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Australia's Maritime Security Challenges: Juggling International Law and Informal Agreements in an International Rules-Based Order

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I. INTRODUCTION

At its 2022 meeting, the members of the “Quad”¹ issued a joint statement in which the four States—Australia, India, Japan, and the United States—declared “Quad partners champion the free, open, and inclusive rules-based order, rooted in international law, that protects the sovereignty and territorial integrity of regional countries.”² Australia has voiced its commitment to the “rules-based order” (RBO) since 2008,³ and it has become a touchpoint of both Australian defense⁴ and foreign policy.⁵ Australia’s 2016 Defence White Paper declared: “Australia’s security and prosperity relies on a stable, rules-based global order which supports the peaceful resolution of disputes, facilitates free and open trade and enables unfettered access to the global commons to support economic development.”⁶

When the RBO is mentioned, references to international law have been bundled in or left adjacent to the rules-based order and the two terms are certainly not synonymous. In the maritime domain, the Quad partners’ recent statement also “reiterate the importance of adherence to international law, particularly as reflected in the UN Convention on the Law of the Sea (UNCLOS), to meet challenges to the maritime rules-based order, including in the South and East China Seas.”⁷

The purpose of this article is to foreground the role of international law in the rules-based order as it relates to (some of) Australia’s maritime security

1. For a description of the Quad, see Australian Government Department of Foreign Affairs and Trade, Quad, <https://www.dfat.gov.au/international-relations/regional-architecture/quad> (last visited May 5, 2022).

2. Joint Statement by the Foreign Ministers of Australia, India, and Japan and the Secretary of State of the United States: Quad Cooperation in the Indo-Pacific (Feb. 11, 2022), <https://www.foreignminister.gov.au/minister/marise-payne/media-release/quad-cooperation-indo-pacific>.

3. Ben Scott et al., *Australia’s Security and the Rules-Based Order*, LOWY INSTITUTE, <https://interactives.lowyinstitute.org/features/rules-based-order/> (last visited May 5, 2022). See also Nick Bisley & Benjamin Schreer, *Australia and the Rules-Based Order in Asia: Of Principles and Pragmatism*, 58 ASIAN SURVEY 302, 305, 307 (2018).

4. AUSTRALIAN GOVERNMENT DEPARTMENT OF DEFENCE, DEFENCE WHITE PAPER (2016).

5. AUSTRALIAN GOVERNMENT DEPARTMENT OF FOREIGN AFFAIRS AND TRADE, FOREIGN POLICY WHITE PAPER (2017).

6. DEFENCE WHITE PAPER, *supra* note 4, ¶ 2.19.

7. Quad Cooperation in the Indo-Pacific, *supra* note 2.

interests. What are the international law implications for the “rules-based order” in relation to Australia’s maritime security?

The context for this discussion is Australia’s—and the Quad’s—focus on the Indo-Pacific region and the suite of maritime security threats perceived to exist in this region. Part II seeks to provide, first, a broad-brush description of Australia’s key maritime security concerns in the Indo-Pacific and, second, an indication of what the rules-based order means in this context. Essentially, I am seeking to unpack the view that one of Australia’s strategic defense interests is a “stable Indo-Pacific region and a rules-based global order.”⁸ Part III considers, from a legal perspective, three examples of Australia’s maritime security challenges: navigation, migrant smuggling, and illegal, unreported, and unregulated (IUU) fishing. In each instance, it seems worth assessing how the rules-based order is working as a means to highlight the legal difficulties that emerge. Finally, in Part IV, the discussion observes how the maritime security issues faced by Australia are not uniquely questions relating to the law of the sea but also fundamental challenges to the operation of international law. This issue arises because of the reliance on a rules-based order and it is therefore vital to ensure a strong and central position for international law in State decision-making in responding to and preventing maritime security threats.

II. AUSTRALIA IN THE INDO-PACIFIC AND THE RULES-BASED ORDER

For Australia’s defense purposes, the Indo-Pacific stretches from “the north-eastern Indian Ocean through maritime and mainland South East Asia to Papua New Guinea and the South West Pacific.”⁹ In a broader view of the Indo-Pacific for foreign affairs, the term extends to include North Asia and the United States.¹⁰ Australia’s reference to “Indo-Pacific” rather than “Asia-Pacific” reflects an overdue recognition of interests to the west of Australia.¹¹ Across the Indo-Pacific there is a multitude of regional organizations with

8. DEFENCE WHITE PAPER, *supra* note 4, at 68. In 2020, Australia’s strategic defense update still referenced, “Australia will continue to be an active and vocal advocate for a rules-based international order designed to support economic growth, security, prosperity and our values.” AUSTRALIAN GOVERNMENT DEPARTMENT OF DEFENCE, DEFENCE STRATEGIC UPDATE ¶ 2.10 (2020).

9. *See, e.g.*, DEFENCE STRATEGIC UPDATE, *supra* note 8, at 11.

10. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 119.

11. David Brewster, *Australia Begins to Step it Up in the Northeast Indian Ocean*, THE INTERPRETER (Mar. 2, 2022), <https://www.lowyinstitute.org/the-interpretor/australia-begins-step-it-northeast-indian-ocean>.

varying mandates and memberships. Australia's participation in such arrangements informs its perspectives on different maritime security issues.

In 2020, Australia sought to respond to the changing security environment through an update of its core defense objectives as had previously been articulated in the 2016 Defence White Paper.¹² These three objectives are, in sum: “to deploy military power to shape Australia’s strategic environment, deter actions against our interests and, when required, respond with credible military force.”¹³ At first blush, these core objectives reflect most profoundly the traditional national security interests of a coastal State. However, the “actions” that are against Australia’s interests range from military threats to transnational crime and economic, social, and environmental harms. The 2020 update further referenced the increase in “grey zone” threats, which are defined in the Strategy as “activities designed to coerce countries in ways that seek to avoid military conflict.”¹⁴ The responses to these different threats are also varied and reliance on existing international governance structures, as well as allowing for the possibility of change consistent with Australia’s interests, is inherent in those responses.

Incorporated within Australia’s interests in the Indo-Pacific is the operation of the RBO. The 2016 Defence White Paper was notable for its consistent reference to the RBO,¹⁵ and the 2020 update noted that the RBO is being undermined through a variety of disruptions.¹⁶ The 2017 Foreign Policy White Paper similarly considered that “challenges to globalisation and the rules-based international order” was one of the “significant trends shaping our world.”¹⁷ The key maritime concerns for Australia in the Indo-Pacific are highlighted immediately below, and the understanding of the RBO in this context is considered thereafter.

12. The three strategic defense interests articulated in 2016 were: “deter, deny and defeat any attempt by a hostile country or non-state actor to attack, threaten or coerce Australia;” “a secure nearer region, encompassing maritime South East Asia and the South Pacific;” and “a stable Indo-Pacific region and rules-based global order which supports our interests.” DEFENCE WHITE PAPER, *supra* note 4, at 17, 33.

13. DEFENCE STRATEGIC UPDATE, *supra* note 8, at 4.

14. *Id.* ¶ 1.5.

15. There were almost fifty occasions that the RBO was mentioned. *See* Greg Redmond, *Playing by the Global Rules*, SYDNEY MORNING HERALD (Feb. 26, 2016), <https://www.smh.com.au/opinion/playing-by-the-global-rules-20160226-gn4bjv.html>.

16. DEFENCE STRATEGIC UPDATE, *supra* note 8, at 5 & ¶ 1.6.

17. FOREIGN POLICY WHITE PAPER, *supra* note 5, at v.

A. Australia's Interests in Relation to the Indo-Pacific Region

Australia's primary foreign relations focus is on the Indo-Pacific.¹⁸ In this context, Australia anticipates maintaining its strong alliance with the United States.¹⁹ While Australia still expects to undertake out-of-region defense activities, these are of seeming secondary importance to regional matters.²⁰ The extent that position will shift with the recent alliance of "AUKUS" (Australia-United Kingdom-United States) remains to be seen. As it currently stands, it may be observed that Australia's specific concerns and priorities relating to maritime security shift across the vast expanse that is the Indo-Pacific.

To the north, Australia has direct national security interests given the relative proximity of its neighbors and the need to ensure sea-lanes of communication through the Indonesian and Philippine archipelagos.²¹ From a defense perspective, the sea, air, and northern approaches of Australia are of concern for defeating or deterring any possible military incursion against Australia.²² The sea-lanes of communication are also vital for Australia's international trade and hence its economy. China remains one of Australia's most significant trading partners, despite recent and ongoing tensions, so passage through the South China Sea for commercial shipping is critical for

18. The Southern Ocean and Antarctica also hold importance for economic, military, social, and political reasons. Australia is concerned to protect the fisheries of the Southern Ocean but does not anticipate the Australian Antarctic Territory facing such a risk that a military response would be needed. DEFENCE WHITE PAPER, *supra* note 4, ¶¶ 2.56, 2.60. Australia has, though, recently announced a significant financial commitment to the Australian Antarctic Territory to "strengthen our strategic and scientific capabilities in the region." Media Release, Australian Antarctic Program, \$800 Million to Strengthen Our Leadership in Antarctica (Feb. 22, 2022), <https://www.antarctica.gov.au/news/2022/major-funding-announcement/>.

19. *See, e.g.*, DEFENCE WHITE PAPER, *supra* note 4, ¶¶ 2.8, 2.9; FOREIGN POLICY WHITE PAPER, *supra* note 5, at 4 ("Our alliance with the United States is central to Australia's approach to the Indo-Pacific").

