COMMONWEALTH LAW BULLETIN

"HARARE DECLARATION OF HUMAN RIGHTS"

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Judicial Colloquium in Harare, Zimbabwe on domestic application of international human rights norms

Readers of this Bulletin will recall the note on the judicial colloquium held in Bangalore, India, in February 1988 concerning the domestic application of international human rights norms. See (1988) 14 CLB 1196. The colloquium was administered by the Commonwealth Secretariat on behalf of Justice P N Bhagwati, the former Chief Justice of India. Participants included a number of Chief Justices and Judges principally from the Asian region. Amongst the participants was Chief Justice Enoch Dumbutshena of Zimbabwe.

Between 19-22 April 1989 in Harare, Zimbabwe, Chief Justice Dumbutshena convened a follow-up meeting. Like the Bangalore meeting it was administered by the Commonwealth Secretariat in London. It was supported by funds from the Ford Foundation. Papers were presented by Chief Justice Dumbutshena and three of the paper-writers for Bangalore. The colloquium gathered together most of the Chief Justices of the Commonwealth countries in Africa. The meeting was opened by the President of Zimbabwe (The Hon R G Mugabe). It closed with the approval by the participants of the "Harare Declaration on Human Rights". This is an appendix to this note.

In his opening remarks, President Mugabe placed respect for internationally stated human rights in the context of the chief concerns of African countries. He said that "The denial of human rights and fundamental freedoms is not only an individual and person tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations". He recorded that since independence in 1980, Zimbabwe had enjoyed the benefits of a justiciable Bill of Rights, enforceable in the courts. It had adopted a policy of national reconciliation applicable to all citizens. The President said that his government was "firmly committed to the rule of law and to the maintenance of a justiciable Bill of Rights. It respects judicial decisions and avoids confrontation with the judiciary".

President Mugabe referred to a significant decision of the Supreme Court of Zimbabwe in 1987 in the case of Ncube Tshuma

& Ndlovu v State. There, the Supreme Court held that corporal punishment by whipping (administered by six strokes of the cane) was an inhuman or degrading punishment in contravention of the constitution of Zimbabwe. In reaching that view, the Supreme Court drew upon jurisprudence which had developed around similar provisions in international statements of human rights and in the constitutions of other countries. It was in this way, the President said, that the developing jurisprudence of human rights could be utilised in the domestic decision-making of judges. In closing, President Mugabe expressed doubts about the "cosmetic" reforms to apartheid in neighbouring South Africa. He declared that "any wishful thinking on this score is not only futile but positively harmful as it raises false hopes and deflects attention and energies away from the struggle against apartheid". The President's speech was a thoughtful contribution to the conference, reflecting Mr Mugabe's training both in law and economics. The Chief Justice of The Gambia (Ayoola CJ) expressed the participants' thanks to the President who then met the Judges privately.

The working sessions then opened with a paper presented by Lallah JA of Mauritius, recently elected Chairman of the Human Rights Committee of the United Nations. This Committee, established under the International Covenant on Civil and Political Rights (ICCPR) (to which many Commonwealth countries are parties) has a large jurisdiction in reviewing national reports on human rights issues and compliance with international obligations. In the case of countries which have accepted the Optional Protocol to the ICCPR, it also receives individual complaints. Justice Lallah outlined the developing framework of international and regional treaties dealing with human rights. He explained the development of customary international law which has accumulated around the United Nations Charter itself, the Universal Declaration of Human Rights (1948), the International Covenants and Declarations and Resolutions of the General Assembly of the United Nations and other international and regional instruments.

This paper was followed by one presented by Dr Rose D'Sa, a Kenyan lawyer now living in England concerning the domestic application of the African Charter on Human and Peoples' Rights. This Charter was adopted as a by the Organisation of African Unity (OAU) in 1981. It entered into force in October 1986. Some two-thirds of the membership of the OAU has ratified or acceded to the Charter, bringing up to thirty-five the number of participating States. The African Charter is the African equivalent to the European Convention on Human Rights and Fundamental Freedom and the American Convention on Human Rights developed by the Organization of American States. But unlike the European and American Conventions, the African Charter does not establish an inter-jurisdictional court to receive and determine complaints about derogations from the treaty. Instead, an

African Commission on Human and Peoples' Rights was established consisting of eleven members, serving in rotation. Some participants in the Harare colloquium questioned why the machinery which had been accepted in Europe and the Americas had not been adopted for the African Charter. Reference was made to this point in the concluding statement. The Commission appointed by the Charter has begun its work which includes the provision of educational material concerning human rights and the provisions of the Charter. The other point of distinction from the European and American treaties is the reference in the African Charter to "peoples' rights" and to "duties", some of the latter expressed in wide language which also attracted the critical attention of the African jurists brought up in the traditions of the common law.

