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SIR
NINIANN
STEPHEN

A Tribute

Edited by

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Foreword

This collection of essays celebrates the public life of Sir Ninian Stephen. However, as Professor Antonio Cassese observes in his chapter (and as other contributors make plain), it is impossible to disentangle the public from the private in the subject of this book. His experience in many high offices, national and international, combined with his intelligence, sensitivity, resolution and charm, put him, as Professor Cassese says, 'head and shoulders' above others with similar distinctions. He is not only admired and respected; he engenders feelings of affection and admiration that are rare, especially in Australia—a land that is sceptical of heroes.

Because I did not have the blessing of a Melbourne upbringing and education, I first saw Sir Ninian Stephen when he was sitting as a Justice of the High Court of Australia. He served in that office for a decade from 1972. In the chapter on the High Court years, Sir Anthony Mason, later Chief Justice of Australia, engagingly recounts the stories of Sir Ninian's service and the big constitutional and other cases that he decided, while a member of the Court. Writing from inside knowledge, Sir Anthony Mason portrays Sir Ninian's urbanity and charm, and also the dispassion that was evident in his work in the Court.

Even before his appointment to the High Court, in a busy life as a leading silk at the Victorian Bar, Sir Ninian displayed a certain disconnectedness from the turmoil of ideological warfare that can sometimes mark legal

decision-making, at least in matters of high constitutional and other significance.

We get a hint of this in a foreword that he wrote to the second edition of Dr Damien Cremean's text *Admiralty Jurisdiction*. Foreword-writing sometimes gives more clues to the personality of the writer than do other works, which are subject to the necessities of greater self-discipline. In keeping with Sir Ninian's original and somewhat quirky way of perceiving things legal, he opened his foreword not with a comment on admiralty law and practice but with a homely and nostalgic remembrance of times in the law long gone:

I always thought it quaintly charming that, at least until the 1950s, the Victorian Supreme Court still boasted a signboard announcing the presence there of the Vice Admiralty Court, a court abolished for Victoria and New South Wales in 1911 and for other States twenty years earlier. But to the common lawyer, admiralty jurisdiction still retains a flavour of the exotic.¹

One can just picture Stephen QC, with a junior or two in tow, rushing past the noticeboard of the Supreme Court under its great dome—the juniors' minds fixed rigidly on the complexities of the case they were about to open, Ninian's mind elsewhere, as he cast his eyes to the gold lettering of the board and the images of vice admirals in days of yore. Human intelligence is a wonderful thing. Great spirits see the same matter but view it from an entirely different perspective. This capacity provides the breakthroughs of human knowledge and understanding. To some it is given to witness old things in different ways. It is a gift and Sir Ninian Stephen, as lawyer, had it.

In the same foreword, he commented presciently on how, virtually from the start, admiralty law in England drew upon international influences in a manner different from the usual approach of the common law: 'since its early British contributors were civilian lawyers who took up the work of continental jurists ... by the early seventeenth century [they] came close to conferring upon the Court of Admiralty exclusive jurisdiction in commercial law, the Law Merchant'.²

Even in this brief comment, upon an area of legal practice esoteric and specialised, Ninian Stephen's mind perceived things differently. He beckoned the reader to a receptiveness to universal legal developments. This

was easier to do in admiralty law because of the global phenomenon of the sea itself. It was an insight that he was to develop and generalise.

Sitting as one of Sir Ninian Stephen's successors in the High Court of Australia, it is always a pleasure to be taken to his opinions. In them are found perfectly crafted examples of knowledge and wisdom, expressed without pomposity. He began as a somewhat conservative judge. One gets a feeling that, in the later years of his service, he moved to a more questioning plane as he perceived the growing impact of international law on Australian domestic law and the need for change. This is a point hinted at in Sir Anthony Mason's chapter. He should know, for his own intellectual journey ran in a parallel course.

Sir Ninian Stephen's appointment as Governor-General of Australia from July 1982 is described in the chapter by Professor Geoffrey Lindell. In the aftermath of the constitutional events of Remembrance Day 1975, the Stephens' service in Government House called for the greatest tact and skill in helping to rebuild confidence in the office among all of the major political players. Professor Lindell describes how this goal was substantially achieved.

In her chapter, Professor Kim Rubenstein tells of his work as Chair of the Citizenship Council. It is a grand review detailing how one, who himself had come to Australia from another land and reached the highest offices that can be bestowed, became interested in the process of citizenship and the evolution of that notion not originally prominent in the Australian Constitution.

In the succeeding chapter, Professor Cheryl Saunders continues with similar themes in recounting Sir Ninian Stephen's role presiding over the Constitutional Centenary Conference in 1991 and the Constitutional Centenary Foundation to which that Conference gave birth. To the irritation of some who were later to participate in the debates over a republic, Sir Ninian, as one-time representative of the Queen of Australia, prudently, and with unerring delicacy, declined a leadership role in that still unresolved controversy.

