Address by the

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on the occasion of

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"The Expansion of International Law – Sovereignty and External Affairs"

In thinking about a topic for this lecture I asked myself what aspect of law or public affairs seemed most to have been affected by change during my lifetime in the law. This seemed to me to be a question likely to suggest a worthwhile topic, if only because any at all dramatic change in an area of the law is usually the outward manifestation of otherwise less obvious but highly significant changes taking place below the surface of society as a whole. I was, of course, looking to changes that were of telling structural effect so far as concerned the governance of this country, knowing that this is what might interest tonight's audience.

It took very little thought to conclude that both the growth of international law and what I thought of, for want of a better term, as the internationalisation of law was just such a subject. There are, I believe, two closely related phenomena occurring in the world today: the first is the way in which we have, in a very real sense, become one world, the nations becoming interdependent each on the others, their concerns being increasingly global in character as major occurrences anywhere in the world are found to impact world-wide, so that no nation is able wholly to insulate itself from happenings beyond its borders.

The second, and closely related, phenomenon flowing from this new interdependence is the extent to which the nations of the world have become willing to confer upon international agencies and multilateral conferences power to decide upon a host of matters domestic in character and occurring wholly within their national borders.

Both of these current phenomena would, I think, have seemed strange indeed to statesmen of past generations. They are the product of radical change over the past couple of generations and they have particular significance, not always fully appreciated, for all of us.

What I am going to talk about is then of the great growth, both in volume and in extent of subject matter, of international law in recent years as a result of the spate of treaties, particularly of multilateral conventions sponsored by the United Nations and its organs, of the particular impact this is having upon nations and their sovereignty and its special impact on the distribution of legislative power within our Australian Federation.

The laws of most nations today include great sectors which are entirely international in character in the sense that their origin is to be found in an international source and their content is similar, sometimes uniform, world-wide. This is not only the case with laws which deal with inherently international subject matters such as the law of the sea, international air law, international trade and shipping laws and laws relating to international postal services and telecommunications; it

applies, too, in a host of quite different and unrelated areas all the way from the environmental quality of atmosphere and ocean to human rights and community health.

The extent of this may be gauged by the fact that it has been estimated that no less than fifty thousand international instruments have come into existence in the past fifty post-war years and that a whole horde of intergovernmental agencies, some two thousand of them, now exist, most of them busy rule-making for the world.

What this amounts to is a partial transference by nations of their sovereignty in recognition of their interdependence one with another, of their absolute need in today's world to relate to other nations and to do so in part through the medium of international treaties and conventions giving rise to new international law and involving a diminution of sovereignty and a growth of common-form laws.

Professor Tallon, Director of France's Institute of Comparative Law, has described the situation as it affects modern French law. Fifty years ago, he says, the impact of international conventions on French law was very limited. "The legal system was built essentially by the national lawmaking authorities and was intended for their own citizens. International conventions were scarce and covered few topics: transport, copyrights, patents, and the like." That quite accurately describes too the Australian scene of 50 years ago. With that he contrasts the present situation: "In all countries," he says, "jurists have become aware of the interconnection between the national legal systems and international order. The fact is," he continues, "that there is an obvious increase in the role played by international conventions in municipal law, especially by multilateral treaties".

In England recent judicial experience has been no different; thus Sir Thomas Gingham has said much the same: "No one," he said, "can doubt the growing significance of such conventions. Brussels, The Hague, Warsaw, Vienna, Rome: the list steadily lengthens, and with it the central role of such conventions in the international legal order". Since he spoke the list has lengthened dramatically.

These two jurists speak, of course, of Europe and the European Community but the same process has in this century been at work everywhere and in the last forty years at an ever-increasing tempo. The process has, I believe, been by no means a planned and carefully programmed affair; rather it has been a largely involuntary reaction to external forces: forces such as the extraordinary growth in the speed and ease of international communication and transportation, the no less remarkable expansion in the reach of the mass media, especially the

electronic media, and, above all, mankind's extraordinary development of technology in this century, which has brought both the opportunity for great material benefits and also dire threats to the future survival of life on Earth.

