

## BOOK REVIEW

***NO COUNTRY IS AN ISLAND: AUSTRALIA AND INTERNATIONAL LAW* BY HILARY CHARLESWORTH, MADELAINE CHIAM, DEVIKA HOVELL AND GEORGE WILLIAMS  
(SYDNEY: UNSW PRESS, 2006) 175 PAGES.  
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This book is a product of a collaborative project by the authors, funded by the Australian Research Council, on the relationship between international law and the Australian legal system. The book has two main aims: first, to investigate how Australia interacts with the international legal order; secondly, to analyse current practices of government and identify where reform is needed.

The authors' primary contention is that no country can afford to be a metaphorical 'island', setting itself apart from the international legal order, when so many of the issues which will shape our future – global warming, the war on terrorism, the conduct of international trade – can only be addressed by concerted international action. If disengagement is not an option, the challenge for Australia is to ensure that we engage with international law in a manner which 'best matches our national aspirations'.<sup>1</sup> The book examines our present processes and practices, and considers how well they meet this challenge.

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<sup>1</sup> Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (2006) 3.

The book is no esoteric academic treatise. Written in a clear, accessible style, it is aimed at a general readership, but would also serve as an excellent introductory text for students of international law and international relations.

Through case studies drawn from recent events - such as the 2003 Iraq war, the detention of David Hicks at Guantanamo Bay and negotiation of the Australia-US Free Trade Agreement - the book examines the way in which the executive government and the parliament interact with the international legal system. By providing a detailed and dispassionate account of recent controversies, the authors are able to get past the political rhetoric and show how the processes of Australia's engagement with international law actually operate, and where they fall short.

Chapter 1 deals with the politics of international law in Australia. The authors note the prevalence in Australian political and judicial circles of an attitude of suspicion towards international law, which, they suggest, is based 'on a perception of international law as a source of un-Australian, vague and chaotic norms'.<sup>2</sup> The generalised anxiety about international law as 'an intrusive outsider voice' is often articulated in public debates in terms of the threat international law poses to national sovereignty. However, as the authors note, the concept of 'national sovereignty' is used in the political arena in a selective and opportunistic manner. In particular, while international human rights law is often portrayed as a threat to national sovereignty, similar concerns are not expressed in connection with the domestic implementation of international trade law. The authors observe that the conception of sovereignty currently prevailing in Australia assumes that the national and international legal orders are antagonistic. Given that Australia's engagement with international law is inevitable and will only increase in the future, this view of sovereignty is unhelpful. The authors suggest that the adoption of a more cooperative conception of sovereignty, which focuses on the duty of all actors in international society to control the abuse of power, would tend to promote a more constructive engagement with the international legal order.<sup>3</sup>

The authors point out that the two major political parties in Australia position themselves in markedly different ways in relation to engagement with the international legal order. While the Labor party presents itself as 'a virtuous international citizen' and champion of multilateralism, the Liberal-National Coalition is associated with a more 'strategic' and sceptical approach.

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<sup>2</sup> Ibid 4

<sup>3</sup> Ibid 20, where the authors discuss conception of sovereignty advocated by Philip Allot in *The Health of Nations* (2002).

However, the authors show that in recent times both parties have been guilty of treating international law in an opportunistic rather than a principled manner. Two case studies are presented in Chapter 1 to illustrate this point: the decision of the federal Government to commit troops to the Iraq War in 2003; and the controversy in 1999 over the NSW Labor government's decision to establish a medically supervised injection room in Sydney.

Chapter 2 outlines the main sources of international law and explains how Australia becomes a party to international treaties, and other international agreements of 'less-than-treaty' status. The relationship between international law and Australian domestic law is also explained. The chapter then proceeds to examine in detail the role of each arm of the federal government in the processes of Australia's engagement with international law. The respective roles of the States and the general community are also discussed.

The authors point out that the international legal order has undergone a profound transformation over the last century. Once concerned mainly with governing the relations between nation states, international law now 'transcends individual state boundaries to affect domestic affairs and the people within the nation state'<sup>4</sup> in areas such as the environment, trade and human rights. Despite this, the power to commit Australia to international obligations belongs today, as it has since Australia acquired full independence from Great Britain,<sup>5</sup> exclusively to the executive branch of the federal government, with minimal scope for parliamentary involvement or public consultation. The authors argue that, given the impact international legal obligations now have on domestic affairs, this has created a 'democratic deficit'. The bulk of the chapter examines the reforms to the treaty-making process introduced by the then newly elected Coalition government in 1996 with a view to assessing how effective they have been in reducing this democratic deficit.