When he left Government House, Sir Ninian Stephen knew that one of his predecessors, Sir Paul Hasluck, had expressed the opinion (explained by Professor Lindell) that a retired Governor-General should thereafter play no part whatever in public life. Fortunately, this was not Sir Ninian's view, although he was careful to avoid activities that might retrospectively cast

doubt on the unwavering impartiality expected of an Australian Governor-General. He did not return to live in a palace. He did not go back to a home in the Old Country. Nor did he accept a life in exile in Australia or the sackcloth of obscurity.

Soon after departing office as Governor-General, he gave a speech, unburdening himself of a point of view that he had presumably held during all his years as a judge and Governor-General but which hitherto he had kept, Trappist-like, to himself. In the speech, he suggested the abolition of the Australian States. Even in those somewhat quieter and more respectful times, his suggestion was greeted with astonishment by States-righters around the nation.³ They were most upset that he had secretly harboured such perfidious thoughts about the Constitution, with their potential to unsettle the very basis of the federal compact. The calls of 'resign' rang out in the land. However, by that stage, there was nothing to resign from.

I once mischievously suggested that his speech on the States had necessitated a rescue passage, which Prime Minister Hawke hurriedly set about creating. Its object was to spirit the erstwhile viceroy out of the country to avoid the rage of the mob and the chattering classes. Upon this theory, his departure was the closest we have ever come in Australia to the rescue by the Americans of the Shah of Iran. Or by the French, who brought the Emperor Boukassa from Central Africa to Lake Annecy, with all his diamonds. Or by the Nigerians, who shifted President Charles Taylor from Liberia to Abuja. The VIP plane was made ready. The parachute was packed. The former Governor-General had to leave for his own safety and for the peace of mind of the people.

In his chapter on Sir Ninian's role as Ambassador for the Environment, Doug Laing ends forever this colourful postulate. He points out that the appointment had less to do with the fear of subversive forces undoing the Australian federation than with the emergence of a new and complex issue: the global environment, in which Sir Ninian's recognised skills of diplomacy could be put to good use on the world stage.

And so Sir Ninian Stephen's fourth career was launched. He was sent to a multitude of commission meetings (affectionately known in the trade as 'prepcoms'). They prepared the way for what became the first international conference on the environment. Eventually, that conference took place in Rio de Janeiro. The trouble was that Sir Ninian found that he enjoyed this new experience of international diplomacy. He saw the utility of Australia's

contributions. Even though small in population, we could help to build an effective response to the damage caused to the global environment by modern ways. In fact, he revelled in the work. Representatives from other lands liked him. Australia had discovered a considerable untapped resource of grace and steely determination. It was a talent that was to be quickly deployed on an even wider international stage. So began his extraordinary, and so far unique, career as a kind of roving ambassador for peace. This is the subject of Professor Timothy McCormack's chapter.

In 1992 the governments of the United Kingdom and the Republic of Ireland appointed Sir Ninian to chair the second phase of the talks on peace in Northern Ireland. These talks were designed to bring the warring factions led by Gerry Adams, for the Irish Republican Army, and Ian Paisley, for the Ulster Unionists, around a table. He aimed to replace murder and cruelty with discussion and compromise.

Of course, Sir Ninian did not succeed in bringing an end to the Irish Troubles. They had, after all, lasted for centuries. The enmities were still deep. The suspicions were even deeper. In Ireland, the path to peace is a slow path along winding roads that lead through dangerous glens. As W. B. Yeats declared, 'peace comes dropping slow'.⁴ Yet, the choice of Sir Ninian to chair the Irish talks was an inspired one. With occasional horrible interruptions, the process of talking has continued to this day. It is harder to hate and murder a person whom you know than one who is a stranger.

There followed a period of service in international tribunals and in the court of the United Nations, established by the UN Charter. This period is described by Sir Kenneth Keith—himself recently elected a permanent judge of the International Court of Justice—and by Professor Hilary Charlesworth, who was one of Sir Ninian's associates in the High Court of Australia. Sir Kenneth Keith describes how Sir Ninian was nominated by Australia in 1989 to be a member of the Permanent Court of Arbitration at The Hague. And how, in 1993, he was elected, on the nomination of Australia, as one of the first eleven judges of the International Criminal Tribunal for the former Yugoslavia. Most Australians have only the vaguest idea of the important work of that Tribunal. They will be enlightened by the chapter of Professor Antonio Cassese, the Tribunal's President at the time. He describes the novel jurisdiction of the Tribunal and Judge Stephen's important part in its adoption of the Rules of Procedure and Evidence and in its early judicial activity.

