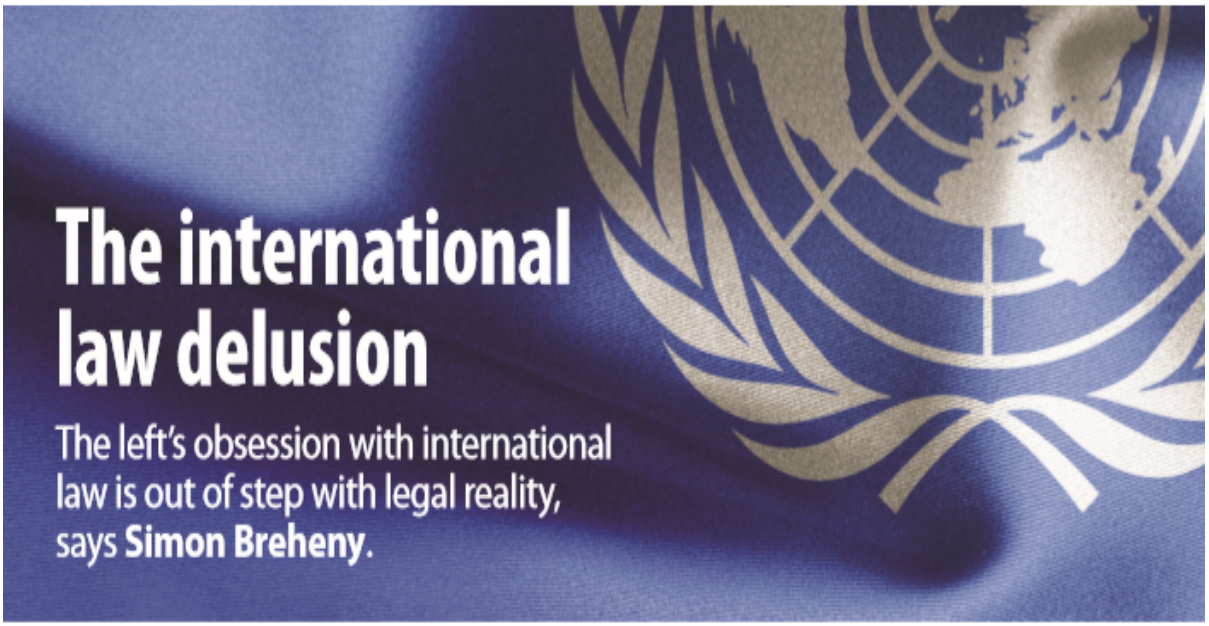

The International Law Delusion

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This article from the December 2012 edition of the IPA Review is by Director of the Legal Rights Project at the IPA, Simon Breheny.

Australian barrister and international lawyer Geoffrey Robertson QC once gave a speech entitled 'no-one is above the law.' Of course he's right. But such a statement leaves Robertson in a peculiar position. Either our international political system of state sovereignty should be scrapped and we should move towards a world government or Robertson's life's work—international law—simply cannot be considered law. There are no prizes for guessing where Robertson is likely to stand on such a question. In an article published in *The Guardian* in April 2005, he criticised the idea that the UK should withdraw from the Geneva Convention, writing that, 'The convention does no more—but no less—than establish in international law the most basic principle of humanity and of every faith.' A withdrawal would 'hurt so many innocent victims of circumstance,' as if morality only exists by virtue of UN conventions.

Like many on the left, Robertson seems unable to grapple with the inarguable truth: international

law is not real law.

According to the 19th century English legal philosopher John Austin, for something to be considered ‘law’ it must include an element of coercion. This is the key reason that international law is simply not law in any way that makes sense.

Austin’s theory regarding law was broken down into three essential parts:
1. Laws are commands issued by the uncommanded commander (i.e. the sovereign)
2. Such commands are enforced by ‘an evil’ (sanctions)
3. A sovereign is one who is habitually obeyed by the majority

Austin even commented specifically on the category that international law might fall into. He held that the generally accepted collection of international norms was obeyed only because of what he called ‘moral sanctions’ but that no sovereign existed to enforce legal sanctions.

International law simply doesn’t meet the criteria for law. It is a total misnomer. Subjects obey law because it has coercive and moral authority but there must be an enforcing sovereign for any of it to work. In the case of domestic law, the state wields that authority on behalf of the community. But in the international context, all states are sovereign. No one international actor has legal authority over another. The result is a legal system comprising laws that have no binding force.

The existence of courts in this context is laughable. There are two main international courts: the International Court of Justice (ICJ) and the International Criminal Court (ICC).

