CLOSING ADDRESS

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Justice Cartwright, Chief Justice Bhagwati, distinguished judges, Ms. Stamiris, Ms. Chin, honoured guests, ladies and gentlemen:

I am honoured and privileged to be invited to give the closing address at this important colloquium and to such a distinguished galaxy of stars plucked from around the Commonwealth's judicial firmament. The holding of this colloquium and the others before it is living testimony to the crucial role played by the Commonwealth Secretariat in the promotion and internationalisation of human rights norms the world over.

I think it might be useful to take a few minutes before we say goodbye to each other to place this colloquium in its true historical perspective by relating it to those that have preceded it and to identify certain recurring themes which, I feel confident, will continue to resonate both within and without the Commonwealth in the coming new century which is just peeping over our horizon.

The historical genesis was the First Commonwealth Judicial Colloquium focusing on the Domestic Application of International Human Rights Norms held in Bangalore, India, in February 1988. Out of that meeting emerged the *Bangalore Principles* which provided, among other things, that:

> "It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law."[1]

But the *Principles* also recognised that:

> "It is essential to redress a situation where, by reason of traditional legal training which has tended to ignore the international dimension, judges and practising lawyers are often unaware of the

[1] *The Bangalore Principles* (1988), para 7, in *Developing Human Rights Jurisprudence: Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-92* (London, Commonwealth Secretariat, 1992) at 1 [hereinafter *Judicial Colloquia Conclusions*].

[2] *Bangalore Principles*, *id* at 3, para 8.

remarkable and comprehensive developments of statements of international human rights norms."[2]

The Second Commonwealth Judicial Colloquium was held in Harare, Zimbabwe in April 1989. It produced the *Harare Declaration of Human Rights* which contained the reminder that:

> "... fine statements in domestic laws or international and regional instruments are not enough. Rather it is essential to develop a culture of respect for internationally stated human rights norms which sees these norms applied in the domestic laws of all nations and given full effect. They must not be seen as alien to domestic law in national courts."[3]

The Third Commonwealth Judicial Colloquium meeting took place in Banjul, The Gambia in November 1990. The resulting *Banjul Affirmation* reaffirmed the *Bangalore Principles* and the *Harare Declaration* and, among other things,

> "... called attention to the need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international instruments and national constitutions and laws".[4]

The Fourth Commonwealth Judicial Colloquium was held at Abuja, Nigeria in December 1991. At the end of the meeting, the judges adopted the *Abuja Confirmation of the Domestic Application of International Human Rights Norms*. By this, they reaffirmed the principles stated in Bangalore, in particular, the role of the courts in giving effect to international human rights norms, wherever possible.[5]

The Fifth Commonwealth Judicial Colloquium took place at Balliol College, Oxford in England in September 1992. The resulting *Balliol Statement* noted that:

> "The international human rights instruments and their developing jurisprudence enshrine values and principles long recognised by the common law. These international instruments have inspired many of the constitutional guarantees of fundamental rights and freedoms within and beyond the Commonwealth.... They reflect international law and principles and are of particular importance as aids to

[3] *Harare Declaration of Human Rights*, para 10(c), in *Judicial Colloquia Conclusion, supra* note 1, at 7.

[4] *The Banjul Affirmation*, para 9, in *Judicial Colloquia Conclusion, supra* note 1, at 12.

[5] For details, see the *Abuja Confirmation of the Domestic Application of International Human Rights Norms*, para 14, in *Judicial Colloquia Conclusion, supra* note 1, at 19.

interpretation and in helping courts to make choices between competing interests."[6]

The Sixth Commonwealth Judicial Colloquium was held in Bloemfontein, South Africa, in September 1993 and the resulting *Bloemfontein Statement*, among other things:

> "... affirmed the importance both of international human rights instruments and international and comparative case law as essential points of reference for the interpretation of national constitutions and legislation and the development of the common law."[7]

The Seventh Commonwealth Judicial Colloquium and the first to be wholly concerned with the human rights of women was held at Victoria Falls, Zimbabwe in August 1994. The *Victoria Falls Declaration* reaffirmed the principles stated at the previous meetings, which

