Dinner Address

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The Australian Bill of Rights Debate: The International Law Dimension

The debate about the desirability of an Australian Charter, or Bill, of Rights has been vigorous. As a demonstration of vibrant participatory democracy, especially through the consultations of the Committee headed by Father Frank Brennan, the debate has been heartening. More than 38,000 submissions have been made to the Brennan Committee, which is due to report its findings and present its recommendations next month.

You will be relieved to hear that it is not my intention this evening to sift through all the points that have been made for and against the proposal. I intend to outline just one set of reasons that prompts me to be opposed to an Australian Charter or Bill of Rights. These reasons have not, so far as I know, been touched upon in the debate so far. I wish to consider the proposal from the aspect of Australia's obligations under international human rights instruments and how they impact upon Australian law. In doing that I shall also reflect on my recent experience of having been a member of the United Nations Human Rights Committee (2001-2008).

Among supporters of the proposed Charter there has been no dispute that the core rights to be contained in it would be based on the so-called International Bill of Rights. This International Bill consists of the seminal *Universal Declaration of Human Rights*, adopted by the United Nations in 1948; the *International Covenant on Civil and Political Rights* (ICCPR) of 1966, which detailed the traditional "negative" human rights and fundamental freedoms, such as the right to free speech, freedom of conscience and belief, and prohibiting arbitrary arrest and punishment; and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), 1966, which expanded and amplified the "second generation" of human rights, such as the rights to education, health and social security. The *Universal Declaration* is not a treaty instrument; it stands as an authoritative exposition of basic human rights and freedoms and has been regarded as having entered the corpus of general international law. The two Covenants, however, are subject to acceptance by way of signature and ratification; the *ICCPR* is peremptory in nature, whereas the *ICESCR* is programmatic and aspirational. The difference between the two is that, for example, while torture is absolutely prohibited, the right to education and health services is subject to the ability of governments within their existing capabilities to achieve these goals.

Many proponents of an Australian Charter would wish to incorporate further rights, or different formulations of the rights contained in the Covenants. This would be to enter still further into uncertain territory with unpredictable consequences. For the purposes of the argument, however, I will assume a "minimalist" model of an Australian Charter that does no more than reproduce exactly the provisions of the Covenants. I would even exclude from consideration this evening an incorporation of the *ICESCR*, which many have proposed in addition to the *ICCPR*, although my argument would be greatly strengthened if that were to be the case.

Australia is one of 164 parties to the *ICCPR*. Out of a total of 192 sovereign States represented in the United Nations, this scale of commitment to basic human rights is impressive. The universal validity of the norms of human rights contained in the *ICCPR* cannot be disputed. Australia takes its obligations under the *ICCPR* seriously. (This is unfortunately not true of all States parties). It reports at regular intervals to the Committee charged with monitoring compliance: the Human Rights

Committee. Australia, moreover, has taken the additional step of becoming a party to the *Optional Protocol* to the *ICCPR*, which allows for individuals to bring a petition (called a "communication") to the Committee alleging a violation of the *ICCPR* with direct consequences for the petitioner, and where all domestic remedies have been exhausted without success.

I thus come to my main point. How are these international obligations discharged by Australia under our present laws, and how would they *not*, in my view, be enhanced by the proposed Australian Charter?

In the past, the Human Rights Committee has not stated it as a requirement that each party to the *ICCPR* incorporate rights secured by it, or equivalent rights, in any particular form. It has been concerned only to find whether those rights are recognised and enforced in practice, irrespective of the nature of the local legal system or system of government. It is true that a majority of States has a written statement of human rights enacted into law, often constitutionally entrenched. This, however, has not always proved in practice to be a guarantee of observance, as witness such States as Zimbabwe, which has a Constitution enshrining provisions taken from the *Universal Declaration* and the *ICCPR*. Australia has always relied on the common law as providing basic protections of human rights, aided by statutes making provisions in particular areas.

