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SPEECH

Australia, Human Rights and the International Rule of Law

CASTAN CENTRE FOR HUMAN RIGHTS ANNUAL CONFERENCE

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I acknowledge the traditional owners of the land on which we meet, and pay my respects to their elders, both past and present.

Today I want to speak about the history and current practice of Australia's pursuit of human rights, in the context of our nation's broader engagement with international law and institutions. I will be arguing that because the pursuit of human rights involves the constant and delicate balancing of what are, at times, competing policy objectives, it is essential that the pursuit of human rights occur in the context of an open, constructive and honest debate between nations in the international sphere, and between governments, civil society, and the wider public in the domestic sphere.

But before I get into the details of my speech, I want to briefly reminisce about the late Ron Castan, a friend and role model for me, and a man whose influence on human rights in our country has been both deep and lasting. I think it is important that those of us who are involved in public life remember the legacy of those who have made lasting contributions to

the lives of individuals and communities, and in the case of a figure like Ron, to our nation's history.

Ron is perhaps best known for his work fighting for justice for Indigenous Australians, particularly for his advocacy in the historic *Mabo* case before the High Court.

In working with Eddie Mabo to overturn the offensive legal fiction of terra nullius, Ron sought to redress a deep injustice, as old as European settlement in this country, and to set in place the legal foundations on which our current native title system has been built.

It is interesting to note that unlike in the United States, where seminal Supreme Court case names like *Roe v Wade, Miranda,* and *Brown v Board of Education* form part of the political lexicon, few Australians would know the names of even the most significant High Court cases. *Mabo* is a welcome exception to this tendency, with the name now closely associated with the idea of 'justice'.

I think that Ron must share the credit for this, not only with Eddie Mabo and the other plaintiffs and counsel, but also with the writers of *The Castle*. I'm sure there are few lawyers who have not secretly daydreamed about finishing a case with the immortal words of Dennis Denuto, who in summing up the grounds for his constitutional challenge to compulsory acquisition declared to the court: *"… it's the Constitution, it's Mabo, it's justice, it's law, it's the vibe."*

In our case against Japan's so-called scientific whaling programs at The Hague earlier this month, our legal team did briefly consider whether a reference to 'the vibe' might usefully diffuse some of the tension in the Court. However, with Professor Hillary Charlesworth the only Australian judge on the 16 member bench of the International Court of Justice we, somewhat regretfully, decided against it.

The second Mabo case is particularly significant in the context of this address, because it is a clear example of international human rights laws positively influencing Australia's domestic legal system. In his judgment in that case, Justice Brennan's said:

> *The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.*

Notwithstanding the historic nature of the High Court's ruling in *Mabo*, the outcome did not end the debate on native title in our nation. The Keating Government's native title laws, that were essential in transforming the High Court's ruling into a national system, were themselves the subject of another fierce struggle, this time in the sphere of public policy.

Many who engaged in that debate were genuinely seeking to develop a policy that would fairly balance the newly-recognised rights of Indigenous Australians with the rights of other Australians. However, I am sure that many of you remember that some conservative opponents of native title at that time engaged in a fear mongering political campaign of the most dishonest and – I'm sad to say – now familiar kind. But we did have the debate, and notwithstanding attempts by some to derail the native title reforms with fear and disinformation, the situation for Indigenous Australians has been significantly improved as a consequence of the historic reforms that we, as a democratic nation, argued and ultimately accepted.

Of course, I am well aware that despite these historic reforms the fight for Indigenous justice continues, with huge and ongoing challenges in health, in education, and the complex and often fraught relationships between our first Australians and the justice system itself. And despite amendments to our Constitution in 1967 that removed the prohibition on counting Indigenous Australians in the census, many would say that the silence of the Australian Constitution regarding first Australians remains an injustice that needs correcting.

It is my intention that Australia continue to honour and to build on Ron Castan's legacy of Indigenous justice. In this regard, I firmly believe that Constitutional recognition of Aboriginal and Torres Strait Islander peoples is an important measure that we should pursue. It would strengthen our Constitution as a unifying document by properly extending the recognition of our first Australians beyond the common law and legislation into the legal bedrock of our nation.

