lot of resentment and resistance in Europe, particularly in Britain. European countries are also very rich and to some extent they pay other countries to go along. They pay a lot of money, billions and billions—I was going to say of dollars, but I should have said of deutschmarks—flow to Spain, Greece, Ireland to keep them happy. If they can't keep up that flow, you may hear more sovereignty talk in Europe, but I certainly wouldn't look at Europe as an example that could be replicated somewhere like Latin America, which is a somewhat similar situation. It's more promising in some ways than Europe, because they have a common language (if you put Brazil aside). They have shared culture, and all of that. But they have no disposition to do it.

North America, forget it. The North American Free Trade Agreement (NAFTA) is a bit controversial, and we're not going one step beyond NAFTA, and it is nothing like the EU. There is no North American parliament, no North American court, and we're not imitating them.

In your part of the world, if you want to join with New Zealand, go ahead. I didn't realise that back in 1900, people were trying to get New Zealand to join the federation. If you want to expand to include New Zealand, fine. But the idea that you're going to go beyond that to have a kind of 'regional federation' with Indonesia—I don't believe anyone would say that out loud in this country, it's so preposterous. So what are we talking about really? Do we want to encourage China to have this with its neighbours? I don't. I'm really glad the Chinese are talking about sovereignty. That's good: you stay in your boundaries—you're very big, stay there.