In response to Australia's 4th periodic report in 2000, the Committee, however, recommended that Australia adopt comprehensive national legislation incorporating the *ICCPR*. More recently, in March 2009, reviewing Australia's 5th periodic report, the Committee stepped up the volume. The first of its "principal subjects of concern and recommendations" stated that:

> "The Committee notes that the Covenant has not been incorporated into domestic law and that the State party has not yet adopted a comprehensive legal framework for the protection of the Covenant rights at the Federal level, despite the recommendations adopted by the Committee in 2000. Furthermore, the Committee regrets that judicial decisions make little reference to international human rights law".

This concern was then followed by a recommendation:

> "The State party should: a) enact comprehensive legislation giving *de facto* effect to all the Covenant provisions uniformly across all jurisdictions in the Federation; b) establish a mechanism to consistently ensure the compatibility of domestic law with the Covenant; c) provide effective judicial remedies for the protection of rights under the Covenant; and d) organize training programmes for the judiciary on the Covenant and the jurisprudence of the Committee".

The Human Rights Committee is entitled to its view, even though this might be regarded as an unwarranted intrusion, especially at this time, into the domestic affairs of Australia. But to recommend a "one size fits all" model of incorporation is to ignore the ability of Australian Parliaments and courts to give effect to human rights in specific cases and in particularised and fully considered ways, adapted to Australia's circumstances.

Take, for example, the decision of the High Court of Australia in the case of *Dietrich v. The Queen*.[1] Dietrich was convicted of serious drug offences and was sentenced to 7 years imprisonment. He had been refused legal assistance by the legal aid administration in Victoria. His trial lasted 40 days. He appealed to the High Court on the ground that his trial breached Article 14 (3)(d) of the *ICCPR*, which provides that an accused person shall have the right, *inter alia*, "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it". The High Court noted that the *ICCPR* had not been implemented directly[2] in Australia and so could not be invoked as such. In any event, the courts in Australia were not competent to decide on the allocation of legal aid funds. Nevertheless, the High

Court held that the common law recognised a right to a fair trial, and that a necessary element of a fair trial in a serious criminal case was access to free legal assistance to those unable to afford it. While the courts themselves were unable to provide that assistance, the courts should, in such cases, issue a stay of proceedings until such time as an indigent defendant facing a serious criminal charge could come back to court suitably represented, no matter what the source of that assistance might be.

Thus the High Court adopted a position consistent with Australia's obligations under the *ICCPR* by applying the essence of those obligations rather than their literal formulation, and by harmonising them with the common law and adapting them to Australian conditions. This approach, in my view, achieves a harmonious and integrated incorporation of human rights norms into the Australian legal order in the most effective manner. In the same spirit, Australian judges are directed to prefer an interpretation of statutes that is in conformity with Australia's human rights obligations, where the language of the statute admits of more than one interpretation.[3]

The second of the four parts to the recommendation above of the Committee directing that Australia adopt a "mechanism" for compliance, does not specify what kind of mechanism should be established by Australia to ensure the compatibility of domestic law with the *ICCPR*. Presumably, this mechanism would be established under the legislation proposed in the first recommendation. But the aim might be achieved, in my view, more consistently with Australia's institutions and common law heritage, through existing monitoring mechanisms without direct enforcement powers, such as the Australian Human Rights Commission. Why was the role of that Commission overlooked by the Committee?

The third recommendation exhorts Australia to "provide effective judicial remedies for the protection of rights under the Covenant". It is difficult to understand how Australia is deficient in this respect, otherwise than through the absence of a written Bill of Rights with inbuilt enforcement provisions. This model would be, for the reasons I have already given, too blunt to achieve a harmonious and integrated implementation of human rights, and moreover, one that could lead to unforeseen consequences.

Perhaps the clearest clue to the Committee's reasoning is to be found in the fourth part of the recommendation: " to organise training programmes for the judiciary on the Covenant and the jurisprudence of the Committee". It might be regarded as more than a little offensive to suggest that the Australian judiciary is in need of such education. Moreover, it is surely self-aggrandizing of the Committee to mandate attention to its own jurisprudence as part of the recommended training programme. It elevates itself to a status tantamount to a final court of appeal for the whole world in the interpretation and application of human rights. Under the proposed Australian Charter, in the form supported by the Human Rights Committee, would the Committee's jurisprudence thus be binding on, or at the very least highly persuasive before, Australian courts?