Do you remember when Prime Ministerial visits overseas meant five or six weeks on an ocean liner to Europe and the same time to return; when international telephone calls meant hours of waiting and called for a deep pocket and high skills in interpreting the garbled sounds that came over the line. Even ten or fifteen years ago, before fax and electronic mail, how all that has changed and now communication is truly instantaneous and travel is as swift as it is uncomfortable and unromantic.

But these technological advances are the instruments rather than the causes of change, which are more deep-seated. The causes lie in the widespread realisation by governments around the world that the human race faces very real and wholly man-made threats to its continued existence on Earth. These threats are created by mankind's ever-increasing ability to manipulate his surroundings to his immediate advantage but regardless of long term consequences. They can be countered only by the proper use of that same ability; by re-directing mankind's extraordinary ingenuity and energy away from destructive and towards supportive and life-sustaining goals involving the cooperation of all or at least a substantial majority of the nations of the world. I believe it is true to say that these threats have made the nations realise that only through internationally coordinated action can we hope to avert disaster.

This is not to say for a moment that with that realisation goes a whole new chapter of international harmony. The old Adam in us all (perhaps in the present day one should add "the old Eve" as well) continues to see to it that nothing so orderly and sensible occurs. But at least there is a new aspiration towards international cooperation.

The kind of threats to life on Earth to which I refer are well enough known in all conscience; indeed we tend to tire of being warned about them on radio and television. Those threats include the perils of an increasingly over-crowded Earth – one and a half billion 90 years ago, five billion today and heading for eleven billion before it stabilises, if we go on as we are; India, with two hundred and forty million 90 years ago growing to just under a billion by this century's end, China already over a billion. And then the alarming drift of the poor to the cities; in only 65 years the numbers living in cities of the third world have increased an unbelievable ten fold, from one hundred million in 1920 to a thousand million, one billion, in 1985 and, of course, ever increasing. Then the

environmental threats of climate change, soil degradation, land, water and atmospheric pollution and loss of bio-diversity, all associated in an evil conjunction with those problems of population and, too, with first world consumption rates. Finally, the nuclear threat that for a whole lifetime has hung over the world, formerly in the shape of cold war stand-off, now as a fear of nuclear proliferation in irresponsible hands.

The response has been that in countries around the world vast areas of human activity are now regulated by laws which owe their origin and their substance not to the initiative of national legislatures (except in the quite subsidiary role of legislating to give effect to a pre-existing international obligation) but to international conventions, agreements and declarations.

Instances of this abound but perhaps international environmental law offers as useful an example as any. For the environment, 1972 and the U.N. Conference in Stockholm on the human environment in that year was a turning point, marking the real beginnings of international environmental law.

This growth has climaxed, in the 1990s, with the so-called Earth Summit, the U.N. Conference on Environment and Development, held in Rio de Janeiro in June 1992. At it no less that 179 nation states reached a consensus on a massive blueprint for global environmental partnership aimed at reconciling the twin requirements of a high quality environment and a healthy economy for all the people of the world. It involves a vast work programme for the 21st Century and contemplates the creation of a great mass of new domestic environmental law by the nations of the world to give effect to that consensus.

Some 165 states have now signed one of the products of that conference, the U.N. framework convention on climate change, and in March of this year that convention entered into force. Nations around the world are coming to terms with the obligations involved, legislation to give effect is emerging in unprecedented volumes and environmental law, essentially international in character, has become a recognised area of specialisation in academia and in legal practice.

The environment is only one example of this growth of international law. Another in which I happen to be personally concerned and which involves quite dramatic infringement of individual national sovereignty is the creation of the International War Crimes Tribunal, set up by the United Nations to prosecute and try war crimes and crimes against humanity in the successor states of former Yugoslavia.

We eleven judges of the tribunal, nominated by the Security Council, elected by vote of the General Assembly, coming from eleven different

nations and sitting as an international criminal court in Holland, in The Hague, are given international authority to try and if found guilty to sentence those responsible for serious violations of international humanitarian law committed in former Yugoslavia and having, of course, nothing to do with Holland or with the nations from which we judges are drawn.

We gain that authority from the powers conferred by the statute of the Security Council, made by it under the powers conferred by Chapter VII of the United Nations charter. The law we will apply is not Yugoslav law but now well recognised international criminal law.