20. DEFENCE STRATEGIC UPDATE, *supra* note 8, ¶ 2.11.

21. Bateman observed that Australia's direct national interests were more immediately the Indonesian and Philippine archipelagos. Sam Bateman, *Australia and the Freedoms of Navigation*, THE STRATEGIST (June 5, 2015), *quoted in* Christian Wirth, *Whose "Freedom of Navigation"?* *Australia, China and the United States and the Making of Order in the "Indo-Pacific,"* 32 THE PACIFIC REVIEW 475, 487 (2019).

22. DEFENCE WHITE PAPER, *supra* note 4, at 17. *See also* DEFENCE STRATEGIC UPDATE, *supra* note 8, ¶ 2.3.

both countries.²³ The UN Convention on the Law of the Sea (UNCLOS) remains the multilateral treaty of pivotal importance for Australia's navigational rights.²⁴ In addition, Australia has a high level of engagement with regional organizations to the north, including the ASEAN Regional Forum and the East Asia Summit, and there are many bilateral initiatives pursued to meet security and strategic objectives.²⁵

The movement of international commercial shipping across the Indian Ocean, west of Australia, is also of importance.²⁶ Australia's Indian Ocean interests are extensive, from environmental concerns to fishing, search and rescue responsibilities, and people smuggling. While Australia's longer-term focus has been to its north and east, into Asia and the Pacific, Australia has more recently been increasing its institutional engagement in relation to the Indian Ocean, particularly through regional structures such as the Indian Ocean Rim Association, the East Asia Summit, and the Indian Ocean Naval Symposium. Compared to Southeast Asia, the institutional governance across the Indian Ocean region is not as strong. India's importance to Australia is manifest in the Quad arrangement, Malabar naval exercises, a recent joint declaration,²⁷ and different trilateral relationships involving Australia and India.²⁸ India holds increasing economic importance for Australia, as

23. The amount of Australian trade is discussed below. *See infra* notes 62–73 and accompanying text. Strating has noted that 40 percent of China's trade passes through the South China Sea. Rebecca Strating, *Norm Contestation, Statecraft and the South China Sea: Defending Maritime Order*, 35 *THE PACIFIC REVIEW* 1, 9 (2022).

24. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

25. *See, e.g.*, Arrangement on Maritime Security Cooperation, Austl.-Indon., Nov. 17, 2017 (between the Maritime Security Agency of the Republic of Indonesia and the Australian Border Force); Agreement on Basic Principles Guiding the Settlement of Sea-Related Issues, Viet.-China, Oct. 11, 2011, <http://vietnamembassy-usa.org/news/2011/10/vn-china-basic-principles-settlement-sea-issues>.

26. "Half of the world's container traffic and one-third of bulk cargo traverses the Indian Ocean." DEFENCE WHITE PAPER, *supra* note 4, ¶ 2.92.

27. Joint Declaration on a Shared Vision for Maritime Cooperation in the Indo-Pacific, India-Austl., June 4, 2020, GOVERNMENT OF INDIA, MINISTRY OF FOREIGN AFFAIRS, MEDIA CENTER, https://mea.gov.in/bilateral-documents.htm?dtl/32730/Joint_Declaration_on_a_Shared_Vision_for_Maritime_Cooperation_in_the_IndoPacific_Between_the_Republic_of_India_and_the_Government_of_Australia.

28. Notably, one with France and another with Indonesia. *See* Rajeswari Pillai Rajagopalan, *Rise of the Minilaterals: Examining the India-France-Australia Trilateral*, *THE DIPLOMAT* (Sept. 17, 2020), <https://thediplomat.com/2020/09/rise-of-the-minilaterals-examining-the-india-france-australia-trilateral/>.

well as manifesting “common interests in upholding international law, especially in relation to freedom of navigation and maritime security.”²⁹

In relation to the Pacific Ocean to the east of Australia, Australia's approach has a strong focus on capacity building and development.³⁰ Beyond economic cooperation, Australia has sought to support Pacific Island countries with prevention and policing of transnational criminal activities, including the smuggling of people, wildlife, and drugs, as well as illegal fishing.³¹ For example, Australia has run the Australian Pacific Patrol Boats Program since 1987, which entails the provision of coast guard vessels, along with training, naval advisors, and technical and logistic support.³² Australia has traditionally been involved in regional governance structures in the Pacific, especially relating to fisheries, and through the South Pacific Defence Ministers' Meeting³³ and the Pacific Islands Forum.³⁴ Moreover, Australia considers stability in the Pacific, as well as in Timor-Leste and Papua New Guinea, as critical for security of the northern approaches to Australia and in protecting its exclusive economic zone (EEZ).³⁵

While the Indo-Pacific region thus prompts a wide variety of challenges and opportunities for Australia, what is consistent is that Australia stresses the need for stability and adherence to the RBO. Australia's Department of Defence emphasized the RBO in its 2020 strategic update: “Australia will continue to be an active and vocal advocate for a rules-based international order designed to support economic growth, security, prosperity and our values. This includes support for laws and treaties, such as the United Nations Convention on the Law of the Sea.”³⁶ This view of course begs the question as to what is the inter-relationship between the RBO and international law.

29. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 42.

30. DEFENCE WHITE PAPER, *supra* note 4, ¶¶ 2.62–2.70; FOREIGN POLICY WHITE PAPER, *supra* note 5, at 99–104.

31. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 103.

32. See Douglas Guilfoyle & Edward Chan, *Lawships or Warships? Coast Guards as Agents of (In)Stability in the Pacific and South and East China Sea*, MARINE POLICY (forthcoming 2022).

33. DEFENCE WHITE PAPER, *supra* note 4, ¶ 2.64.

34. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 99, 104.

35. *Id.* at 99.

36. DEFENCE STRATEGIC UPDATE, *supra* note 8, at 24.

B. *Understanding the Rules-Based Order and the Role of International Law*

Australian governments “have typically defined the rules-based order expansively to encompass ‘a broad architecture of international governance which has developed since the end of the Second World War.’”³⁷ In its Defence White Paper, it is noted: “The stability of the rules-based global order is essential for Australia’s security and prosperity. *A rules-based global order means a shared commitment by all countries to conduct their activities in accordance with agreed rules which evolve over time, such as international law and regional security arrangements.*”³⁸ This interpretation of the RBO includes international law within the concept of a RBO, along with “arrangements,” and accepts the possibility of the “rules” changing; though interpretations could vary as to whether international law is specifically changing or the “rules” of the RBO are more broadly evolving.

Academic commentators differ in their interpretations of the RBO, sometimes depending on the school of thought or international relations theory from which they draw.³⁹ For example, realists may consider that the RBO reflects the entrenched interests of existing powerful States and change to the RBO is only countenanced when it is intended to support the existing power of a State, whereas challenges from other States (notably China) are construed as undermining the RBO.⁴⁰ Australia’s use of the RBO is widely seen as support for an ongoing dominant role of the United States and the needs of a mid-level power trying to assert its interests between great powers.⁴¹ Institutionalists will value the inclusion of regimes and organizations as part of a RBO, highlighting the ongoing role that international organization plays in developing and reforming rules and standards of behavior to

37. Scott et al., *supra* note 3.

38. DEFENCE WHITE PAPER, *supra* note 4, at 15 (emphasis added).

39. See Melissa Conley Tyler, *Perspectives on “Rules-Based International Order,”* THE INTERPRETER (July 31, 2018), <https://www.lowyinstitute.org/the-interpreter/perspectives-rules-based-international-order>.

40. See, e.g., Nick Bisley, *Australia’s Rules-Based International Order*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (July 27, 2018), <https://www.internationalaffairs.org.au/australianoutlook/australias-rules-based-international-order/>; Nick Bisley & Benjamin Schreer, *Australia and the Rules-Based Order in Asia: Of Principles and Pragmatism*, 58 ASIAN SURVEY 302, 303 (2018).

41. Wirth, *supra* note 21, at 489–90. See also Bisley & Schreer, *supra* note 40, at 304–5.

which States choose to conform.⁴² The position or role for international law is less clear in these conceptions of the RBO;⁴³ indeed, Australia has referred to “habits of cooperation” when it could have just as easily referenced international law.⁴⁴

References to the RBO are in no way unique to Australia and feature in dialogue from a variety of other States. The United States and the United Kingdom have both utilized the term in their policy documents on national security policy.⁴⁵ Further, “Asian leaders have often advocated for a rules-based order in the region, using the term ‘rule of law.’”⁴⁶ Japan’s view of the RBO has been cast as “ensur[ing] the principles of peaceful conflict resolution, free navigation, and free trade, rather than promoting democratic regimes or human rights.”⁴⁷ The PRC Foreign Minister has stated that every nation “should protect the rules-based international order.”⁴⁸ However, “[d]espite the use of ‘rules-based’ in these statements, emphasis on the UN Charter and sovereignty demonstrate the PRC’s conception of the international order has not undergone a fundamental change.”⁴⁹ Some countries are skeptical of the RBO, considering it a means of preventing the evolution of international law or allowing for different perspectives of the regulation of international order. Russia is said to consider that some actors are trying to

42. See *If Not For Peace, Why Does Australia Favour Rules-Based Global Order?*, THE MANDARIN (Sept. 15, 2016), <https://www.themandarin.com.au/70225-rules-based-global-order-australian-shift/>.

43. See Malcolm Jorgensen, *China is Overturning the Rules-Based International Order from Within*, THE INTERPRETER (Aug. 12, 2020), <https://www.lowyinstitute.org/the-interpreter/china-overturning-rules-based-order-within>.