So, I come to the question of what is the status of decisions of the Human Rights Committee under the *Optional Protocol* (to which 112 of the 164 States parties to the *ICCPR*, including Australia, have adhered)? The *Optional Protocol* itself refers to the "Views" of the Committee, which is not a term normally associated with notions of binding decision. The Committee itself has discussed the question in its General Comment No. 33 (2008). It stated, in part:

> "While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions".

It concluded that:

> "The views of the Committee under the *Optional Protocol* represent an authoritative

> determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the *Optional Protocol*".

The Committee thus adopts a nuanced conclusion as to the status of its views, falling just short of stating them to be binding, but by stating them to be "authoritative" it gives to those views a status far higher than that of mere recommendations for consideration by the respondent State party.

In its Concluding Observations of 2009 on Australia's Report, the Committee took Australia to task for its failure to accept the views adopted in all cases brought against it under the *Optional Protocol*. (Of a total 105 cases registered against Australia as at November 2008, violations were found in 24 cases, no violation in 6 cases, 32 cases were found to be inadmissible, 28 were discontinued, and 15 remained pending.) In those cases in which Australia was found in violation of the *ICCPR* but where Australia, in respect of some of them, found itself unable to accept the views of the Committee, it provided detailed reasons to the Committee for its inability to accept the views. The Committee nevertheless regards these cases as ones where "dialogue is continuing". It does not accept a rejection of its views. In the Concluding Observations of 2009 it stated that "a failure to give effect to its views would call into question [Australia's] commitment to the *First Optional Protocol*", and that Australia "should review its position in relation to the views adopted by the Committee … and establish appropriate procedures to implement them". The Committee has thus further elevated the status of its views in cases brought under the *Optional Protocol*.

It is impossible on this occasion to summarise each case of a violation found against Australia and give a reasoned critique. (Moreover, I was disqualified from sitting on cases involving my own country). A good many of them involved immigration decisions and mandatory detention of asylum seekers. I can only say, compared with many States parties that simply ignore findings against them, that Australia has always been meticulous in responding with detailed reasons in cases where it feels unable to implement the views of the Committee. Would that be possible any longer under a Charter that directly or indirectly gave an elevated status to the views of the Committee?

I give examples of three cases where I think the Committee erred and which go beyond mere matters of evaluation of the facts at hand. One is a case against Australia; the other two relate to other countries.

Faure v. Australia[4]

This was a complaint by a young woman that Australia's "Work for the Dole" programme violated the prohibition of the *ICCPR* against forced or compulsory labour (Article 8). She had entered into a work agreement with Newstart, but after a short period had abandoned her job and failed to keep scheduled appointments with Centrelink. Her allowances were thereupon reduced. The Committee decided that Australia was in violation of the Covenant. It did not decide whether or not the programme constituted forced or compulsory labour (a vigorous separate opinion that it did not was entered by Professor Ruth Wedgwood of the United States), but found a violation in that there was no law in Australia that allowed her to challenge the compatibility of the Work for the Dole programme with the human rights protected by the Covenant. In other words, the Committee was implying that Australia must introduce legislation allowing all such challenges to be made and tested before the courts. This might be thought to give further substance to the "lawyers' picnic" view of the proposed Charter.

To be fair, I must give an example of a finding against Australia with which I (and I would think most people here) would agree. This was the very first case brought against Australia after its accession to the *Optional Protocol*; the case of Toonen.[5] The Committee held that the continued existence of a prohibition in the Criminal Code of Tasmania of sexual relations between consenting males of full

age was in violation of the Covenant's protection against discrimination and violations of privacy. The law had not been invoked in practice for more than 20 years; nevertheless, in the submission of the petitioner, its continued presence on the statute book constituted a kind of Sword of Damocles, potentially liable to fall without warning. Since Australia alone has status under international treaties, Tasmania could not be a party to the case. In fact Australia stated to the Committee that it did not oppose a ruling against it, but for the sake of assistance to the Committee it forwarded a brief from the Tasmanian Government supporting the legislation. Ultimately, the Tasmanian Parliament repealed those provisions of the Criminal Code.