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When Professor Cassese, Sir Ninian Stephen and their colleagues arrived in The Hague to set up the new Tribunal, there were no staff, no courtroom, no chambers, no judicial assistants; only a tiny library and very few facilities. No wonder that Sir Ninian looks back on that time of creating this new institution with a sense of excitement and accomplishment. It threw him into close contact with lawyers from different cultural, linguistic and legal traditions. For his lively and ever-expanding intelligence, it was an encounter he delighted in.

Of one thing this experienced Australian judge was determined. It was that the Tribunal would not be established like the military tribunals of the victors that had tried the leaders of the vanquished powers at Nuremberg and Tokyo after World War II. Nor would it be a military body of the kind that tried Alfred Dreyfus or a commission of the dubious variety apparently contemplated for the shackled prisoners held these past five years in the United States' military base at Guantánamo Bay. Sir Ninian Stephen, a judge once again, was insistent that the Tribunal would uphold basic principles of fair play and due process.

The first trial before the Tribunal in which Sir Ninian participated, was that of Duško Tadić. In the course of that trial, an application was made by the prosecution to call a witness against the accused without disclosing that witness's identity to the accused or his lawyers. So deep were the continuing divisions between families and communities in the former Yugoslavia that vengeance was often close at hand against those who might give testimony. A majority of the Tribunal held that the application for anonymity was justifiable and lawful.⁵

In his dissent to that decision in the *Tadić Case*,⁶ Sir Ninian Stephen referred to the provisions of the International Covenant on Civil and Political Rights and to the similar provisions in the European Convention on Human Rights guaranteeing fair trial. He invoked a number of holdings of the European Court of Human Rights dealing with the provisions of that Convention.⁷ He also referred to decisions of English⁸ and Australian courts.⁹ He concluded that basic justice, and the right of the accused to defend himself effectively, necessitated provision in most cases of the identity of the accusers.

I wrote to my friend Hans Corell, then General Counsel for the United Nations, about Sir Ninian Stephen's work in the International Criminal Tribunal for the former Yugoslavia. He wrote back: 'In the formative years

of the Tribunal, [he was] instrumental in shaping its image, laying the legal framework for its operation and most importantly developing the principles for international criminal jurisdiction'.¹⁰ Like other observers, Hans Corell recognises that the *Tadić* decision, the first important one delivered by the Tribunal, was 'a landmark in the development of international criminal law'. He says: 'In his knowledge, wisdom and grace [Sir Ninian Stephen] was one of the leading judges on the Bench'.

In 1995, on the nomination of Australia, Sir Ninian Stephen assumed office as a judge *ad hoc* of the International Court of Justice, to participate in the case in that Court concerning East Timor. This is the specific subject of Professor Charlesworth's chapter. Portugal had commenced proceedings against Australia, contending that the 1989 bilateral treaty between Australia and Indonesia, dividing the petroleum and gas resources of the Timor Gap, was invalid. As the former colonial power, Portugal purported to bring the claim on behalf of the people of East Timor, then part of the Republic of Indonesia. The International Court of Justice rejected Portugal's proceedings, on technical rather than substantive grounds.¹¹ As a judge of the Court, Sir Ninian joined in the majority opinion.

It is a misfortune that he did not have the opportunity of serving as a judge of that Court over a longer time. However, in the light of the intelligence offered by Sir Kenneth Keith's chapter concerning Australia's nominations to the International Court, it can only be said that the prospects of nomination and election to a permanent seat on that Court were so problematic that it is as well that Sir Ninian did not count on them. Many hearts have been broken in that aspiration.

Yet, having been discovered, and having proved himself so successful on the international stage, invitations began to arrive in Melbourne to seek out Sir Ninian Stephen's involvement in many new and challenging initiatives. Most of them were of a diplomatic, rather than specifically of a legal, character.

Just before the end of the apartheid government in South Africa, and the inauguration of the new South African Constitution, Sir Ninian Stephen was invited to participate, with other Commonwealth experts, in giving advice on the form that its new basic law should take. Soon afterwards, he took part in another Commonwealth mission to Bangladesh. The head of government and the Opposition Leader in that country had not been on talking terms. The fragile democracy was endangered. Once again, his

skills were invoked to pour oil on troubled waters, so that civil discourse might be restored.

Later, under the auspices of the International Labour Organization, the oldest of the agencies of the United Nations, Sir Ninian took part in an investigation of labour conditions in Burma. This mission took him to the borderland and the refugee camps in the Golden Triangle, including camps in Thailand.