44. See, e.g., DEFENCE STRATEGIC UPDATE, *supra* note 8, ¶¶ 1.5, 2.6.

45. Shirley V. Scott, *The Decline of International Law as a Normative Ideal*, 49 VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 627, 638 (2018) (referring to the 2015 United States National Security Strategy and the United Kingdom’s 2015 National Security Strategy and Strategic Defence and Security Review).

46. Hitoshi Nasu & See Seng Tan, *A Rules-Based Order in the Asia-Pacific*, in PROSPECTS FOR THE RULES-BASED GLOBAL ORDER 9 (Andrew Carr ed., 2017), https://sdsc.bellschool.anu.edu.au/sites/default/files/publications/attachments/2017-06/cog_34_global_rules_based_order.pdf.

47. Nobuhiko Tamaki, *Japan’s Quest for a Rules-Based International Order: The Japan–US Alliance and the Decline of US Liberal Hegemony*, 26 CONTEMPORARY POLITICS 384, 394 (2020).

48. Simone van Nieuwenhuizen, *Australian and People’s Republic of China Government Conceptions of the International Order*, 73 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 181, 186 (2019).

49. *Id.*

replace “international law with a rules-based order founded on political expediency that serves their political, military and economic interests.”⁵⁰

As an international lawyer, there may be an initial impression that so much emphasis on the RBO in various government statements reflects a warm embrace of international law and of its relevance to managing State decision-making and States’ interactions. While there are different views on the RBO, closer examination indicates that the RBO and international law are not the same.⁵¹ International law may be considered a counter-point to coercive action;⁵² that the accepted “rules” (or is it really laws?) must be upheld in the face of deviant or undesirable behavior.⁵³ In some instances, international law seems to be incorporated within the RBO; in other instances, international law is considered in addition to the RBO. Jorgensen astutely observes that “the broader [RBO] concept holds the potential to reinforce the visibility and legitimacy of law, but also to erode what is unique about legal authority.”⁵⁴

The RBO is broader than international law, extending beyond formal sources of international law (treaty or customary international law). The RBO also encompasses the use of soft law, or non-binding or informal agreements. Such agreements are “informal,” because of the actors involved, the modes by which the agreement is reached and or because of the non-binding nature of the output.⁵⁵ In the international system, informal agreements can be useful because they create shared expectations as to the standard of conduct in relation to specific international issues. Yet, the RBO is not just hard law and soft law, but also seems to encompass “shared

50. Stefan Talmon, *Rules-Based Order v. International Law*, GERMAN PRACTICE IN INTERNATIONAL LAW, <https://gpil.jura.uni-bonn.de/2019/01/rules-based-order-v-international-law/> (Jan. 20, 2019). Malcolm Jorgensen, *The Jurisprudence of the Rules-Based Order: The Power of Rules Consistent with but Not Binding Under International Law*, 22 MELBOURNE JOURNAL OF INTERNATIONAL LAW 15 (forthcoming 2021).

51. “RBO and international law are not the same thing: international law is concerned with justice but doesn’t have anything to say about order between States. Our commitment to international law will often clash with our interest in maintaining a favourable balance of power.” Sam Roggeveen, *How Far Would Australia Go In Defence of the Rules-Based International Order?*, THE INTERPRETER (Mar. 1, 2021), <https://www.lowyinstitute.org/the-interpreter/how-far-would-australia-go-defence-rules-based-order>.

52. See, e.g., FOREIGN POLICY WHITE PAPER, *supra* note 5, at 38.

53. “Strong rules that help constrain the exercise of coercive power contribute to global security.” *Id.* at 82.

54. Jorgensen, *supra* note 50, at 8.

55. Joost Pauwelyn, *Informal International Lawmaking: Framing the Concept and Research Questions*, in INFORMAL INTERNATIONAL LAWMAKING 22 (Joost Pauwelyn et al. eds., 2013).

norms”⁵⁶ or governance structures or arrangements. It is not just agreements, but the processes and institutions that produce the agreements, monitor them, and potentially engage in their revision. The RBO definitely anticipates that the rules will evolve over time, but the extent to which evolution is agreed seemingly depends on the accepted authority of the actor or actors seeking to change the rules.⁵⁷

The relevance of these different theoretical understandings may not be immediately apparent.⁵⁸ However, when examined in relation to some of the specific maritime security issues that Australia is facing, there is an opportunity to test what adherence to the RBO might mean, particularly in relation to the role of international law. It is suggested that distinguishing the RBO—encompassing formal law, informal law, and organizations—from international law does matter and greater affirmation of international law, as opposed to the RBO, is needed. This point is revealed through a consideration of different maritime security concerns for Australia and the legal implications of those issues.

III. AUSTRALIA'S MARITIME SECURITY THREATS AND INTERNATIONAL LAW IN THE RULES-BASED ORDER

Australia has not adopted a specific definition of “maritime security,” but rather its conception of maritime security is a matter of perspective for different stakeholders.⁵⁹ David Letts has indicated there is both a “macro” dimension, which is the concern of the Departments of Defence and of Foreign Affairs, as well as a “micro” dimension, which is the focus for the Department of Home Affairs and the Australian Border Force.⁶⁰ As a general matter, what constitutes maritime security extends beyond immediate defense interests to concerns about varied harms to economic, political, and

56. See Shirley Scott, *In Defense of the International Law-Based Order*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (Jun. 7, 2018), <https://www.internationalaffairs.org.au/australianoutlook/in-defense-of-the-international-law-based-order/>; Jorgensen, *China is Overturning the Rules-Based International Order from Within*, *supra* note 43.

57. Bisley and Schreer argue that the RBO is concerned with preventing China from upsetting the existing status quo of the western, liberal focus of the RBO. Bisley & Schreer, *supra* note 40, at 311.

58. *But see* Scott, *supra* note 56.

59. David Letts, *Australia's Conception of Maritime Security*, ASIA MARITIME TRANSPARENCY INITIATIVE (Dec. 9, 2021), <https://amti.csis.org/australias-conceptualization-of-maritime-security/>.

60. *Id.*

social interests. This broader understanding of maritime security is utilized in selecting three case studies for assessing the role of international law in the RBO.

The discussion in this Part focuses first on navigation through the South China Sea, as many of the conflicts and responses to tensions in this region serve to illustrate the contrasts that exist between the RBO and international law.⁶¹ In any event, the legal questions that emerge have broader applicability. As noted above, Australia's interest in navigation is not limited to the northern approaches to Australia—there is increasing awareness of the importance of the Indian Ocean for the movement of people and goods. The legal principle of the freedom of navigation is of central importance, but ambiguities in interpretation and application may undermine the value of this principle in international discourse.

Second, the discussion compares the situation with Australia's border security in relation to migration by sea. The legal framework within which Australia operates to control maritime migration perhaps has less ambiguity compared to the legal principles supporting the exercise of navigational rights. Instead, deflecting applicable international law requirements through use of a RBO appears to be the preferred *modus operandi*.

Finally, this Part considers the legal frame responding to illegal, unreported, and unregulated (IUU) fishing. This example provides a positive example of the symbiotic relationship of international law with the RBO. In this instance, the use of informal agreements and the bolstering of regional arrangements are consistent with and complementary to international legal rights and obligations. Yet problems posed by IUU fishing remain.

A. Freedom of Navigation and the South China Sea

Australia's navigational interests to the north include being able to transit through the Indonesian archipelago and reach important ports in southeast and north Asia.⁶² The importance of the South China Sea for Australia's trade has been described differently: Bonnie Glaser estimated that 60 percent

61. Strating notes that the South China Sea is "totemic" of a shifting balance of power in the region. Strating, *supra* note 23, at 25.

62. Dale Stephens, *The Legal Efficacy of Freedom of Navigation Assertions*, 80 INTERNATIONAL LAW STUDIES 235, 242 (2006).

of Australia's trade traverses the South China Sea,⁶³ whereas Sam Bateman suggested it was less than half that amount.⁶⁴ Australia's defense interests in this area include concerns about coercive paramilitary activities, disputed territory, and the militarization of the South China Sea.⁶⁵

The legal challenges for navigation that Australia faces, and particularly in relation to the South China Sea, are manifold. First, the freedom of navigation is critically important for the passage of commercial shipping to ensure the continuous movement of goods between export and import markets. These rights are clearly protected in UNCLOS: in the territorial sea through the existence of the right of innocent passage;⁶⁶ through international straits subject to the regime of transit passage;⁶⁷ the availability of archipelagic sea-lanes passage through archipelagic States;⁶⁸ in the EEZ while showing due regard to the EEZ rights of the coastal State;⁶⁹ and on the high seas⁷⁰ through the existence of high seas freedoms.

While navigational rights for commercial shipping have not been directly challenged, Australian trade was hampered in 2020–2021 when ships carrying Australian goods were barred from unloading in Chinese ports.⁷¹ This issue was not so much about the freedom of navigation under UNCLOS as it was about customary law rights for access to ports and international trade rules.⁷² The inability to deliver goods in a timely manner further prompted

63. Bonnie Glaser, *High Stakes for Australia in Limiting China's South China Sea Incursions*, THE AGE (May 22, 2015), <https://www.theage.com.au/opinion/high-stakes-for-australia-in-limiting-chinas-south-china-sea-incursions-20150521-gh6nww.html>. Australia's 2016 Defence White Paper aligns with this view: "Nearly two thirds of Australia's exports pass through the South China Sea, including our major coal, iron ore and liquefied natural gas exports." DEFENCE WHITE PAPER, *supra* note 4, at 57.

64. Sam Bateman, *What are Australia's Interests in the South China Sea*, THE STRATEGIST (May 28, 2015), <https://www.aspistrategist.org.au/what-are-australias-interests-in-the-south-china-sea/>.