I suppose that this is as drastic an invasion of the sovereignty of the successor republics of former Yugoslavia as could be imagined. Yet it is an undoubted consequence of their membership of the United Nations and their consequent acceptance of the terms of its charter. Australia and all the other member nations of the United Nations have in theory equally surrendered their sovereignty in this way although the circumstances which would translate theory into practice have not, in their case, come to pass as they have for former Yugoslavia. For instance, all nations are obliged to comply with orders of the tribunal for the arrest and transfer to the tribunal of any accused persons in their territory.

What all this means is that national governments world wide are increasingly experiencing diminished sovereignty, diminished power to legislate as they see fit and increased obligations to conform at criteria and benchmarks imposed by international agencies.

All this is precisely, on a world scale, what many British Tories complained of on a European scale when Maastricht was being debated; what Mrs Thatcher said at the time would "diminish democracy and increase bureaucracy". The European Community, now the European Union, seeks to soften the impact of that reduction in the extent of national sovereignty by emphasis upon subsidiarity, upon leaving to local, regional and national institutions those matters which are of their nature best dealt with at those levels, only matters inherently global in impact calling for international attention.

The European Union has adopted a need-for-action and proportionality test. The treaty on European Union, which entered into force on 1 November 1993, contains this provision:

> In areas which do not fall within its exclusive competence, the community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the

> proposed action cannot be sufficiently achieved by the member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the community.

I suspect that would sound like music to the ears of state Premiers at a COAG meeting!

The whole debate on subsidiarity has much occupied member nations of the European Union and at the heart of it is this very question of what is appropriate for supranational regulation and what should be left for determination by the nation state. There is not and cannot be any rule of thumb about this and inevitably it will be tempting, for the mere sake of the possession of power and the advantages it brings with it, for some inappropriately to seek that power and for others no less inappropriately to retain it. This is, of course, precisely the scenario that so often also plays itself out between entities within a federation.

In fact within the European Union, in response to criticism and following the European Council meeting in Edinburgh in December 1992, a major review of community legislation has been undertaken and as a result extensive simplification, and in some cases repeal, of existing community legislation is in process. So the principle of subsidiarity is being applied.

Moving from the European scene to the world stage one finds only this year Secretary-General Boutros Boutros-Ghali of the United Nations remarking, in a speech in Buenos Aires, that:

> The United Nations is the world organisation of sovereign states. But the time of fundamental and absolute sovereignty has passed. Commerce, communication, disasters such as famine, and environmental threats transcend state borders ... in many cases states have voluntarily given aspects of their sovereignty to supranational bodies or external multilateral groups ... so the foundation stone of international order and progress – the state – is, both by design and involuntarily, being transformed.

As with the opposition to anything resembling a federated Europe, so too there has been strong opposition to any large scale surrender of sovereignty such as Boutros Boutros-Ghali contemplates. Perhaps the most recent expression of this opposition has come from an American critic, author Michael Lind, who, in the last issue of Foreign Affairs, makes a spirited defence of national sovereignty. He predicts failure for what he called the "interdependence" movement and concludes that "why nations that will fight to the death to prevent surrendering their

sovereignty to a conqueror would voluntarily surrender it to a supranational bureaucracy or a global elite of financiers and industrialists is a mystery that interdependence theorists have yet to explain".

Whoever proves correct in this debate about the ultimate fate of world interdependence, the fact remains that already interdependence has produced far-reaching results and a deal of transfer of sovereignty; even if it proceeds little further, and it shows no signs at present of abating, it will already have wrought irrevocable changes to the statute books of nations around the globe.

There is a particular problem, or rather a two-pronged problem, involved in any such transfer of sovereignty from nation state to international authority, two-pronged because it occurs, although in different form, at two stages. It first occurs when transfer of sovereignty over particular subject matter is effected by a country's decision to become a party to a particular convention having that effect. It can occur again, later, when, as a result of having become a party, particular functions of government which have thereby been transferred are being exercised by their new possessor, usually some supranational body.

The problem consists of the likelihood of a democratic deficit at the stage when adhesion to some treaty or convention is being decided upon the deficit becomes very apparent. In the case of Westminster-type governments because with them the process of treaty-making is a purely executive act; parliament has no formal, constitutional role in the process. Instead, as a result of long-settled constitutional doctrine, treaty-making is an exercise of the prerogative, not requiring parliamentary sanction. Accordingly the executive, in effect the Cabinet, can ... bring about such a transfer.