I turn to two cases that worried me deeply when I was a member of the Committee.

In *Haraldsson v. Iceland* [6] a group of fishermen challenged the allocation system for the issue of fishing licences established under Icelandic legislation. They claimed that the system discriminated in favour of existing licence holders and against new applicants. The fisheries allocation system adopted by Iceland in the face of declining stocks and increasing demand for licences had evolved over several years of vigorous debate in Iceland, both inside and outside Parliament. The system finally adopted was the subject of a challenge in the Supreme Court of Iceland; the Court rejected the challenge, by a majority of its members.

The Human Rights Committee decided, by a majority of 12 to 6, to uphold the complaint, on the ground that the discrimination lacked objectivity and reasonableness. I dissented, in a joint separate opinion with my Swedish and Romanian colleagues. Dissenting opinions were filed also by the members from Japan, the UK and the USA. My real objection to the decision was that the Committee should simply not second-guess a law adopted by a democratically elected legislature after exhaustive public discussion and upheld by its highest national court, unless it was very obviously in violation of the Covenant.

A difference of opinion as to what is reasonable or proportionate lacks plausibility when advanced by a Committee which has studied the case for only a few hours. Unfortunately I omitted to take this position explicitly in order to be able to join the two other colleagues in dissent, who preferred to find the case unsubstantiated. I wish now that I had stated my view independently, or in company with Professor Wedgwood, whose dissenting view, based on her evaluation of the limits of the Committee's competence, was filed too late for me to see and join.

My third example is the recent case of *Sayadi and Vinck v. Belgium*.[7] The complainants in that case were a married couple of Belgian nationality who were directors of a Belgian organisation affiliated with the Global Relief Foundation. That Foundation, because of its alleged links with international terrorism, appeared on the Sanctions List maintained by the United Nations under the authority of resolutions of the Security Council. Shortly after the listing of the Foundation, Belgium reported the names of the complainants to the UN as persons associated with the listed organisation, as it was required to do by relevant Security Council resolutions. Shortly prior to this, the Belgian Public Prosecutor had launched a criminal investigation into the activities of the complainants. These proceedings resulted in the termination of the investigation some three years later. Belgium then applied to have the names of the complainants removed from the UN Sanctions List, but without success.

The Committee found a violation of the *ICCPR* in that Belgium had acted prematurely, and therefore wrongfully, in transmitting the names of the complainants to the Sanctions Committee before the conclusion of its criminal investigation, with adverse consequences for the complainants in respect of their reputation, their ability to travel, and access to their bank accounts. In the Committee's view, the obligations of States to carry out decisions of the Security Council under Article 25 of the UN Charter did not prevail over their obligations under the *ICCPR*, and thus over the right of the complainants to be heard in answer to allegations having such serious consequences for their personal freedom.

In my dissenting view (and I regret that I was not joined by certain colleagues whose views I especially respect), Belgium should not have been found in violation of the *ICCPR* in this case. It acted in good faith in reporting the names to the Sanctions Committee, as it was legally required

to do under a resolution binding on it (such resolutions also having superior force as law by virtue of Article 103 of the UN Charter). Should Belgium have waited until the case was established? It took three years to complete inquiries and clear the complainants of terrorist associations. In the meantime, the UN Sanctions Committee may have had good reasons for listing the complainants and the organisation with which they were associated, and thus for causing their activities to be restrained. Irreparable danger to the international community could have resulted from delay. After the mistake became clear, Belgium did all that it could by repeatedly requesting the de-listing of the complainants, but without success. (Why the Sanctions Committee has maintained their listing is not known).

The chief flaw in the Committee's decision in this case, in my opinion, was to see the *ICCPR* as standing alone, and not in its relation with other instruments, especially the United Nations Charter. The members from Japan and the UK saw this point, but attempted to reconcile the overlapping obligations. I did not find their reconciliation convincing. Above all, the majority appears to have taken a blinkered view of the supremacy of the *ICCPR* over all other considerations, reflective indeed of the existence of a "human rights industry" which poses the danger, also in the context of the present debate in Australia, of enthusiastic but uncritical pursuit of otherwise admirable goals.