65. DEFENCE STRATEGIC UPDATE, *supra* note 8, at 5, 12. *See also* Strating, *supra* note 23, at 8–9.

66. UNCLOS, *supra* note 24, art. 17.

67. *Id.* art. 38.

68. *Id.* art. 53.

69. *Id.* art. 58.

70. *Id.* art. 87(1).

71. Yan Zhuang, *Sailors Stranded for Months as China Refuses to Let Ships Unload Australian Coal*, NEW YORK TIMES (Dec. 26, 2020), <https://www.nytimes.com/2020/12/26/business/coal-ships-china-australia.html>.

72. General Agreement on Tariffs and Trade art. 5, Oct. 30, 1947, 61 Stat.A-11, 55 U.N.T.S 194.

legal questions about contracts for the carriage of goods and labor contracts where crews were held on board for lengthy periods of time.⁷³

Second, navigation is an issue in relation to the movement of warships and other State vessels and their associated activities. These ships are entitled to the freedom of navigation comparable to commercial ships⁷⁴ and further enjoy immunity from the exercise of jurisdiction by other States.⁷⁵ Yet various complications arise in relation to naval vessels' enjoyment of navigational rights. One challenge is a coastal State's purported requirement for warships to either notify or seek authorization from the coastal State prior to traversing the territorial sea. The International Court of Justice in the *Corfu Channel* case stated:

It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas *without the previous authorization of a coastal State*, provided that the passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace.⁷⁶

This rule was not changed with the adoption of UNCLOS, and over forty States maintain conditions of notice or permission for warship passage in the territorial sea, despite protests against this position.⁷⁷

Another challenge in relation to naval vessels is the permissibility of different military activities in the EEZ of another State. Such military activities are considered an internationally lawful use of the sea related to the freedom of navigation and are permissible if they show due regard to the rights of the coastal State and do not constitute a threat or use of force in violation of Article 2(4) of the UN Charter or Article 301 of UNCLOS. Further, the legality of military research in the EEZ is sometimes contested on the basis that such research falls within the exclusive jurisdiction of the coastal State

73. Kai Feng, *Crew Trapped at Sea Due to China's Ban on Australian Coal Reunite with Family After Seven Months*, ABC NEWS (Feb. 3, 2021), <https://www.abc.net.au/news/2021-02-03/crew-caught-in-china-ban-on-australian-coal-returns-home/13111622>.

74. See *supra* notes 66–73 and accompanying text.

75. UNCLOS, *supra* note 24, arts. 32, 95, 96.

76. *Corfu Channel Case* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 28 (Apr. 9) (emphasis added).

77. See, e.g., John E. Noyes, *The Territorial Sea and Contiguous Zone*, in OXFORD HANDBOOK OF THE LAW OF THE SEA 91, 99 (Donald R. Rothwell et al. eds., 2015).

as a form of marine scientific research rather than as another freedom of the seas permitted under Article 58.⁷⁸ There is no definition of “marine scientific research” in UNCLOS to resolve this question definitively. Finally, contested territorial sovereignty over islands and rocks results in undelimited maritime boundaries, which in turn affects the characterization of maritime zones and concomitant rights and duties of different States in those zones. General principles of international law, such as the principle of non-aggravation of disputes and prohibition on abuse of rights, still apply in this situation.⁷⁹

Thus, while the exercise of navigational rights may be contested in different situations because of varied interpretations of the law and shifting fact patterns, the key point is that binding treaty obligations and customary international law exist and apply. International law is central to the resolution of these differences.⁸⁰

A third maritime security threat to navigational rights in the South China Sea concerns the exercise of law enforcement powers. This issue relates in some instances to the aforementioned point concerning disputed sovereignty and contested rights and duties in different maritime zones. Yet China's law enforcement practices by its Coast Guard and armed fishing vessels prompt additional questions as to the legality of those actions. Rules of attribution in the customary international law of State responsibility are potentially relevant,⁸¹ and the parameters on the permissible use of force in the context of law enforcement are also set in customary international law.⁸² While contested maritime zones and differing factual scenarios may make the application of the law difficult, it should again be a core consideration in decision-making on responses to contested assertion of rights in the South China Sea.

Australia has sought to assert its interpretation of international law in its inter-State interactions relating to navigation. Unlike the United States, Aus-

78. Wirth, *supra* note 21, at 481–82.

79. See YOURI VAN LOGCHEM, *THE RIGHTS AND OBLIGATIONS OF STATES IN DISPUTED MARITIME AREAS* 74–89 (2021).

80. See Strating, *supra* note 23, at 13.

81. Rob McLaughlin, *The Law of the Sea, Status and Message Ambiguity*, in *LAW OF THE SEA IN SOUTH EAST ASIA: ENVIRONMENTAL, NAVIGATIONAL AND SECURITY CHALLENGES* 136, 145–47 (Donald R. Rothwell & David Letts eds., 2020).

82. *M/V Saiga (No. 2)* (St. Vincent v. Guinea), Judgment, July 1, 1999, ITLOS Rep. 10, 61, ¶¶ 155–56.

tralia does not maintain a specific program of “freedom of navigation operations.”⁸³ Australia instead has an informal freedom of navigation program that began in the mid-1990s and, similarly to the United States, seeks to combine at-sea action with diplomatic exchanges.⁸⁴ In addition, Australia undertakes maritime surveillance flights through Operation Gateway in the South China Sea, as well as in the North Indian Ocean.⁸⁵ These flights are considered presence operations rather than involving an assertion of legal rights equivalent to the purposes of freedom of navigation operations.⁸⁶

Within the South China Sea, Australia has previously avoided sending warships through waters that China claims as territorial sea.⁸⁷ However, the Australian Navy does sail through the South China Sea and, in at least one instance, has been closely followed by the Chinese military and reportedly had what were called “unplanned interactions” in July 2020.⁸⁸ A statement issued by Australia’s Department of Defence at the time observed that the interactions “were conducted in a safe and professional manner.”⁸⁹ This statement alludes to an underlying treaty regime of the Convention on the International Regulations for Preventing Collisions at Sea (COLREGs), which binds Australia and China, as well as 160 other States, including the United States.⁹⁰

The Western Pacific Naval Symposium has sought to further address the tensions that emerge during encounters of warships in the region through

83. Stephen Dziedzic, *Australia Reaffirms American Alliance But Resists Push For Further Exercises in South China Sea*, ABC NEWS (July 29, 2020, 8:06 AM), <https://www.abc.net.au/news/2020-07-29/ausmin-talks-defence-south-china-sea-darwin-fuel-reserve/12501548>; Sam Bateman, *Some Thoughts on Australia and the Freedoms of Navigation*, 11 SECURITY CHALLENGES 57, 62 (no. 2, 2015).

84. Stephens, *supra* note 62, at 242.

85. Australian Government Department of Defence, Operation Gateway, <https://www.defence.gov.au/operations/gateway-south-china-sea-and-indian-ocean> (last visited May 5, 2022).

86. Malcolm Cook, *Australia’s South China Sea Challenges*, LOWY INSTITUTE: POLICY BRIEF (May 26, 2021), <https://www.lowyinstitute.org/publications/australia-coming-south-china-sea-challenges>.

87. *Id.*; Bisley & Schreer, *supra* note 40, at 314.

88. Andrew Greene, *Australian Warships Encounter Chinese Navy in Contested South China Sea*, ABC NEWS (July 22, 2020, 10:44 PM), <https://www.abc.net.au/news/2020-07-23/australian-warships-encounter-chinese-navy-south-china-sea/12481514>.

89. *Id.* (quoting the Department of Defence statement).

90. Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459, 1050 U.N.T.S. 16.

the adoption of an informal instrument, the Code for Unplanned Encounters at Sea (CUES).⁹¹ ASEAN and China have agreed that the CUES should apply in the South China Sea.⁹² Although the CUES has as its purpose “establishing international standards,” the document is very clear as to the status of the CUES as non-binding as a legal matter.⁹³ Supporting the standards set out in the CUES aligns with adherence to the RBO. Arguably, the CUES provides more details on what may be expected from warships in demonstrating adherence to a requirement of due regard to other users of the high seas or EEZ.⁹⁴ Yet the utility in providing more substance to a binding rule in UNCLOS or the COLREGs is limited, precisely because it is a non-binding agreement. Moreover, the CUES has its limitations from an operational perspective, as recognized by various commentators, because its scope of application is limited to warships and is only for unplanned (not planned) encounters.⁹⁵

Rather than increasing direct confrontations or operations at sea, Australia has instead issued a *note verbale* at the United Nations in which it objected to how China used straight baselines to encircle island groups within the South China Sea.⁹⁶ Australia also rejected the legality of claiming territorial sea from submerged features and low-tide elevations as inconsistent with

91. Western Pacific Naval Symposium, Code for Unplanned Encounters at Sea: Version 1.0 (Apr. 22, 2014), <https://wpns2020.navy.mil.ph/files/CUES.pdf> [hereinafter CUES].

92. Sultan of Brunei et al., Joint Statement on the Application of the Code for Unplanned Encounters at Sea in the South China Sea (Sept. 7, 2016), <https://asean.org/wp-content/uploads/2016/09/Joint-Statement-on-the-Application-of-CUES-in-the-SCS-Final.pdf>.

93. “The document is not legally binding; rather, it’s a coordinated means of communication to maximise safety at sea.” CUES, *supra* note 91, ¶ 1.1.1.

94. Natalie Klein, *The Use of Informal Agreements to Enhance Navigational Safety*, in UNCONVENTIONAL LAWMAKING IN THE LAW OF THE SEA 137, 148 (Natalie Klein ed., 2022).