Our Constitution should be a living document. Of course it reflects the times in which it was drafted, but to remain relevant and respected our Constitution should also reflect the fundamental shifts that have occurred in our society in over a century since Federation, and that that have made us a more modern, progressive and unified nation.

The framers of Australia's constitutional arrangements could scarcely have imagined the developments that have occurred within our nation, and also in the international community, since World War II.

In the aftermath of the Second World War Australia became deeply involved in forging a new international system, and in the development of human rights law that occurred under

the United Nations framework. It was the Labor Party's Doc Evatt who chaired the United Nations General Assembly when it adopted the Genocide Convention and the Universal Declaration of Human Rights. Not only that, but Australia was one of eight nations to draft that central human rights document.

Since that time, international human rights law has grown in both scope and sophistication. The two UN Covenants which were adopted by the United Nations General Assembly in 1966 – the first on civil and political rights – and the second on economic, social and cultural rights – have been particularly significant.

These developments in international law reflect a change in the status of human rights principles, which are now increasingly considered as binding between states. It is no longer assumed that states can do as they please within their jurisdictions and escape international scrutiny based on the once paramount doctrine of non-interference in the internal affairs of UN member states.

Developments in international human rights law during the 1960s and 1970s coincided with changes within Australia, including the end of the White Australia Policy, reforms to address racial discrimination against Indigenous Australians, and domestic measures to oppose apartheid in South Africa. In 1966 Australia signed up to the Convention on the Elimination of All Forms of Racial Discrimination, and Australia was one of the first countries to sign the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.

Gough Whitlam's Government was central – and enormously energetic – in efforts to bring Australia into the modern era of human rights. As Prime Minister, Whitlam was committed to Australia's engagement in multilateral institutions, and he and Lionel Murphy were responsible for driving the introduction of federal protections against racial discrimination.

Indeed, in giving the Lionel Murphy Memorial lecture this year I was somewhat humbled to be reminded of the remarkable range of reforms that Lionel Murphy instituted in just three years as Attorney-General. His first act was to abolish the death penalty. Within a year he had introduced a national system of legal aid, an institution that quickly became pivotal in providing justice for the disadvantaged in our nation, and which celebrated its 40th anniversary just yesterday. Murphy also established the Law Reform Commission and the Institute of Criminology, and proposed the establishment of a general Federal Court. He also found time to introduce national trade practices legislation, and he was instrumental in modernizing family law in this country, as the driving force behind the *Family Law Act 1975*.

I also acknowledge that Malcolm Fraser's Government also demonstrated respect for our international obligations by increasing Australia's refugee intake, particularly from Asia, and by working to oppose apartheid in South Africa.

Australia's active engagement in international human rights continued throughout most of the 1980s and 1990s. One notable example of the growing linkages between international and domestic human rights standards occurred following Australia's ratification of the *Optional Protocol to the International Covenant on Civil and Political Rights*, when a Tasmanian by the name of Mr Nicholas Toonen brought a complaint to the United Nations Human Rights Committee against laws criminalising homosexuality in his state. In the landmark decision of *Toonen v Australia* in 1994, the Committee found that adult consensual sexual activity in private is covered by the concept of "privacy", and that Mr Toonen was affected by the continued existence of the Tasmanian laws, which continuously and directly interfered with his privacy, despite their lack of recent enforcement.

In response to the recommendation of the Human Rights Committee, the Keating Government passed an Act effectively voiding the Tasmanian legislation.

Throughout the 1990s the Australian Government worked hard for the establishment of the International Criminal Court. Some of you will remember that with the Court's Statute finally agreed at an international level, John Howard then wavered at the point of Australia's ratification. Once again, a fierce domestic debate erupted as many within Liberal Party, particularly Bronwyn Bishop, opposed ratification. I expect that some of you were also part of that debate, though probably not in Ms Bishop's corner. Fortunately for Australia's international reputation, wiser heads prevailed, and in 2002 Australia ratified the Statue of the International Court that it had fought so hard to establish. In bringing perpetrators of human rights atrocities to account, the International Criminal Court has played an important role in upholding human rights standards and strengthening the international rule of law.