In 1998, the Secretary-General of the United Nations appointed him to chair an expert group set up to investigate options for the trial of surviving leaders of the Khmer Rouge in Cambodia. This appointment followed soon after the conclusion of my own appointment as Special Representative of the Secretary-General for Human Rights in Cambodia. My efforts to persuade the Cambodian Government to render publicly accountable those in Cambodia who had taken part in the genocide that had killed more than a million of the Khmer people, fell on deaf ears.

Sir Ninian Stephen and his colleagues produced a report recommending the establishment of a fully independent and international tribunal for Cambodia. Alas, that plan was not accepted by the Cambodian Government. A compromise was eventually struck. The United Nations is now assisting in the establishment of extraordinary chambers within the Cambodian court system. Professor Steven Ratner of the US, with Sir Ninian and Justice Rajsoomer Lallah of Mauritius, was a participant in the Expert Group. In his chapter he tells the story of those endeavours. It is a tale that will give the reader a sobering insight into the internecine world of Cambodian power-play that frightens off all but the most intrepid and courageous.

Commenting on Sir Ninian Stephen's work as head of the Expert Group on Cambodia, Hans Corell observed that he 'combined a legal and political judgment, profound belief in the principles of international criminal jurisdiction and grace and human warmth to the many Cambodians who shared with him their pain and grief'.¹² In these remarks, Mr Corell picks up key features of Sir Ninian's personality. They were also mentioned by Professor Lowitja O'Donoghue at the dinner held in Melbourne to mark Sir Ninian's eightieth birthday. Reflecting on his role as Governor-General, this outstanding Australian said that Sir Ninian had proved himself a man with an open heart. He reached out to the disadvantaged. He understood those who suffered in law, and in life, and those who experienced the pain of marginalisation. Because the memories of the suffering of Khmer people

are still fresh in my mind, I can readily rekindle the dialogue of suppressed recollections that the Khmer people, responding to this warm, graceful and good man, would have felt able to share with him.

Sir Ninian Stephen has continued to be engaged in many ventures. Indeed, the only real flaw that I have ever discovered in his international activities was his involvement in the Ethics Committee of the International Olympics Committee (IOC). I had fondly hoped that Sir Ninian Stephen was a person, like myself, with no taste for, or interest in, sport. I have been reassured that his interest in the post was purely ethical and not sporting. Upon his appointment as Governor-General, he was offered the No. 1 ticket of the Hawthorn Football Club. It had to be explained to him what this meant; where the club was; who the players were; and how, for many, they were infinitely more famous and important than the Queen's representative. It is comforting to know that Sir Ninian has never himself engaged in the unpleasant and dangerous activity of sport of any kind. To be a member of the Ethics Committee of the IOC, it seems, one must not only be *disinterested*. One must be completely *uninterested* in sport.

Sir Ninian Stephen's life continues to blaze a trail through the firmament of Australia and the wider world. Important projects lie ahead. Most of them, I am sure, will be in the international domain where he has won respect and appreciation for his work and his sterling character.

Scientists have discovered that the number of stars in the universe is vastly greater than was previously suspected. Until this era, our vision of the universe was limited by the necessity to perceive it through the atmosphere that surrounds our watery planet. Now, with the Hubble telescope, the full magnificence of space is revealed in all its wonder. Most of the newly discovered stars are more powerful than our sun. Space is created as the universe expands, growing ever faster and spreading ever further every earthly day. The closest star beyond our sun is 4.22 light years away. And far beyond the closest star lie systems of stars and planets and galaxies in wonderful abundance.

In such a context, how small and insignificant is human achievement? How puny and trivial are our human differences? When we think of such differences, in the world and in our countries, it is a healthy corrective to conjure up the most distant star, exploding somewhere in the infinite universe. If ever we consider that we and our works are grand, we should remember that star and the boast of Ozymandias. They help to put our

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lives, and their achievements, in a proper context. Throughout his journey, Ninian Stephen has always kept a sense of proportion. Although important offices have come to him in abundance, he has never been prideful. He has always remained the same person.

Serving Australia was not enough for Ninian Stephen. He went beyond and sought to serve humanity. Through it all, his wife Valery and his close family have shared the pleasures, the service, the burdens. Of course, when we think of those distant galaxies and the exploding stars in infinite space, the Stephens' service, like that of all of us, is but a passing thing—a trifle. A human being cannot achieve much. But that fact does not release us from the obligation to try.

Sir Ninian Stephen has lived by such rules. His many honours rest lightly upon him. In the mighty universe, where eternity and infinity meet, it is his kindness, intelligence and capacity to reach out and to give back, far beyond his own country, that make him a model for all citizens. Most especially, he is an example for lawyers in Australia and everywhere. This book celebrates his public life. We, its contributors, are honoured by being part of it because something of the grace of the man rubs off on us also.

The Hon. Justice Michael Kirby AC CMG
Justice of the High Court of Australia
Canberra, 1 October 2006