95. See e.g., James Kraska, *Maritime Confidence-Building Measures for Navigation in the South China Sea*, 32 INTERNATIONAL JOURNAL OF MARINE AND COASTAL JOURNAL LAW 268, 294 (2017); Anh Duc Ton, *Code for Unplanned Encounters at Sea and Its Practical Limitations in the East and South China Seas*, 9 AUSTRALIAN JOURNAL OF MARITIME & OCEAN AFFAIRS 227, 232 (2017); Mark J. Valencia, *The US-China MOU on Air and Maritime Encounters*, THE DIPLOMAT (Nov. 17, 2014), <https://thediplomat.com/2014/11/the-us-china-mou-on-air-and-maritime-encounters/>.

96. Letter No. 20/026 from the Permanent Mission of Australia to the Secretary General of the U.N. (July 23, 2020), https://www.un.org/depts/los/clcs_new/submissions_files/mys_12_12_2019/2020_07_23_AUS_NV_UN_001_OLA-2020-00373.pdf.

Article 13 of UNCLOS.⁹⁷ The statement was notable because of its categorical views about which of China's actions Australia considered to be in violation of UNCLOS. It is arguably more helpful to affirm specific rules rather than make general references to the freedom of navigation and UNCLOS as a whole, because it reflects an attitude of transparency and accountability. The United States has also utilized this approach through the State Department's *Limits in the Seas* publication, which recently undertook a close analysis of China's use of straight baselines around groups of islands in the South China Sea.⁹⁸

It is good for Australia to stand firm on these specifics of international law. Emphasizing the COLREGS, rather than CUES, would also be beneficial.⁹⁹ It should be asked whether binding rules of international law are somehow denigrated or relegated in instruments that are explicitly stated to be non-binding? For example, the inclusion of navigational rights within the future Code of Conduct for the South China Sea may carry this risk if it is a non-binding instrument. Care must be taken not to diminish treaty rules through informal instruments. If the future Code of Conduct prohibits military surveillance in the EEZ, it may be argued that this agreement reflects State practice that contributes to the formation of a new rule of customary international law. Emphasizing the RBO instead of international law may be detrimental to the very rules of international law that are considered politically or strategically important to protect interstate relations.

B. *Australia and Maritime Migration*

Turning to another of Australia's maritime security challenges, both to its north and west, Australia regularly seeks to reduce, if not eliminate, irregular migration by sea. Boat migration, as it is sometimes called, has been an issue for Australia since the 1970s but became a greater focal point at the turn of the century. Catalyzing significant legal and policy changes was the 2001 rescue of over four hundred migrants by the Norwegian vessel, the *Tampa*, and

97. *Id.*

98. See U.S. DEP'T OF STATE, OFFICE OF OCEAN AND POLAR AFFAIRS, LIMITS IN THE SEAS NO. 150, PEOPLE'S REPUBLIC OF CHINA: MARITIME CLAIMS IN THE SOUTH CHINA SEA (Jan. 2022), <https://www.state.gov/limits-in-the-seas/>.

99. A joint task group, Indo-Pacific Endeavour, has a component of upholding the COLREGs through routine practice. Strating, *supra* note 23, at 18.

its attempted arrival at the Australian offshore territory of Christmas Island.¹⁰⁰ The *Tampa* incident prompted sweeping changes to Australia's migration laws, as well as the institution of Operation Relex, which involved interdiction of migrant vessels and their removal from Australia's waters.¹⁰¹ Australia subsequently initiated Operation Sovereign Borders, which has involved the towing of migrant vessels to the outskirts of Indonesia's territorial sea or the replacement of the migrant vessels with suitably equipped life rafts, again taken to the edge of Indonesia's territorial sea.¹⁰² Operation Sovereign Borders has also encountered vessels leaving from India and attempting to cross the Indian Ocean.¹⁰³

Australia's responses to the challenges arising from boat migration are skewed in favor of national security.¹⁰⁴ However, there are treaty obligations to which Australia must adhere in responding to irregular migration by sea. Most notably, Australia has obligations under UNCLOS,¹⁰⁵ the Safety of Life at Sea Convention,¹⁰⁶ and the Search and Rescue Convention to rescue persons in distress at sea and take them to a place of safety.¹⁰⁷ Australia has a

100. The facts and relevant legal principles are discussed in Donald R. Rothwell, *The Law of the Sea and the MV Tampa Incident: Reconciling Maritime Principles with Coastal State Sovereignty*, 13 PUBLIC LAW REVIEW 118 (2002); see also Anthony Heiser, *Border Protection: UNCLOS and the MV Tampa Incident 2001*, 16 AUSTRALIAN AND NEW ZEALAND MARITIME LAW JOURNAL 84 (2002).

101. Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 661 (2002); Mary Crock, *In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows*, 12 PACIFIC RIM LAW AND POLICY JOURNAL 49 (2003).

102. Andreas Schloenhardt & Colin Craig, *Turning Back the Boats: Australia's Interdiction of Irregular Migrants at Sea*, 27 INTERNATIONAL JOURNAL OF REFUGEE LAW 536, 550–89 (2015).

103. Violeta Moreno-Lax et al., *Between Life, Security and Rights: Framing the Interdiction of "Boat Migrants" in the Central Mediterranean and Australia*, 32 LEIDEN JOURNAL OF INTERNATIONAL LAW 733–34 (2019).

104. "In its manifestation as a multilateral regional process, the Bali Process arose out of a regional 'securitized' discourse on irregular migration which began in the 1990s." Susan Kneebone, *The Bali Process and Global Refugee Policy in the Asia-Pacific Region*, 27 JOURNAL OF REFUGEE STUDIES 596, 599 (2014). See also Daniel Ghezlbash et al., *Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia*, 67 INTERNATIONAL & COMPARATIVE LAW QUARTERLY 315 (2018).

105. UNCLOS, *supra* note 24, art. 98.

106. International Convention for the Safety of Life at Sea, Nov. 1, 1974, 32 U.S.T. 47, 1184 U.N.T.S. 278.

107. International Convention on Maritime Search and Rescue, Apr. 27, 1979, T.I.A.S. No. 11,093, 1405 U.N.T.S. 119.

large search and rescue zone covering much of the Indian Ocean and extending northwards to Indonesia for which it has primary responsibility to make arrangements for rescued persons to be disembarked.¹⁰⁸ Ambiguities in some of the requirements under the Search and Rescue Convention (such as the meaning of “place of safety”) are addressed in a set of guidelines, an informal agreement, adopted under the auspices of the International Maritime Organization following the *Tampa* incident.¹⁰⁹

International human rights obligations are also applicable to Australia when Australian authorities intercept vessels transporting migrants either in Australia’s territorial sea or when those authorities exercise effective control over the vessel.¹¹⁰ The UN Human Rights Committee has also recently recognized that human rights obligations are owed when a State exercises effective control for a rescue operation, as the engagement in the rescue may give rise to “a direct and reasonably foreseeable causal relationship between the States parties’ acts and omissions and the outcome of the operation.”¹¹¹ Moreover, the specific factual scenario of a rescue, coupled with law of the sea obligations on search and rescue, may also create “a special relationship of dependency” between the individuals on the vessel in distress and a State, attracting human rights obligations.¹¹²

Possible human rights issues include the prohibition on *non-refoulement*, which prevents migrants from being returned to places where they face torture or other cruel, inhuman, or degrading treatment,¹¹³ and the right to an

108. Int’ Maritime Org., *Guidelines on the Treatment of Persons Rescued at Sea*, IMO Doc. MSC 78/26/Add.2, ¶ 6.7 (May 20, 2014), [https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MS.167%20\(78\).pdf](https://wwwcdn.imo.org/localresources/en/OurWork/Facilitation/Documents/MS.167%20(78).pdf).

109. *Id.* ¶¶ 6.12–18.

110. The applicability of human rights based on effective control has been recognized in international human rights law. *See, e.g.*, U.N. Human Rights Comm., *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 10 (May 26, 2004); U.N. Comm. Against Torture, *Concluding Observations: United States of America*, U.N. Doc. CAT/C/USA/C/2, ¶ 20 (2006).

111. U.N. Human Rights Comm., Decision Adopted by the Committee Under the Optional Protocol, Concerning Communication No. 3043/2017, U.N. Doc. CCPR/C/128/D/3043/2017, ¶¶ 6.5–6.7 (Apr. 28, 2021).

112. U.N. Human Rights Comm., Views Adopted by the Committee Under Art 5(4) of the Optional Protocol, Concerning Communication No. 3042/2017, U.N. Doc. CCPR/C/130/D/3042/2017, ¶ 7.8 (Apr. 28, 2021).

113. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, T.I.A.S. 94-1120.1, 1465 U.N.T.S. 85. Article 7 of the International Covenant on Civil and Political Rights has also been interpreted to similar

effective remedy.¹¹⁴ Under international refugee law, migrants seeking asylum are entitled to a right to have their status determined,¹¹⁵ and not to be returned to the place of persecution.¹¹⁶ Most particularly, the right to life includes “an obligation for States parties to adopt any appropriate laws or other measures in order to protect life from all reasonably foreseeable threats.”¹¹⁷ Australia is bound to act consistently with these international law obligations.

Australia could be accused of cherry-picking its preferred rules when it comes to a RBO because it places little emphasis on international refugee law or international human rights law in its responses to irregular migration by sea and in implementing these international obligations.¹¹⁸ For example, concerns have been raised under international refugee law where Australia has sought to return Sri Lankan migrants to Sri Lanka.¹¹⁹ A recent Australia Border Force initiative has seen the delivery of drones to Sri Lanka to be used for aerial surveillance to counter people-smuggling operations as well as other possible crimes at sea.¹²⁰ This surveillance raises a range of legal questions as to whether the use of maritime autonomous vehicles can fully meet search and rescue obligations and whether the State supplying such

effect. See U.N. Human Rights Comm., *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, at 30–33 (July 29, 1994).