In order to have a productive dialogue about human rights and to effect meaningful change, it is important that nations listen respectfully and engage constructively with the views expressed by others in the international community. Although Australia was closely involved in East Timor's independence struggle in 1999, and was active in the suspension of Zimbabwe from the Commonwealth in 2002, under John Howard's government Australia started to withdraw from its traditionally constructive approach to multilateralism, and became notably less open to constructive criticism from international institutions. UN Special Rapporteurs were made to feel unwelcome, Australia became antagonistic toward international human rights committees, and many non-government organisations involved in upholding the international rule of law and holding governments to account were treated with disdain.

Indeed, within Australia attempts were made to gag non-government organisations that were critical of the federal government. For example, in 2006 the Australian Tax Office revoked the charitable tax status of an NGO called Aid/Watch, on the basis that it was engaged in advocacy for a more efficient and effective use of Australian foreign aid, and this advocacy was not a proper 'charitable' purpose. The effect of this decision not only threatened the funding base of Aid/Watch, but had a chilling effect on freedom of political communication throughout the charity sector, as organisations that had long advocated for policy changes were suddenly unwilling to speak out lest they have their funding base undermined by similar rulings. A four year legal battle followed, ultimately reaching the High Court in 2010 where I am pleased to say that the High Court majority reversed the decision of the ATO by throwing out the narrow and archaic definition of charitable purposes that had been used to try to shut down criticism of the government.

I have recently been speaking publicly about contemporary attempts by conservative state governments to silence the voices of the institutions that constitute our civil society, with the governments of Queensland and New South Wales blatantly trying to prohibit what they define as political advocacy by independent organisations they fund. I consider these attempts to prohibit political activities by independent legal and other community organisations to be inimical to the freedom of political communication that is a characteristic and strength of Australia's robust and open democracy.

That is why in extending joint-funding arrangements for community legal services with the NSW Government this year I refused to accept the constraints on political activities that the NSW Government sought to impose. And that is why in May this year our Government passed the *Not-for-Profit Sector Freedom to Advocate Bill*, which came into operation in June. This law prohibits and invalidates clauses in Commonwealth agreements that seek to limit or restrict not-for-profit entities from advocating on Commonwealth policy issues.

I will not go into further detail on these matters here this morning. But the fact is that despite raising this unacceptable anti-democratic behaviour several times in recent months, I have seen no indication of a change of policy from either the New South Wales or Queensland governments, and no sign that the federal Opposition would, should they win government, do any different than their conservative state counterparts. Indeed, if Senator Brandis' comments are anything to go by, it appears that if elected the federal Opposition would return to policies of suppression of political advocacy by non-government organisations that the Howard Government once pursued, and that their conservative state colleagues are now engaged in.

As I said at the outset of my comments this morning, to engage constructively in the challenge of building a more just nation, consistent with evolving standards of human rights, our nation needs to be able to conduct an honest and constructive debate on the policies that are required. It is inevitable that reforms to better protect human rights will spark debate

within communities, whether it is a community of citizens arguing about reforms to domestic law, or the community of nations, negotiating international treaties. That is as it should be.

At the international level, the human rights regime is built upon dialogue amongst peers.

And that is what our Government has been engaged in. For example:

- The Australian Government has signed the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and we are now working with the States to make ratification a reality.

- Our Government has acceded to the complaints mechanisms provided by Optional Protocols concerning women and people with disabilities, demonstrating our willingness to have our nation's standards and practices scrutinized.

- Our Government has announced Australia's support for the Declaration on the Rights of Indigenous Peoples, and we expect that document to help guide Australia's domestic policy development.

- We are an active participant in the Universal Periodic Review process conducted by the UN Human Rights Council, and we have built our own National Human Rights Action Plan around the vast majority of recommendations of that Review into Australia.

These measures demonstrate our willingness as a nation to accept criticism and to engage constructively with the ideas that are generated from international scrutiny of our country. It is an approach that we encourage other countries to adopt.