The International Court of Justice was set up to adjudicate cases only between states—individuals are not able to bring cases against other individuals or against states. The ICJ writes its own procedural rules and applies ‘international law’ to disputes brought before it. Under the Statute of the International Court of Justice, this includes international conventions, international custom, ‘general principles of law recognised by civilised nations’ and the writings of academics.

If this sounds fuzzy to you it’s because it is. But the ambiguity doesn’t stop there. The court is also given the power to decide a case by reference to general principles of justice and fairness if the parties agree. No law—just ‘the vibe’.

As a UN body, the ICJ carries all the baggage of that out-dated organisation. The greatest example of this is that any of the permanent members of the UN Security Council can ignore rulings of the ICJ on a whim, even if they are defendants in the case and had agreed pre-hearing to be bound to the court’s decision. Apart from the issue that the permanent members of the UN Security Council represent an anachronistic view of geographic power, a legal structure that allows five state actors to ignore decisions of the judicial body while expecting 186 others to take the court seriously is a joke.

The International Criminal Court has a slightly clearer mandate. It has jurisdiction to prosecute individuals accused of committing genocide, crimes against humanity or war crimes. But the Court receives a huge amount of criticism for its failure to properly limit the power of prosecutors and

judges to ICC cases. Henry Kissinger has said that ICC prosecutors have ‘virtually unlimited discretion.’ The ICC also offers little by way of the kinds of legal rights that underpin liberal legal systems— juries are never used by the ICC and accountability to individuals is non-existent.

There is also the constant looming threat of jurisdiction creep. In April 2010, UK environmental lawyer, Polly Higgins, called for the ICC to begin prosecuting corporations guilty of what she called ‘ecocide.’ In September 2011, a coalition of atheist groups filed an 80-page complaint with the ICC, demanding that Pope Benedict XVI be prosecuted for alleged abuse by Catholic priests. Robertson even wrote a book about it.

While the idea of a powerful global court to decide criminal cases might sound attractive to groups like these, it raises several very serious concerns. The Rome Charter, which set up the ICC, is quite clearly hostile to the idea that the law in local jurisdictions deserves respect. But laws are most effective the closer they are to the people. The issue in many of these cases is not simply the law itself but that many political systems don’t allow citizens to take an active role in the formulation of the laws that apply to them; democracy has yet to reach every corner of the globe.

But the left worships international law. It is idealised and held up as the future of human civilisation. To many, there is no higher calling. Each year thousands of law students compete for positions at the international courts and with agencies that offer the opportunity to shape international law.

These efforts are often directed towards human rights law. But the record of international law in dealing with human rights abuses is shocking. The relevant laws were drafted in the post-World War II era. The goal was to ensure that the abuses seen during the Holocaust were never seen again. Intentions are not reality, however, and the translation from the former to the latter is often difficult to achieve even in the context of domestic law.

The most common problem for international human rights laws is that tyrannical governments often agree to particular treaties and other legal agreements at international meetings while ignoring them back at home. This often allows repressive governments to reap rewards for compliance in the short term as abuses are hidden from the international community.

Although campaigns in the West for environmental and sexual abuse cases to be brought under the jurisdiction of the ICC are concerning, they demonstrate what is required for the ICC and international law more generally to be taken seriously by individuals: civil society. Citizens can become interested and engaged in the international arena only after their own domestic political situation allows them to participate. But a vibrant civil society is a feature of nations that emphasise freedom of expression and association. And the worst human rights abuses don’t occur in Australia or the US, they occur in countries ruled by dictators where civil society is weak.

International law is not law. At best it is a collection of what might fairly be called ‘formal norms’. It has neither the moral authority nor the coercive elements required for a true system of laws. National sovereignty is far more important. Not only is a legal system based on national sovereignty more likely to yield better outcomes, it is also more accountable to the people.

Undemocratic international laws pose a significant threat to sovereignty. As non-government organisations become increasingly aware that their aims may be carried out through the international law framework, they are likely to place growing pressure on both international bodies to grow their jurisdiction, and national governments to cede it.

This is bad news for sovereignty. Sovereignty has strong links with democratic and constitutional government, with limits on power at its core. It is the structure by which liberal democracy is achieved. But beyond any positive domestic implications, an international community of individual sovereign actors promotes competition and ensures peace through the dispersal of power. International law encourages the concentration of power.

Those on the left who yearn for international law simply don’t understand this point. They just see another, superior, avenue for the achievement of their aims. But there is a very strong moral case for sovereign states, and international law weakens the benefits that flow from a system built on sovereign actors.