114. International Covenant on Civil and Political Rights art. 2(3)(a), Dec. 16, 1966, T.I.A.S. 92-908, 999 U.N.T.S. 171 [hereinafter ICCPR].

115. Implicit in the obligation of *non-refoulement*. Andreas Fischer-Lescano et al., *Border Controls at Sea: Requirements Under International Human Rights and Refugee Law*, 21 INTERNATIONAL JOURNAL OF REFUGEE LAW 256, 284–285 (2009).

116. Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. 6577, 606 U.N.T.S. 267.

117. U.N. Human Rights Comm., *supra* note 112, ¶ 8.3 (citing General Comment 36, ¶ 18). The right to life is enshrined in Article 6(1) of the ICCPR. ICCPR, *supra* note 114, art. 6(1).

118. Moreno-Lax et al., *supra* note 103, at 734–39.

119. One such incident prompted a challenge before the High Court of Australia, albeit focusing on Australian law rather than international law. *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 51 (Austl.).

120. Press Release, Australian Federal Police, Australia and Sri Lanka Strengthen Ties Over Aerial Drone Surveillance (Apr. 9, 2021), <https://www.afp.gov.au/news-media/media-releases/australia-and-sri-lanka-strengthen-ties-over-aerial-drone-surveillance>.

information could still be responsible for violating human rights.¹²¹ Even in the context of suppression of the transnational crime of migrant smuggling, these efforts do not trump the human rights obligations owed to the smuggled individuals.¹²²

It must be recalled that the RBO is not only concerned with formal sources of international law, but also regional arrangements that support strategic endeavors. This perspective is consistent with the view from Australia's Foreign Policy White Paper: "To support a balance in the Indo-Pacific favourable to our interests and promote an open, inclusive and rules-based region, Australia will also work more closely with the region's major democracies, bilaterally and in small groupings."¹²³ To this end, Australia has entered into memoranda of understanding with Papua New Guinea and Cambodia for resettlement of refugees and other migrants who seek to enter Australia unlawfully.¹²⁴ The legality of these arrangements under international human rights law has been rightly questioned.¹²⁵

Yet most notable in this regional engagement has been Australia's co-chairing of the Bali Process with Indonesia. The Bali Process was established in 2002 as "a forum for policy dialogue, information sharing and practical cooperation to help the region" address, *inter alia*, migrant smuggling.¹²⁶

121. Issues that are already acute in the Mediterranean. See Natalie Klein, *Maritime Autonomous Vehicles and International Laws on Boat Migration: Lessons from the Use of Drones in the Mediterranean*, 127 MARINE POLICY 10447 (2021).

122. Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organised Crime art. 19, Nov. 15, 2000, T.I.A.S. 13127, 2241 U.N.T.S. 480.

123. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 4.

124. Memorandum of Understanding, Regional Resettlement Arrangement, Austl.-Papua N.G., July 19, 2013; Memorandum of Understanding between the Government of the Independent State of Papua New Guinea and the Government of Australia, Relating to the Transfer to, and Assessment and Settlement in, Papua New Guinea of Certain Persons, and Related Issues, Aug. 6, 2013, <https://www.dfat.gov.au/geo/papua-new-guinea/Pages/memorandum-of-understanding-between-the-government-of-the-independent-state-of-papua-new-guinea-and-the-government-of-austr>; Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of Australia Relating to the Settlement of Refugees in Cambodia, Sept. 26, 2014. On the latter agreement, see ANDREW & RENATA KALDOR CENTRE FOR INTERNATIONAL REFUGEE LAW, THE AUSTRALIA-CAMBODIA REFUGEE DEAL (2019).

125. See, e.g., Azadeh Dastyari, *Detention of Asylum Seekers in Nauru: Is Deprivation of Liberty by any Other Name Just as Unlawful?*, 38 UNSW LAW JOURNAL 669 (2015).

126. See Bali Process, About the Bali Process, <https://www.baliprocess.net/> (last visited May 5, 2022). It was pre-dated by other regional initiatives. See Susan Kneebone, *The*

Australia has been accused of holding a dominant position in the Bali Process and using it as a vehicle to advance its policy objective of preventing irregular migration.¹²⁷ From 2011, the participants in the Bali Process devised a Regional Cooperation Framework, which entailed a set of “principles” and “considerations.”¹²⁸ This Framework is overseen by a Regional Support Office to facilitate activities such as capacity-building, information sharing, and resource sharing.¹²⁹ Australia has described the Bali Process as “the only mechanism in the Indo–Pacific addressing irregular migration.”¹³⁰

There is undoubtedly an important place for mechanisms that promote information sharing and cooperation, as well as allowing for capacity building. These dimensions are critical for a stable Indo-Pacific region. In this regard, it makes sense for the RBO to encapsulate these sorts of initiatives, which are intended to take legal frameworks into account.¹³¹ Yet undertakings such as the Bali Process should not come at the expense of applicable international laws. The 2016 Declaration does reference international law generally: recognizing that States are to determine their migration policies consistently with international law,¹³² that involuntary return may occur

Bali Process and Global Refugee Policy in the Asia-Pacific Region, 27 JOURNAL OF REFUGEE STUDIES 596, 599 (2014).

127. See, e.g., Sebastien Moretti, *Between Refugee Protection and Migration Management: The Quest for Coordination Between UNHCR and IOM in the Asia-Pacific Region*, 42 THIRD WORLD QUARTERLY 34, 41–42 (2021); JOSEPH H. DOUGLAS & ANDREAS SCHLOENHARDT, COMBATING MIGRANT SMUGGLING WITH REGIONAL DIPLOMACY: AN EXAMINATION OF THE BALI PROCESS 24 (2012).

128. Foreign Ministers of Indonesia and Australia, Fourth Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, Bali, Indonesia, 29–30 March 2011 Co-Chairs’ Statement, [https://www.baliprocess.net/UserFiles/baliprocess/File/110330_FINAL_Ministerial_Co-chairs%20statement%20BRMC%20IV\(2\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/110330_FINAL_Ministerial_Co-chairs%20statement%20BRMC%20IV(2).pdf) (last visited May 5, 2022).

129. Melissa Curley & Kahlia Vandyk, *The Securitisation of Migrant Smuggling in Australia and its Consequences for the Bali Process*, 71 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 42, 46 (2017).

130. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 72.

131. Though the 2018 Declaration refers to taking account of national laws rather than international laws. Declaration of the Seventh Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime, ¶ 1 (Aug. 7, 2018), [https://www.baliprocess.net/UserFiles/baliprocess/File/BPMC%207%20Ministerial%20Declaration-Final\(2\)\(2\).pdf](https://www.baliprocess.net/UserFiles/baliprocess/File/BPMC%207%20Ministerial%20Declaration-Final(2)(2).pdf) [hereinafter 2018 Bali Declaration].

132. Bali Declaration on People Smuggling, Trafficking in Persons and Related Transnational Crime, The Sixth Ministerial Conference of the Bali Process, ¶ 3 (Mar. 23, 2016) [hereinafter 2016 Bali Declaration].

where consistent with human rights and humanitarian laws,¹³³ and that the collective response “should promote . . . full respect for human rights and fundamental freedoms.”¹³⁴ It seems problematic to exhort the application of human rights law in a non-binding instrument when those obligations are formally binding. Formal international law matters in Australia’s interactions with its neighbors more than reliance on the RBO.¹³⁵ Where certain rights of affected individuals are recognized in the 2016 Declaration, acknowledgment is also afforded to domestic laws and policies in that context.¹³⁶ The emphasis remains on suppression of people smuggling and supporting law enforcement efforts.¹³⁷

The 2018 Declaration affirms the earlier commitments of the 2016 Declaration,¹³⁸ but otherwise the only international law noted in the 2018 Declaration are the two Global Compacts on Refugees and for Safe, Orderly and Regular Migration as “frameworks for international cooperation.”¹³⁹ The Global Compacts are important but non-binding agreements. Instead, commentators and the UN High Commission for Refugees have raised concerns about the failure of the Bali Process to engage and promote refugee protection.¹⁴⁰

In 2022, the Bali Process celebrates its twentieth anniversary and its scale and operations as a regional mechanism to respond to transnational crimes reflects a governance model that is intended to foster cooperation, allow for stakeholder engagement beyond State actors, and provide practical mechanisms to address migrant smuggling and people trafficking. Australia’s support for the RBO in this context encompasses not only the law enforcement

133. *Id.* ¶ 10.

134. *Id.* ¶ 4.

135. Gregory V. Raymond, *Advocating the Rules-Based Order in an Era of Multipolarity*, 73 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 219, 224 (2019).

136. “We welcome provision of resettlement places which allow refugees to start new lives in safety, subject to the domestic laws and policies of member states.” 2016 Bali Declaration, *supra* note 132, ¶ 9; “We encourage member states to explore potential temporary protection and local stay arrangements for asylum seekers and refugees, subject to domestic laws and policies of member states.” *Id.* ¶ 6.

137. *Id.* ¶¶ 8, 13.

138. 2018 Bali Declaration, *supra* note 131, ¶ 2.

139. *Id.* ¶ 6.