And Australian candidates continue to be supported by our Government for important international positions, as we believe that Australia should be actively engaged in deliberations amongst nations. For example, Ron McCallum is now the Vice-Chair of the UN Committee on the Rights of Persons with Disabilities, and Megan Davis was recently reappointed to the UN Permanent Forum on Indigenous issues. We are supporting the nomination to the International Court of Justice of Professor James Crawford, a superb lawyer with an excellent sense of humour, who I just recently had the honour of appearing with in our case against Japan before the International Court of Justice.

Our Government has also supported the appointment in May 2013 of former High Court judge Michael Kirby as chair of the Commission of Inquiry into human rights abuses in the Democratic People's Republic of Korea.

Australia has also been active in negotiating and co-sponsoring numerous resolutions in the UN General Assembly and the UN Human Rights Committee across the breadth of thematic issues, from the rights of people with disabilities to the global abolition of the death penalty.

Finally, I note that with our sound multilateral record of achievement to cite, we now have a solid basis to launch Australia's candidacy for the Human Rights Council 2018-20 term. This is the first time that Australia has sought membership of the Council and reflects our strong commitment to the promotion and protection of human rights.

Our Government has worked hard to re-engage Australia as an active and constructive participant in the international community. And we believe that we have a responsibility as a mature democracy, and particularly as a member of the United Nations Security Council, to continue to press ahead with the international human rights agenda.

In addition to our positive international engagement in human rights, our Government's legislative and programmatic record also demonstrates a constructive approach to promoting human rights within Australia.

For example, the Parliament's proper role examining the compatibility of new and existing legislation with human rights standards has recently been formalised through the creation of a specific Parliamentary Joint Committee on Human Rights, and by the requirement, introduced by federal Labor in 2011, that Bills and legislative instruments be accompanied by a Statement of Compatibility with human rights. This second measure requires that every time a Minister proposes a law, he or she must be prepared to permanently place upon the public record a Statement detailing how the laws being proposed are compatible with Australia's obligations under seven core human rights treaties.

Our government has also been working to consolidate Australia's anti-discrimination laws – laws which have a noble origin in international human rights treaties, but which now appear in five partially overlapping pieces of legislation, and so have become complicated and confusing. The Government is now working through the technical issues presented by the Senate Committee's recent report.

And while this work of consolidation has been occurring, I am proud that our Government has introduced and passed long-overdue protections against discrimination on the grounds of sexual orientation, gender identity and intersex status.

Today I have outlined some of the important work that is being undertaken by our Government to further the international human rights agenda, while also improving human rights protections in the domestic sphere.

I have also been arguing today that the pursuit of improved human rights standards will inevitably generate debate. It is my firm view that constructive debate and criticism is beneficial to policy development in both the international and domestic arenas, and that debate and criticism should be encouraged by governments, not crushed as dissent.

The protestors out the front of today's event are a case in point.

And in that regard, I would like to take this opportunity to address the issue of our nation's asylum seeker policy, that has once again gripped our national debate in the last week, and that is relevant to the themes that I have been discussing this morning.

I do not want to even try to analyse every aspect of the issues at hand, but I do want to briefly give you my views about what I know is a vexed matter for all compassionate Australians, including probably everybody here today. I have no doubt that David Manne will have something to say about the issue too, when he addresses you this afternoon.

For more than a decade, since political bipartisanship and measured debate on the issue of asylum seekers was, I would say, deliberately destroyed by the Howard Government for its political advantage, the treatment of refugees coming to Australia has polarised our country. Last Friday the Prime Minister announced a policy that has been designed to end the traffic in human suffering driven by people smugglers. The subsequent debate about the merits of this policy has, understandably, been fiery.

Clearly, our Government has taken a firm policy position. But the reality of recent years is that the situation has changed dramatically, and with that change more than a thousand people have drowned in the ocean trying to reach this country since 2000. More died yesterday when a boat sank in Indonesian waters. This new situation is unacceptable, and we can not pretend to ourselves that this appalling toll of deaths at sea will not continue to occur without a significant change in policy by the Australian Government.

The policy announced by the Prime Minister last Friday is aimed squarely at removing the incentive that induces the desperate to make the dangerous voyage to Australia. And with that incentive removed, the policy aims to fundamentally undermine the business of the smugglers who exploit the desperation of their human cargo.