> "reflect the universality of human rights — inherent in men and women — and the vital duties of an independent judiciary in interpreting and applying national constitutions and laws in the light of those principles. These general principles are applicable in all countries, but the means by which they become applicable may differ."[8]

The *Declaration* went on to refer to the

> "... need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms as stated in international and regional instruments and national constitutions and laws. It is crucially important for them to be aware of the provisions of those instruments which particularly pertain to women."[9]

In this respect, the *Declaration* made particular reference to the United Nations Convention on the Elimination of All Forms of Discrimination against Women.[10] Judges should, said the Declaration, be guided by the Convention

6 *The Balliol Statement* (1992), in *Judicial Colloquia Conclusion, supra* note 1, at 27, para 5.

7 *The Bloemfontein Statement*, in *Developing Human Rights Jurisprudence, Vol 6: Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norm* (London, Commonwealth Secretariat, 1995) at viii, para 8.

8 Commonwealth Secretariat, *Victoria Falls Declaration on the Promotion of the Human Rights of Women* (Victoria Falls Declaration), in *Report of the Commonwealth Judicial Colloquium on Promoting the Human Rights of Women*, Victoria Falls, Zimbabwe, August 1994, at 8, para 1 .

9 *Id* at 10, para 15.

10 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

> "... when interpreting and applying the provisions of the national constitutions and laws, including the common law and customary law, when making decisions".[11]

These themes were repeated in the Second Colloquium devoted to the Human Rights of Women, held in Beijing in September 1995 as part of the Fourth World Conference on Women.

The present Colloquium has maintained the high standards set by its distinguished predecessors. A number of the themes of previous meetings have reemerged. One of them is that, wherever possible, judges in national courts should have regard to international human rights norms, including those relevant to women's human rights. The holding of meetings such as this one are an effective way of acquainting judges, not least those of the host country or territory, with these international norms.

But it is not only judges who should become acquainted with international human rights norms. Lawyers in the private sector should also do so in order that they may bring these norms to the attention of judges where relevant in litigation with which they are involved. So far as concern lawyers in the public sector, I can tell you that the drawing on of international human rights norms and jurisprudence in the course of giving advice to government departments is a daily occurrence on the part of officers of the Human Rights Unit in the Attorney General's Chambers in Hong Kong.

This is particularly so when advising on the compatibility of pre-existing legislation with the Hong Kong Bill of Rights Ordinance enacted in 1991.[12] This Ordinance is unique not just in the Hong Kong context insofar as it provides us for the first time with a statutory bill of rights complementing and, in certain circumstances, superseding the common law. The Ordinance is also unique the world over in that it incorporates verbatim into the domestic law of Hong Kong the provisions of the International Covenant on Civil and Political Rights (ICCPR)[13] as applied to Hong Kong, including of course article 26 which guarantees equality before the law and prohibits discrimination on the basis of, among other factors, sex.

Of the 130 signatories to the ICCPR, only Hong Kong has in that sense fully domesticated the provisions of the Covenant. And because we have done so in a common law context, the Ordinance becomes a source of living law as our courts extrapolate from and interpolate into the statute, drawing on home-grown experience as well as precedents within and without the common law world including decisions of the House of

[11] *Victoria Falls Declaration*, *supra* note 8, at 10, para 11.
[12] Hong Kong Bill of Rights Ordinance (Cap 383), reprinted in 1 HKPLR pp liv-lxviii.
[13] 999 UNTS 171, adopted on 16 December 1966, entered into force 23 March 1976.

Lords in England, the Privy Council, the High Court of Australia, the New Zealand Court of Appeal, the Supreme Court of Canada, the United States Supreme Court, the European Court of Human Rights in Strasbourg and the United Nations Human Rights Committee, to give but a few examples drawn from the more prominent sources of our inspiration. The growing corpus of jurisprudence we have built up over the past five years results from a unique synthesis of local and international judicial creativity and has aroused interest, so we are told, the world over.