140. Moretti, *supra* note 127, at 41–42; Dian Septiari, *UN Calls Out Failure of Bali Process in Saving Lives of Stranded Refugees*, JAKARTA POST (Sept. 8, 2020), <https://www.thejakartapost.com/seasia/2020/09/08/un-calls-out-failure-of-bali-process-in-saving-lives-of-stranded-refugees.html>. These concerns pre-date the 2018 Declaration. See Kneebone, *supra* note 126, at 608–10.

rules set out in binding treaties, but also embraces informal agreements reflecting those efforts and institutions that contribute to those objectives. This RBO uses international law selectively, however. Reliance on the RBO in this instance not only allows Australia to perpetuate its preferred emphasis on security over human rights obligations, but also shelters other regional actors that have failed to ratify international human rights treaties and/or the Refugee Convention, or that deny the applicability of relevant customary international law. Australia's inconsistent observance of international law requirements risks its credibility in challenging other States' adherence to international law in situations where Australia depends on international law.¹⁴¹

C. Australia and IUU Fishing

The problem of IUU fishing is global and not limited to the Indo-Pacific. Australia has evinced interest in managing fishing in its EEZ,¹⁴² which is the third largest in the world, as well as in the oceans and seas surrounding Australia. For Australia, "IUU fishing risks millions of dollars of investment and thousands of jobs . . . IUU fishing threatens the Australian harvest of fish stocks both within and beyond the Australian Fishing Zone, and thus impacts fishing industries and communities in Australia and in neighbouring countries."¹⁴³

International and regional treaties have played a critical role in Australia's efforts in conserving and managing its own fisheries and in high seas areas immediately beyond Australia's EEZ.¹⁴⁴ This section highlights Australia's deep engagement both with international law and in relation to informal agreements and institutional mechanisms. Though not necessarily articulated

141. As Australia itself has stated, Australia's "ability to protect and advance our interests rests on the quality of its engagement with the world" and "our ability to persuade others to our point of view." FOREIGN POLICY WHITE PAPER, *supra* note 5, at 17. It is thus incumbent upon Australia to set a positive example in adherence to international obligations.

142. Nominated as the Australian Fisheries Zone under Australian legislation. See *Fisheries Management Act 1991* (Cth), s 4(1). Australia's national implementation scheme is described in AUSTRALIAN GOVERNMENT DEPARTMENT OF AGRICULTURE, AUSTRALIA'S SECOND NATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING ¶ 40 (2014) [hereinafter SECOND NATIONAL IUU PLAN].

143. SECOND NATIONAL IUU PLAN, *supra* note 142, ¶ 5.

144. *Id.* ¶ 13.

as such in Australia's approach, Australia's responses to IUU fishing align strongly with the RBO concept.

To the north, Australia has encountered difficulties with the enforcement of what is known as the Indonesian MoU Box. In that Box, "traditional Indonesian vessels have been allowed access to a defined area of the Australian fishing zone (north-west of Broome) in which Australia agrees not to enforce its fisheries laws."¹⁴⁵ However, "IUU fishing has occurred both in the MoU Box (through a failure to comply with agreed rules) and as a result of opportunistic fishing in areas around the MoU Box."¹⁴⁶ Similarly to the north, Australia has indicated concerns that the traditional fishing allowed throughout the Torres Strait is giving way to commercial enterprises.¹⁴⁷ While these two fishing arrangements are covered by bilateral agreements, one a memorandum of understanding¹⁴⁸ and the other a treaty,¹⁴⁹ Australia has also engaged in this issue at the regional level. One example is the 2017 Statement of Cooperation on the need to deter IUU fishing, which was adopted at the ASEAN Regional Forum.¹⁵⁰

Similar regional statements that recognize the importance of sustainable fisheries and addressing IUU fishing have also been adopted in relation to

145. Australian Government Department of Agriculture, Water and the Environment, Overview: Illegal, Unreported and Unregulated (IUU) Fishing, https://www.awe.gov.au/agriculture-land/fisheries/iuu/overview_illegal_unreported_and_unregulated_iuu_fishing (last updated Nov. 4, 2019).

146. *Id.*

147. *Id.*

148. Memorandum of Understanding between the Government of Australia and the Government of the Republic of Indonesia Regarding the Operations of Indonesian Traditional Fisherman in Areas of the Australian Exclusive Fishing Zone and Continental Shelf, Nov. 7, 1974. This MoU was later updated by the Agreed Minutes of Meeting between Officials of Australia and Indonesia on Fisheries, Apr. 29, 1989, and the Practical Guidelines for Implementing the 1974 Memorandum of Understanding, Apr. 29, 1989.

149. Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, Dec. 18, 1978, 1985 A.T.S. 4.

150. ASEAN Regional Forum Statement on Cooperation to Prevent, Deter and Eliminate IUU Fishing (Aug. 7, 2017), <https://aseanregionalforum.asean.org/wp-content/uploads/2019/01/ARF-Statement-on-Cooperation-to-Prevent-Deter-and-Eliminate-Illegal-Unreported-and-Unregulated-Fishing-Manila-the-Philippines-7-August-2017.pdf>. Australia is also party to the U.N. Food and Agriculture Organization's Asia-Pacific Fishery Commission and Asia-Pacific Economic Cooperation's Oceans and Fisheries Working Group. *See* SECOND NATIONAL IUU PLAN, *supra* note 142, ¶ 19.

the Indian Ocean.¹⁵¹ Australia is also a party to two regional fisheries management organizations that cover parts of the Indian Ocean: the Indian Ocean Tuna Commission¹⁵² and the Southern Indian Ocean Fisheries Agreement.¹⁵³ While the former agreement applies to tuna and tuna-like species in a specific part of the Indian Ocean, the latter agreement covers all living resources in the southern Indian Ocean. Southern bluefin tuna migrate across the Indian and Southern Oceans and are managed under the Convention for the Conservation of Southern Bluefin Tuna.¹⁵⁴

Australia has also taken a range of steps to address illegal fishing in the Pacific Ocean. As mentioned at the outset, Australia is very involved in the relevant regional fora,¹⁵⁵ such as the Pacific Islands Forum Fisheries Agency. Australia is a party to the Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean,¹⁵⁶ and the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean.¹⁵⁷ Each of these agreements establishes a regional institutional structure that cooperates to adopt agreed harvest allocations and other conservation and management measures. Enforcement of such agreements is also facilitated by international treaty in the south Pacific through the Niue Treaty and a subsequent implementation agreement

151. See Indian Ocean Rim Association, Declaration on the Principles for Peaceful, Productive and Sustainable Use of the Indian Ocean and its Resources (Nov. 1, 2013), https://mea.gov.in/bilateral-documents.htm?dtl/22441/Declaration_of_the_Indian_Ocean_Rim_Association_on_the_principles_for_peaceful_productive_and_sustainable_use_of_the_Indian_Ocean_and_its_resources; Indian Ocean Rim Association, Maritime Cooperation Declaration (Oct. 23, 2015), <https://www.iora.int/media/8209/iora-maritime-declaration.pdf>; Indian Ocean Rim Association, Jakarta Concord (Mar. 7, 2017), <https://www.iora.int/media/23875/jakarta-concord-7-march-2017.pdf>.

152. Established under the Agreement for the Establishment of the Indian Ocean Tuna Commission, Nov. 25, 1993, 1927 U.N.T.S. 329.

153. Southern Indian Ocean Fisheries Agreement, Dec. 29, 2006, 2012 A.T.S. 21.

154. Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1819 U.N.T.S. 359.

155. See, e.g., Pacific Islands Forum Special Leaders' Retreat, Leaders' Decisions, ¶¶ 17–18 (Feb. 3, 2021), <https://www.forumsec.org/wp-content/uploads/2021/02/2021-Special-Leaders-Retreat-Decisions.pdf>.

156. Convention on the Conservation of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, Sept. 5, 2000, T.I.A.S. 13115, 2275 U.N.T.S. 43.

157. Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Nov. 14, 2009, 2012 A.T.S. 28.

strengthening the Niue Treaty.¹⁵⁸ The adoption of these treaties reflects strong cooperation in addressing issues such as surveillance and law enforcement, as well as information sharing.¹⁵⁹

While not part of the Indo-Pacific, it may be noted that in the Southern Ocean, Australia has sought to take steps against unlawful fishing of Patagonian toothfish and has emphasized conservation around the Heard and McDonald Islands.¹⁶⁰ Australia is a party to the Convention for the Conservation of Antarctic Marine Living Resources, which applies to all living resources apart from seals and whales, in the area south of sixty degrees latitude.¹⁶¹ Australia has also concluded bilateral agreements with France to cooperate in the enforcement of their respective fisheries laws around sub-Antarctic islands.¹⁶²

When it comes to IUU fishing, the legal framework is thus quite vast and includes a plethora of treaties as well as informal agreements. The regional agreements to which Australia is a party sit within an international legal framework established in UNCLOS and the 1995 Fish Stocks Agreement.¹⁶³ Australia has also become a party to the Compliance Agreement, which not only seeks to encourage flag State efforts in ensuring their vessels comply

158. Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, July 9, 1992, 1993 A.T.S. 31; Agreement on Strengthening Implementation of the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific, Nov. 2, 2012, 2017 A.T.S. 11.

159. See Camille Goodman, "Strength Through Cooperation": A 21st Century Treaty for Multilateral Maritime Enforcement in the Pacific, 31 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 11 (2013).

160. Through the creation of the Heard and McDonald Islands Marine Reserve. For discussion, see Cassandra M. Brooks et al., *Managing Marine Protected Areas in Remote Areas: The Case of the Subantarctic Heard and McDonald Islands*, FRONTIERS MARINE SCIENCE (Oct. 11, 2019), <https://www.frontiersin.org/articles/10.3389/fmars.2019.00631/full>.

161. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, T.I.A.S. 10240, 1329 U.N.T.S. 47.