The founding fathers of the U.S. constitution sought to place some restraints upon executive power, in effect upon the President, when it required the "advice and consent" of the Senate to any treaty-making by the President. However, as early as Washington's presidency the Senate's advice function was largely ignored, it being excluded from playing any significant part in the negotiation process, the stage at which its advice might have been sought. Instead the President would come to the Senate with an already negotiated treaty, seeking only consent and not also advice. Once when the Senate did seek to offer him advice President Washington in indignation swore never to go back to the Senate again! Nowadays it is assumed that the Senate's only role is to give or withhold consent, certainly not to advise.

The doctrine familiar to English law, though not applied in the U.S. or in most continental legal systems, that treaties entered into by the executive do not have effect as law of the land unless implemented by legislation, may be thought to mitigate the absence of parliamentary consultation. The doctrine was an outcome of England's 17th Century constitutional settlement, reflecting the desire to limit prerogative power and, in particular, the power of the Crown to change the law of the land by a mere exercise of the prerogative. However its mitigating effect is reduced by the fact that, once the executive ratifies a treaty, so that the state becomes a party to it, the legislature will have little option but to enact any necessary enabling legislation; not to do so would be tantamount to repudiation, to a failure to honour the county's international obligations. True, in many jurisdictions various consultative and other processes have been introduced to give parliaments some greater share in, or at least insight into, the treaty-making process; Britain's "Ponsonby Rule" is an instance of this, requiring tabling of the text of any treaty in both houses of parliament at least twenty one days before ratification. A practice of prior tabling of treaties has also applied in Australia since 1961.

The ability of the executive to enter in this way into a treaty without formal parliamentary sanction has seemed to some particularly to lack democratic content nowadays, when no longer are treaties largely confined to matters remote from the ordinary citizen, with military or economic alliances or the like, but are often multilateral conventions whose implementation may intimately affect the everyday life of individual citizens.

Of course, in the case of Westminster-style democracies, the executive, if it is to remain in office, must retain the confidence of the legislature. The suggested democratic deficit involved in the making of treaties may therefore be more theoretical than real. But at the second and later stage, if the treaty involves a transfer of power from the national authorities to the supranational entity, the latter assuming plenary power within its mandate over matters affecting the national community, there may indeed be room for real concern about a democratic deficit. The criticism within the European Union of the so-called Eurocracy of Brussels, of which we currently read so much, and the allegedly excessive extent of the power exercised by the commission, is essentially based on just such a concern.

There may perhaps be lessons for other nations to learn from the experience of members of the European Union, lessons that apply when functions of state are transferred to a supranational entity as a result of entry into an international convention. They would apply even if that entity had only recommendatory power concerning the adoption

of standards of criteria but would be particularly applicable if it had power actually to make rules directly enforceable within the national jurisdiction. The lessons are, I suggest, first, to observe the principle of subsidiarity and only confer upon the supranational entity such powers as will leave the principle in full operation, secondly to ensure that the decision-making structures of supranational entities in fact provide a satisfactory degree of assurance of democratic input. Of course there will necessarily have to be limits to this; reasons for the creation of the entity will often include the securing of international uniformity and of efficiencies of scale and their attainment may not always be consistent with substantial national democratic input. But at least an environment of concern regarding the democratic nature of the decision-making process may of itself have a healthy effect upon the conduct of the entity.

Just as the virtues of local government are said to lie in its grassroots character, its relative accessibility and intimate contact with those it governs, so, by way of contrast, when power passes from nation states to international agencies the individual elector risks becoming increasingly unimportant, increasingly isolated from influence over affairs that may be of direct concern to him or to her. The decline in extent of national sovereignty may mean just that; policy affecting the citizen may be determined at levels altogether too remote, in international forums by people largely immune to the sorts of pressures that the citizen can still exert over policy-making by Australian governments if sufficiently determined and if their determination is shared by sufficient others.

This is why, with the continued move towards internationalisation, necessary and beneficial as it is in many ways, we must be alert to ensure true subsidiarity, must devise mechanisms to ensure that our democracy retains its meaning. In this we should look carefully at the ongoing experience of Britain and other members of the European Union as they seek to retain a degree of sovereignty while entering into something close to federation on a continental scale.

