

CHAPTER 1

THE POLITICS OF INTERNATIONAL LAW

Introduction

Australia's engagement with international law often gets lost in the political contest and daily work of government. While topics ranging from Australia's participation in the war in Iraq to the signing of a free trade agreement with the United States can dominate the media, little attention is given to how we as a country decide such matters and how our system of government has been designed to deal with them.

This lack of attention continues despite the fact that these issues raise some of the most important matters of our time, including climate change, prosecution of crimes against humanity, rules for fair trade between nations, poverty in Africa and other parts of the world, respect for universal human rights, and the steps that need to be taken in the fight against terrorism. Many of the questions that will shape Australia's future and our quality of life are inextricably linked with international law. International law will influence the price we get for our exports, and hence our standard of living, as well as how the nations of the world deal with global warming, and thus the environment and climate we and our children will experience.

Decisions on such matters are made in a legal and political environment in which key issues are often misunderstood or misrepresented. Indeed, Australia's current approach is dominated by seemingly entrenched ideological positions, misconceptions and double

standards. As subsequent chapters will show, the debate often revolves around all-or-nothing positions about the relationship between Australian and international law, obscuring discussion about the particular international legal rules involved and how they are best translated to suit the Australian context. This is not a problem stemming from any one side of Australian politics. The problem goes deeper than that. While both major political parties can claim some important successes, neither has yet come to grips with the policy challenges posed by globalisation and the ongoing development of international law. Instead, Australia's engagement with international law is so often driven by political expediency rather than by principled action taken with regard to the long-term implications for the national interest.

Similar criticisms can be levied at other important areas of government decision-making where new policies must be developed. Indeed, some of the problems affecting international law result, not from anything particular about international law, but from weaknesses in our Westminster system of government and from the nature of decision-making as part of a political process. Even so, in important respects, Australia's engagement with international law is different. It is an area of great complexity and rapid change that is little understood by the public or, judging from their public comments, sometimes by our elected representatives.

Australia's interaction with international law has become a charged and politicised field that gives rise to popular and political anxiety about unwarranted 'intrusions' into Australian 'sovereignty' and domestic decision-making. Such anxiety pervades almost every aspect of government in Australia, including at the highest levels of authority in the executive and judiciary. The selective use of the idea of 'sovereignty', usually as an argument against implementation of some new international rule in Australia, is often used in a way that is unexplained. It has been deployed consistently to reject the use of international human rights standards in Australia, even in regard to the poorest and most disadvantaged Australians, yet rarely invoked in other areas where it might also be relevant, such as in the area of free trade. The use of 'sovereignty' as a political device can illustrate some important misunderstandings about Australia's place in the world.

Australia's economy and the lives of its people are part of the larger international community. Indeed, Australia is now so integrated globally that to reject change purely on the basis of 'sovereignty' is to ignore the reality of our lives and of Australian history. Australia has never existed as a nation free from external influence, whether that be from its colonial past, or, increasingly since the Second World War, through its alliance with the United States and voluntary acceptance of a range of international treaties and conventions. Although we argue that the invocation of 'Australia's sovereignty' as a shield against international legal rules is often a hollow and meaningless claim, we do not suggest that international law should routinely trump local laws devised to respond to particular problems. International law is generated through a consensual process between states, which can produce minimalist regulation and cautious and abstract rules. The real question is: how can we navigate a path forward, while recognising our interdependence with other nations, in a way that best matches our national aspirations, such as for fair trade and democracy? Given that our engagement with the international legal order is inevitable, how can we make the most of it?

The book has two broad aims. Our first aim is to investigate how Australia interacts with international law. We seek to unravel a complex area of law, policy and practice and to expose some of the mythologies and ideologies that affect the relationship. We also explore the lack of transparency in the processes that determines the nature of this engagement. We examine various case studies of international law, including Australia's approach to the UN human rights treaty bodies, the detention of Australian David Hicks at Guantánamo Bay, Australia's decision to become a party to the International Criminal Court (ICC) and the negotiation of a free trade agreement with the United States. These examples illustrate the contemporary focus of this book, which deals primarily with the time of the Howard government. This is not because problems necessarily arise with greater force with this government than its predecessors (indeed, many of the criticisms that we levy could be equally applied to earlier governments), but our concern is current practices rather than their historical development.

Our second aim is to analyse these practices and to identify where reform of Australia's interaction with international law is needed. We find

that our system of government is not structured to provide adequate processes and fora for dealing with international law. We propose changes relating particularly to the ways in which Australia agrees to accept new international rules and to ensure that, when we do decide to take on a new obligation, we follow through on that commitment.

This chapter describes various attitudes to international law in national legal systems and then focuses on Australian examples of these approaches in the context of the invasion of Iraq in 2003 and proposals for drug injecting rooms in New South Wales. Chapter 2 examines the nature of international law and explores the mechanics of the relationship between international law and the Australian system of government. Chapters 3 and 4 present Australia's often contrasting attitudes to the international legal order in the context of international human rights and international trade respectively. Chapter 5 proposes some measures for reform.

Attitudes to international law

In Australian debates, international law is often dismissed as a grab-bag of rules selectively employed by politicians. It has largely been ignored by the Australian public. To those who have paid it more than passing regard, such as some of our judges, its reception into Australian law suggests a Trojan horse importing dangerous foreign values. Implementation of international human rights law through a bill of rights has caused particular anxiety. For example, Sir Harry Gibbs, a former Chief Justice of the High Court, said in 1995, 'nowadays bills of rights are to be found in most democratic countries in the world – like AIDS'.¹

Yet gradually it has become recognised that a growing array of issues facing Australia, extending well beyond human rights concerns, contain an international legal dimension. Such matters raise questions about how the Australian political and legal system interacts with international law and international institutions: chiefly, what force should the rules of international law have in Australia and what influence on its foreign policy? In answering such questions, international law is often seen as suspect because it involves a system

of regulation generated outside national boundaries. The traditional concept of a national legal system is that it is self-contained and impermeable, the quintessential expression of a country's sovereignty. Most suspicions about international law voiced from within domestic political and legal systems rest on a concern about the preservation of national sovereignty, whether they are described as issues of 'democratic deficit', legitimacy or accountability of international law. But does a preoccupation with sovereignty still make practical sense in the 21st century, when national laws and institutions operate within an international framework in almost all contexts? The relevance of sovereignty concerns to Australia's engagement with the international legal order is one of the main themes we explore in this book.

A further concern is the tendency for the debate about the appropriate role for international law in Australia to become bogged down in fixed positions, or at least the attribution of fixed positions to antagonists. For example, politicians and media commentators playing the sovereignty card will present supporters of international law as jet-setting romantics whose heads have been turned by the glitter of international gatherings. Internationalists in turn regard their critics as jingoistic denizens of an insular society who will ultimately be unable to resist the advent of international law in Australia. The major Australian political parties also operate within set images of their roles in the international community. The Labor Party, for example, sees itself as a virtuous international citizen, carrying on the legacy of Dr HV Evatt through a focus on multilateral cooperation and respect for international institutions. The Liberal–National Coalition, on the other hand, presents itself as taking a more strategic approach to international relations, one that is cautious about the benefits of multilateralism and that prefers domestic solutions to international ones where possible. As we try to show in this book, however, these assumed positions often do not reflect reality and the attitudes of all participants are much more complex, even if they do not acknowledge this themselves. Indeed, as we show, the critics of international legal standards in one context may well champion the value of international law in others.

Australian judges have long dominated debates about the proper relationship between Australian and international law. Certainly,