162. Treaty between the Government of Australia and the Government of the French Republic on Cooperation in the Maritime Areas Adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands, Nov. 24, 2003, 2438 U.N.T.S. 253; Agreement on Cooperative Enforcement of Fisheries Laws between the Government of Australia and the Government of the French Republic in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands, Jan. 8, 2007, 2011 A.T.S. 1.

163. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Aug. 4, 1995, T.I.A.S. 01-1211, 2167 U.N.T.S. 3.

with international and regional requirements but also aims to deter re-flagging practices to avoid such requirements.¹⁶⁴ The Port State Measures Agreement is the first binding agreement that specifically targets IUU fishing; Australia ratified this treaty in 2015.¹⁶⁵ Also important in supporting efforts to improve fisheries conservation and management are a suite of informal agreements that variously seek to close gaps in existing formal treaties, promote modernized approaches to fisheries management, and articulate more detailed standards to improve responses to the variety of problems that emerge from IUU fishing practices.¹⁶⁶ Australia has strongly endorsed these non-binding agreements in its National Plan of Action on IUU Fishing, indicating their influence on national law and policy.¹⁶⁷

Consistent with its international and regional obligations, Australia dedicates resources to supporting monitoring, control, and surveillance of IUU fishing. For example, Australia has undertaken joint operations to deter fishing in violation of conservation measures adopted in the Western and Central Pacific Fisheries Commission.¹⁶⁸ Further, in accordance with its policy focus for the Indo-Pacific, Australia seeks to engage in regional capacity building. Australia played a critical role in the 2007 adoption of the Regional Plan of Action to Promote Responsible Fishing Practices including Combating Illegal, Unreported and Unregulated Fishing in Southeast Asia, which has facilitated training, funding, and capacity building.¹⁶⁹

In sum, Australia's actions in relation to fishing are informed by its extensive international law obligations and regional treaty requirements, as well

164. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, *opened for signature* Nov. 24, 1993, T.I.A.S. 03-424.1, 2221 U.N.T.S. 91 (entered into force Apr. 24, 2003).

165. Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Nov. 22, 2009, T.I.A.S. 16-605, 2016 A.T.S. 21.

166. These informal agreements and their relevance are assessed in Zoe Scanlon, *The Significance of Informal Lawmaking in International Fisheries Law*, in UNCONVENTIONAL LAW-MAKING IN THE LAW OF THE SEA 210 (Natalie Klein ed., 2022).

167. See, e.g., SECOND NATIONAL IUU PLAN, *supra* note 142, ¶¶ 17, 18, 60.

168. See, e.g., Joint Media Release, Australian Fisheries Management Authority and Australian Border Force, Multilateral Cooperation to Combat Illegal Fishing (Aug. 11, 2016), <https://www.afma.gov.au/multilateral-cooperation-combat-illegal-fishing>.

169. Regional Plan of Action (RPOA) to Promote Responsible Fishing Practices including Combating IUU Fishing in the Region (2009), <https://lontar.ui.ac.id/file?file=digital/126508-T+26250-Kerjasama+maritim-Lampiran.pdf>. See also Australian Government Department of Agriculture, Water and the Environment, Combating IUU Fishing and Promoting Sustainable Fisheries in Southeast Asia Program, <https://www.awe.gov.au/agriculture-land/fisheries/iuu/combating-iuu-fishing-program> (last updated Feb. 21, 2022).

as standards and expectations articulated within different international and regional institutions to reflect common understandings or approaches to problems arising in the conservation and management of international fisheries. This governance framework is by no means perfect, especially when account is given to the ongoing prevalence of over-harvesting of different species and persistent, unsustainable fisheries practices in the region. More effort is needed around data collection and sharing, implementation of fish license requirements, and enforcement of fishing standards around quantity of fish catch, authorized fishing gear, and restricted areas. Yet there is at least in this context a shared, over-arching goal of sustainable use.¹⁷⁰

The response to IUU fishing is truly the RBO in action. In this instance, there can be less concern about the diversity of tools being brought to bear to deal with this problem and that international law is being diminished as a result. The RBO—with all its component parts—can potentially work when these parts are complementary and positively reinforcing the response to the problem. While there may be scope to hold different views on the most appropriate conservation and management measures, there tends to be less scope to pick and choose between the application of different laws. Rather, problems emerge because of insufficient implementation, compliance, and enforcement.

IV. CHOOSING INTERNATIONAL LAW OR A RULES-BASED ORDER

When considering the international maritime security threats that currently confront Australia, it must be noted that they are not limited to the three discussed. Australia also has concerns and must confront legal issues relating to the security of submarine cables, protection of the marine environment, pollution, climate change, and other maritime crime, including drug smuggling. To respond to these concerns, Australia is a party to relevant international treaties and works within international and regional organizations to develop standards to inform national decision-making.

As a matter of national policy, Australia does not necessarily prioritize the implementation of international law requirements in all instances. A difference should be appreciated between situations where the Australian gov-

170. Goal 14 of the Sustainable Development Goals is “Conserve and sustainably use the oceans, seas and marine resources for sustainable development.” U.N. Department of Economic and Social Affairs, Sustainable Development Goal 14, <https://sdgs.un.org/goals/goal14> (last visited May 6, 2022).

ernment's decisions to rank specific national interests over international obligations, as arguably happens in climate change debates, and those situations where Australia purports to be acting to advance an international RBO when it is actually relying on international law.¹⁷¹ Arguably, Australia's approach to maritime migration reflects government decisions to prioritize security over human rights, but the Bali Process ostensibly reflects Australia's engagement with the RBO to respond to irregular migration.

To meet these challenges, Australia needs international law. It is international law, and especially UNCLOS, that provides Australia with the maritime rights that it now seeks to protect in different ways.¹⁷² Australia has acknowledged: "As a continent surrounded by three oceans, Australia has a fundamental interest in the legal regimes and norms that govern the oceans."¹⁷³ Yet while this interest is evident, how it is manifested in different contexts prompts questions as to the extent Australia is foregrounding its reliance and use of international law, beyond the regional regimes and non-binding norms.

In its Foreign Policy White Paper, the Australian government has proclaimed: "Australia's national interests are best advanced by an evolution of the international system that is anchored in international law, support for the rights and freedoms in United Nations declarations, and the principles of good governance, transparency and accountability."¹⁷⁴ Yet, as Nick Bisley notes, "[o]ver the past decade or so the 'rules-based international order' has become a rhetorical centrepiece of Australian international policy."¹⁷⁵ Rhetoric has its place and its value. The reference to the RBO may be understood as sending signals from Australia to its allies, such as the United States, and to regional neighbors, including China.¹⁷⁶ Signals as to the relevance and applicability of international law matter too.¹⁷⁷ For international lawyers, it is

171. Price has observed a distinction between messaging to international stakeholders as opposed to the domestic constituency in Prime Minister Morrison's conflicting views on sovereign equality. See Megan Price, *Norm Erosion and Australia's Challenge to the Rules-Based Order*, 75 AUSTRALIAN JOURNAL OF INTERNATIONAL AFFAIRS 161 (2021).

172. Strating, *supra* note 23, at 4.

173. FOREIGN POLICY WHITE PAPER, *supra* note 5, at 94.

174. *Id.* at 7.

175. Nick Bisley, *Australia's Rules-Based International Order*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (July 27, 2018), <https://www.internationalaffairs.org.au/australianoutlook/australias-rules-based-international-order/>.

176. Bisley & Schreer, *supra* note 40, at 305.

177. See Price, *supra* note 171.

incumbent to dive a bit more deeply and insist on a preeminent place for international treaties and customary international law.

There are limits to the value that should be ascribed to informal agreements, and it must be ensured that they are not “antagonistic” to the existing hard law, to use Greg Shaffer and Mark Pollack’s term.¹⁷⁸ The protection of navigational rights may require a more precise articulation of how, what, and where specific rights apply. Any such articulation should engage with the views of regional actors and, ideally, reflect a shared perspective. Relying on blanket assertions of the “freedom of navigation” or of UNCLOS in general and then promoting informal agreements that reflect binding obligations may undermine the very principles of international law that are needed to protect maritime security interests.

Moreover, when we are dealing with the mechanisms and processes and arrangements that are enveloped within the RBO, we should think carefully about how they might reinforce international law. Do they allow for accountability? Do they enhance the day-to-day implementation of international standards? Do they provide an appropriate mechanism to revise or update international law? These questions are more likely to be answered in the positive for IUU fishing, but not in the responses to maritime migration. At the least, a consistent approach to international law may be warranted if the invocation of the RBO is to be a credible framework for international responses to maritime security threats.

V. CONCLUSION

The RBO is alive and well in international relations discourse and should be understood as an endeavor to maintain an existing order¹⁷⁹ and to be selective as to what is accepted for its evolution. For these goals, the place of international law should not be down-played or minimized in favor of less formal understandings that shift away from long-accepted international standards. Efforts to change international law need to be inclusive and transparent. It may well be the case that existing international law should be updated to account better for the views of different actors than was once the case. International law has the tools to evolve and those mechanisms should be used, rather than allowing for a mutating and obtuse downward spiral.

178. See generally Greg C. Shaffer & Mark A. Pollock, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINNESOTA LAW REVIEW 706 (2010).

179. Strating, *supra* note 23, at 12.

There may well be a juggling act between the RBO, regional mechanisms, informal agreements, and formal international law in Australia's current approaches responding to different maritime security concerns. Consequently, there are undoubted challenges. In this juggle of governance tools to respond to maritime security threats, the position of international law must be secure, and not one of the balls being tossed around at risk of being dropped.