Two of the 1996 reforms were designed to give parliament a greater formal role: the introduction of a requirement that all treaty actions proposed by the government be tabled in parliament for at least 15 sitting days prior to binding action being taken; and the establishment of the Joint Parliamentary Committee on Treaties (JSCOT) to inquire and report into proposed treaty actions. Having identified JSCOT as the most significant of the 1996 reforms,

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<sup>4</sup> Ibid 25.

<sup>5</sup> In 1942, with the enactment of the *Statute of Westminster Adoption Act 1942* (Cth).

the authors provide a detailed account of how the committee operates. They conclude that while JSCOT scrutiny increases transparency, it fails to deliver any real improvements in accountability. The timing of JSCOT scrutiny is identified by the authors as a particularly significant limitation on JSCOT's ability to operate as a check on executive power. As a general rule, treaties are referred to JSCOT only *after* they have been signed by the government, that is, after the completion of the negotiation phase. This means that there is little scope for JSCOT reports to influence the terms of a treaty. The authors' overall verdict on the 1996 reforms is that they are no more than window dressing: power over treaty-making remains in the hands of the executive, with little real improvement in transparency and accountability.

Chapters 3 and 4 examine Australia's engagement with international law in the specific areas of human rights and international trade law respectively.

Chapter 3 outlines the international human rights regime which has developed since the end of the Second World War and provides a brief account of Australia's engagement with it. As the authors note, Australia has been generally supportive of the international human rights framework, having ratified most of the international human rights treaties currently in force; however, implementation of human rights standards in Australian domestic law has been slow and piecemeal. The Chapter then presents three case studies of Australia's interaction with international human rights system: the political manoeuvring which preceded Australia's decision to ratify the Rome Statute of the International Criminal Court; the deterioration over the past decade in Australia's relationship with the human rights treaty monitoring bodies; and Australia's response to the detention of the Australian citizen David Hicks at Guantanamo Bay. Among the matters of concern which emerge from these case studies are what the authors describe as the 'pliability' of arguments based on notions of sovereignty and the influence of the Australia's relationship with the US on the way in which it engages with international law.

Chapter 4 examines Australia's engagement with the international trade system. Australia's enthusiastic participation in the WTO's trade dispute settlement processes is contrasted with its antipathetic attitude to the human rights treaty bodies. The authors also observe that although compliance with international trade regulations and WTO agreements on 'trade-related' issues constrains Australia's freedom to regulate domestically in a number of

important areas, the ‘language of interference with sovereignty is remarkably absent from the government’s response to its international trade obligations.’<sup>6</sup>

The bulk of Chapter 4 is devoted to a detailed examination of the negotiation, ratification and implementation of the Australia-United States Free Trade Agreement (AUSFTA). The authors suggest that, in view of the profound impact of the AUSTFA on domestic affairs, these processes were not sufficiently accountable or transparent. The government’s negotiating objectives were released to the public only in broad and general terms prior to the start of negotiations, and the negotiating process itself was confidential. No drafts of the agreement were released, and little information provided as to the progress of negotiations. While AUSFTA was the subject of inquiries by two parliamentary committees – one conducted by JSCOT and the other by a Senate Select Committee - these inquiries took place only after the text of the AUSFTA had been settled, and hence were not able to influence the terms of the agreement in any real way.

In the final chapter the authors summarise the main areas of concern identified in the preceding chapters, and put forward some proposals for reform. The authors argue that a new balance needs to be struck between the powers of the executive and the parliament in the processes by which Australia engages with international law, one which imposes real constraints on the executive’s power to commit Australia to international obligations. Specifically, they propose that JSCOT scrutiny should take place *before* treaties are signed by the executive, and JSCOT should provide an advisory opinion on whether each instrument should be signed, with the matter determined by a majority vote of each house of the parliament. In the case of bilateral agreements, the authors argue that negotiations should be conducted according to an instrument, subject to disallowance by parliament, which sets out the terms of the negotiation. Finally, they argue that these reforms should apply not only to treaties but also to other international agreements such as memoranda of understanding. As the authors point out, these agreements with ‘less-than-treaty’ status have in recent years been used to by government to implement significant and contentious policies without any parliamentary scrutiny. Examples are the agreement with Nauru in 2001 by which the so-called ‘Pacific Solution’ was implemented and the MOU on Climate Change Cooperation with China.

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<sup>6</sup> Ibid 110.

By providing a clear account of present processes, exposing some of the myths and misconceptions associated with international law and putting forward proposals for change, the authors have provided a good starting point for fresh discussion of this vitally important subject.