For Australia, there is one curious consequence of this extraordinary growth of international treaties and multi-lateral conventions under the auspices of the United Nations, its agencies and other international groupings, one perhaps unique to Australia in its precise operation. It is the quite unanticipated extension of the legislative power of the Commonwealth at the expense of the states.

Our constitution at the time of federation in 1901 gave the Commonwealth power to make laws on 39 distinct subject matters; one of them was "external affairs". Whatever the founding fathers intended to be the content of that head of power, it was certainly not regarded as

likely to be extensive. The British Government continued to conduct the Empire's external affairs after federation as it had before, the Empire still spoke with one voice, Britain's voice, unchanged by the federation of its six Australian colonies. Only quite gradually did Australia begin to conduct its own external affairs, exercising an originally unperceived treaty-making power. And it was, of course, the Commonwealth, not the several states, that gradually and in consequence achieved international recognition and fully fledged and independent nationhood.

At the turn of the century, this was, however, entirely unanticipated. The intended scope of the grant of power to make laws with respect to external affairs seems to have been no wider than to permit of the implementation within Australia of imperial treaties affecting it.

The extraordinary extension since World War II of the scope of what might be called international legislation, in the shape of conventions and treaties, has given "external affairs" an entirely different scope from anything conceived possible at federation. It would be scarcely an exaggeration to say that there are few areas of human affairs which are not nowadays, in one way or another, the subject of this process of international law-making by convention or treaty.

For all countries, as we have seen, this has meant change, introducing a host of international laws, standards, codes and regulations in their corpus of time-honoured domestic law. But for Australia it has been revolutionary. By defining one head of federal legislative power as the power to make laws with respect to external affairs the constitution did very little so long as there was not much about in the way of "external affairs". That was the case for the first fifty years of federation. The second forty-four years have seen, I suppose, a ten-fold increase in relevant "external affairs" and with it an automatic increase in the subject matters which may now be legislated for by the Commonwealth under the "external affairs" power.

It has been held by the High Court that the scope of the power to legislate given to Federal Parliament by the world "with respect to external affairs" at least extends to the implementation in Australia of conventions and treaties to which Australia is a party. On one view it extends a good deal further. Its precise limits will evolve with interpretation by the High Court.

This of course has the effect of changing quite dramatically the legislative balance of power as between Commonwealth and state. It means that the Commonwealth's potential legislative power is as wide as the whole area of treaty-making power, which is unlimited in theory and, as we have seen, is in fact explosively expanding as, in a sweeping

manifestation of internationalisation and with the encouragement of the United Nations, the nations of the world increasingly make international agreements on a whole spectrum of subject matters.

I mentioned earlier the commonly cited grassroots virtues of local government. Some would say that those same virtues reside to a degree in state governments, that they are closer to the people than government in Canberra can ever be. According to that view it would not be inappropriate to describe as leading to a democratic deficit an outcome that takes powers from the states in this way and gives it to the Commonwealth.

I leave this peculiarly Australian consequence of internationalisation with this concluding thought – whatever you may think of recent decisions of the High Court, it is wrong, I believe, to view their honours' decisions on the external affairs power as itself symptomatic of some devilish desire to extend Commonwealth legislative power at the expense of state legislative power. What has had that effect, and in a quite dramatic way, has been the impact of this plethora of international treaty-making upon the originally modest power of the Commonwealth to legislate with respect to "external affairs".

Put in a nutshell, the exponential growth of international law vastly increases the range of Australia's external affairs. Because the Commonwealth has always had power to make laws on "external affairs", this vast increase in scope means, too, a vast increase in the Commonwealth's range of legislative power, an increase whose potentiality is, as yet, still largely untapped.

Major industry organisations have very recently urged our Federal Government to reform Australia's approach to treaty-making to provide both for greater transparency and more consultation preparatory to and in the course of negotiation and for parliamentary ratification of treaties and conventions once negotiated. States also talk of the need for greater consultation and fuller representation. But however practices may be reformed, internationalisation and the growth of international law seems inevitably to have conferred enhanced law-making power on the Commonwealth.

Thank you for being so patient, so late and after so excellent a dinner.

Sir Ninian Stephen