To sum up:

1. I see great danger in supporting an Australian Charter of Rights; the adoption of a Charter would tend to have the effect, directly or indirectly, of binding Australia to adhere to the decisions of treaty monitoring bodies whose role should be seen as recommendatory only.

2. I consider that Australia's present system of implementation of human rights through specific legislative acts, through decisions of the courts acting within legitimate leeways of judicial choice,[8] and through the monitoring roles of federal and State Human Rights Commissions (to say nothing of an active Australian NGO community) to be entirely adequate and effective. The present system leads to an integrated and harmonious incorporation of human rights within the Australian legal order and leaves untouched the sovereignty of Parliaments.

3. However, I would not be opposed to two alternative steps which may be points of recommendation likely to come out of the Brennan Committee:
   (a) An amendment to the *Acts Interpretation Act* directing the courts to take into account Australia's obligations under international human rights instruments in interpreting and applying statutes and the common law where they are unclear or admit of more than one interpretation. This would be to give legislative force to *dicta* already expressed by the High Court. The drafting would have to be careful not to repeat the wording of section 3 of the UK *Human Rights Act*,[9] which has been interpreted by the House of Lords as mandating a quasi-legislative approach far beyond the legitimate leeways of judicial choice.[10] Where Parliament has made its intention clear the courts must not defeat the legislative will through "judicial creativity".
   (b) The federal Parliament (and State Parliaments) should establish a Committee along the lines of the Joint Standing Committee on Treaties (JSCOT) to examine Bills for possible incompatibility with Australia's human rights obligations. This would be to situate the obligation to respect, and to avoid inadvertent breaches of, human rights as part of the legislative process, where they belong.

But not beyond this!

Endnotes:

1. (1992) 177 CLR 292.

2. The *ICCPR* and other human rights instruments are set out in the Schedule to the *Human Rights and Equal Opportunity Act* 1986, as a guide to be followed by the Australian Human Rights Commission, but are not thereby incorporated into Australian law.

3. See *Minister for Immigration v. Teoh* (1994) 183 CLR 273, at 279 per Mason CJ and Deane J; *Al Kateb v. Godwin* (2007) 219 CLR 562, per Gleeson CJ and Kirby J.
   In *Teoh's Case*, Chief Justice Mason and Justice Deane, in their joint judgment, said:
   > "Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party [citing *Chu Khen Lim v. Minister for Immigra*tion (1992) 176 CLR 1 at 38], at least in those cases in which legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, *prima facie*, intends to give effect to Australia's obligations under international law. It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with established rules of international law."

   Regarding the development of the common law, the same Justices stated:
   > "Apart from influencing the construction of a statute or subordinate legislation, an international convention may play a part in the development by the courts of the common law. The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law" [citing *Mabo v. Queensland No.2* (1992) 175 CLR 1, at 42 per Brennan J (with whom Mason CJ and McHugh J agreed on this point); *Dietrich v. The Queen* (1992) 177 CLR 292, at 321 per Brennan J, and at 320 per Toohey J; *Jago v. District Court (NSW)* (1998) 12 NSWLR 558, at 569 per Kirby P.]

4. Communication No. 1066/2001, Views adopted 31 October 2005.

5. *Nicholas Toonen v. Australia*, Communication No. 488/1992, Views adopted March 1994.

6. Communication No. 1306/2004, Views adopted 24 October 2007.

7. Communication No. 1472/2006, Views adopted 22 October 2008.

8. Chief Justice Spigelman of the Supreme Court of NSW has referred to the "Australian common law of human rights" without taking a position on the desirability of a Charter: J Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

9. Section 3 of the *Human Rights Act* (UK) 1998 provides: " So far as possible to do so, primary legislation and secondary legislation should be read and given effect in a way which is compatible with [European] Convention rights".

10. *Ghaidan v. Godwin-Mendoza* [2004] 2 AC 557. See especially per Lord Nicholls at 570-572. It must of course be remembered that the UK is bound by judgments of the European Court of Human Rights, and that the approach to statutory interpretation, mandated by section 3 of the *Human Rights Act* and endorsed by the House of Lords, is largely dictated by a desire to pre-empt appeals to the European Court.