The Covenant is also important in relation to legislation enacted after the commencement of the Bill of Rights Ordinance, since under Hong Kong's present constitution, the Letters Patent, no law can be made which restricts rights in a manner inconsistent with the Covenant as applied to Hong Kong. A similar provision in Hong Kong's future constitution, the Basic Law, specifically article 39 thereof, will restrict the enactment of laws that are inconsistent with the Covenant after 30 June 1997.[14] So the Covenant, and the human rights principles that it espouses, are and will remain an important component of Hong Kong's legal and constitutional fabric.

Although I have not been present throughout your deliberations, I know that you have been treated to a collection of excellent presentations. I do not intend to refer to them all but there are some that caught my attention. Justice Silvia Cartwright's paper entitled "The Relevance of International Standards to Domestic Litigation: the Case of New Zealand" is one of them. In it, she noted that while judges and the courts have an important role to play in the protection of women's rights, in reality the opportunity does not arise all that frequently. It is in the making of policy, or in the work of tribunals and government agencies such as the police and the social welfare department that women's human rights will be implemented or frustrated, as the case may be. Few women would think first of going to the courts as a means of changing the structural factors which are the real barriers to achieving equality with men. That said, however, Justice Cartwright made an eloquent plea for judges to examine their own beliefs and prejudices and to lead the way in the attempt to eliminate bias in the court system towards women.

In a paper delivered this morning entitled "Personal/Common Law Conflicts and Women's Rights in the South Pacific: the Solomon Islands Experience", Sir John Muria dealt with the problem of reconciling traditional customary law as it relates to women with introduced legal

[14] Basic Law of Hong Kong Special Administrative Region of the People's Republic of China, reprinted in (1990) 29 ILM 1511. Article 39 states:

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

norms, particularly those of the common law. This problem was also touched on by Chief Justice Lussick of Kiribati and Justice Doherty of Papua New Guinea in their papers delivered in the session on "Litigation Raising Issues Relating to Women's Human Rights in the Asia/Pacific Region". I understand that this morning's session included a stimulating discussion on the interface between international human rights norms and customary law and practices which forms, of course, the cutting edge of development in this field.

One thing which struck me from these and other papers delivered here is how little litigation there has been involving the interpretation or application of human rights norms pertaining to women, except in the context of anti-discrimination legislation. This has been true of the Hong Kong experience as well. Another important point was made by Justice Cartwright, namely, that conferring jurisdiction to determine human rights disputes on tribunals that operate in a semi-private manner outside the central court system results in a lack of judicial examination by the higher courts of such disputes and a low level of impact on policy makers and the public generally. Fortunately, I can predict with some confidence that this problem will not arise in Hong Kong, since the recently enacted Sex Discrimination Ordinance provides that claims of discrimination may be made the subject of civil proceedings in the District Court, in like manner as any other claim in tort.[15]

In conclusion, let me say that Hong Kong has been honoured to host this important Colloquium. The timing has been auspicious as well as historic. Auspicious since the Equal Opportunities Commission, established under the Sex Discrimination Ordinance, commenced work this past Monday, 20 May 1996. The publicity given to both events will give a much needed boost to the cause of protecting and promoting women's rights, both in Hong Kong and the region. Historic, since this will be the last time that Hong Kong will host a Commonwealth judicial colloquium, but hopefully, not the last time that we will host a common law colloquium. Whilst we are poised to depart from the Commonwealth at the stroke of midnight on 30 June 1997, our common law links are guaranteed for at least another fifty years thereafter by international treaty registered with the United Nations, the Sino-British Joint Declaration,[16] and by our future mini-constitution, the Basic Law, specifically article 8 thereof.[17]

Ladies and gentlemen, thank you once again for coming to Hong Kong and giving so generously of your time and wisdom to this Colloquium, which I now officially declare closed.

[15] Sex Discrimination Ordinance (Cap 480).

[16] For details, see *China and United Kingdom of Great Britain and Northern Ireland: Joint Declaration on the Question of Hong Kong (with annexes)*, 1399 UNTS 36, reprinted in (1984) 23 ILM 1366.

[17] Article 8 states

> "The law previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."