Obviously the decision to close this route for those wanting to seek asylum in Australia was only taken after careful deliberation and years of debate during which many options were considered. I say again, the new status quo of ongoing – and very likely increasing – deaths at sea is intolerable, and all prior efforts to find policy measures that would stop the dangerous flow of boats have been unsuccessful.

I would also point out that the Government will be implementing these new arrangements in a manner that is consistent with our international obligations. Papua New Guinea is a signatory to the UN Convention on Refugees and will remove its reservations to the Convention for people covered by this arrangement. Asylum seekers found to be refugees would be resettled in PNG with appropriate support from the PNG Government.

Those transferred and accommodated in PNG will be treated with dignity and respect and in accordance with human rights standards. They will not be returned to their place of persecution, and the obligations of the Refugees Convention will be adhered to.

There is another aspect to the moral imperative for this policy change, which is that our international legal obligations should not be seen through a parochial lens that seeks to confine our responsibilities to only what happens within our borders. The Office of the United Nations High Commissioner for Refugees has put in place processes to deal with the international issue of refugees, and the actions of the people smugglers completely subverts that system. Australia cannot claim to be responsibly engaged with the international frameworks set up to deal with refugees if we are willing to tolerate the subversion of that framework by illegal people smugglers, who have created a dangerous and Hobbesian system, driven not by human rights obligations, but by the pursuit of profit.

There are thousands of refugees waiting in UN camps who do not get on boats, in some cases because they are so poor that such journeys are beyond contemplation. They are amongst the neediest of refugees, awaiting their chance to come to Australia under our humanitarian program. And for every boat arrival that we now say no to receiving here, a place is made for a refugee who is patiently – and desperately – waiting for their chance in a UN camp.

So let me be clear: Not one less refugee will be taken into Australia as a consequence of our arrangement with Papua New Guinea. And those that we do take in will be those who have been assessed through the processes established by the Office of the United Nations High Commissioner for Refugees.

Which brings me to another important fact that is often lost in the current political noise: our Government has recently *increased* our humanitarian intake by 7,000, the largest increase in 30 years, so that Australia now accepts 20,000 refugees a year. Of the 22 countries with a dedicated resettlement program under the Refugee Convention, our nation is now in the top three for refugee settlement, along with Canada and the US. And our Government will consider another increase – to 27, 000 refugees – if there is now a significant decline in the deadly voyages by boat.

The polarised, passionate and – regrettably, often disgracefully opportunistic – nature of the debate about asylum seekers over the last decade has led many positions to become so entrenched that the important facts I have just outlined are often obscured. Consequently, the realities that we must responsibly confront with effective policy solutions have become harder to see.

In this regard the federal Opposition have once again been engaged in reprehensibly irresponsible, dishonest and self-serving tactics motivated it seems by the sole purpose of furthering their partisan political interests. Of course there should be a genuine debate about how to best respond to the immensely difficult challenges that Australia faces in this area. But the Liberal Party is entirely absent from that debate, and are instead back to their old playbook of fear-mongering, trashing diplomatic protocols, and throwing up three word slogans in place of considered policies, the latest of which is the risible and duplicitous 'Operation Sovereign Borders', a slogan clearly designed to once again dangerously conflate what are humanitarian and law enforcement issues with matters of national security.

I will have more to say about these issues over the coming weeks. Indeed, I have been wrestling with these issues for my entire professional life, and I welcome constructive contributions from anyone, anywhere in our community, regarding this enormously difficult policy area, and the questions that it raises.

But I strongly believe we can and must rebuild our confidence and pride in our nation's humanitarian programs, and I sincerely hope that we will find a way to build a lasting, bipartisan approach to these difficult issues, that could become a symbol of our maturity as a nation.

As I said when addressing at the Sydney Institute last week, a robust, open and honest conversation between those with differing viewpoints creates the energy that drives a vibrant and creative democracy. Viewed through one eye the world has no depth, but with the parallax created by differing viewpoints, we perceive the world and the challenges that we face in three dimensions, and our nation is made richer – and wiser – for that.

Thank you very much.