The third session considered a paper by Justice Kirby on "Implementing the Bangalore Principles on Human Rights Law". This paper referred to the Australian legal authority on the recognition given to international law in courts in Australia. See Chow Hung Ching v The King (1948) 77 CLR 449; New South Wales v The Commonwealth (1975) 135 CLR 337, 445 and Koowarta v Bjelke-Petersen (1983) 153 CLR 168, 218, 224. It called attention to the choices which must frequently be made by judges in common law countries where the language of the constitution or legislation is ambiguous or where a gap is demonstrated in the common law which is to be filled by analogous reasoning from past precedents. In these circumstances, Kirby P proposed that reference could legitimately be made by judges to any relevant jurisprudence which had developed around international statements of universal human rights. He pointed out that this was now commonly done in the United Kingdom, under the stimulus of the decisions of the European Court of Human Rights. See eg Attorney General v Guardian Newspapers Limited & Ors [No 2] [1988] WLR 805 (CA) and In re K D (a minor) Ward: Termination of Access [1988] 2 WLR 398 (HL). The growing attention in English courts to international human rights norms has been noted in a number of recent commentaries. See eg T C Hartley, "Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community" (1986) 34 Am J Comp Law, 229-247; Nigel Foster, "The European Court of Justice and the European Convention for the Protection of Human Rights", [1987] ECJ and ECHR vol 8 245. Kirby P then illustrated, by reference to a number of decisions of the High Court of Australia and of the Court of Appeal of New South Wales, instances where useful reference had been made by members of the courts to international human rights law in the development of their reasoning. See eg Deane J in J v Lieschke (1986-87) 162 CLR 447; Daemar v Industrial Commission of New South Wales and Ors (1988) 12 NSWLR 45-53; Jago v The District Court of New South Wales & Ors (1988) 12 NSWLR 558, 569, 580. Gadidge v Grace Bros Pty Limited, Court of Appeal, unreported, 4 December 1988; (1988) 5 NSWJB 219 and Cachia v Isaacs & Ors, Court of Appeal, unreported, 23

March 1989; (1989) 6 NSWJB 54.

The session then proceeded to a discussion led by Mr Anthony Lester QC (United Kingdom) on the way judges could respond, consistently with human rights law, to state challenges to personal liberty of subjects who appeal to the court for protection. Anthony Lester's session was stimulated by a paper of Ms Beverley Byfield of Interights, London on "Personal Liberty and Reasons of State". The session concluded with a vigorous paper by Justice Bhagwati on Fundamental Rights in their Economic, Social and Cultural Context.

Although meetings of the Chief Justices of Commonwealth Africa now regularly take place (See (1988) 14 CLB 1198) it is rare, if not unprecedented, to have collected in the one place so many leading judges discussing international human rights instruments. Dinners in honour of the participants were offered by the Minister of Justice, Legal and Parliamentary Affairs of Zimbabwe and the Zimbabwe Law Society. At the last mentioned, the guest of honour was Mr Arthur Chaskalson SC of South Africa. He is the National Director of the Legal Resources Centre of South Africa. This is a body which helps to represent disadvantaged persons before the courts of South Africa, particularly persons detained under the emergency laws. Mr Chaskalson also attended the meeting of the colloquium as an observer, as did representatives of the African Bar Association, the Zimbabwe Legal Resources Foundation and representatives of the University of Zimbabwe, the publishers of the Law Reports of the Commonwealth and of Interights. The last mentioned publishes regular bulletins on developing international human rights law and makes particular mention of domestic references to such law in court decisions in many countries, including Australia.

The principal proposal of the colloquium was the preparation by the Commonwealth Secretariat in London of a handbook for Commonwealth judges and lawyers. This would include the principal international human rights instruments together with handy references to the leading cases on the various basic rights referred to in those instruments. The preparation of such a volume would, it is hoped, translate the growing body of international human rights law from fine sentiments in international treaties to an influential stimulus to the decision-making of judges and the work of lawyers. International human rights law is not thereby incorporated into domestic law, contrary to established authority. It simply becomes one of the resources by which lawyers and judges perform their daily functions of interpreting ambiguous statutes and filling gaps in the common law where these are shown to exist. Support for this approach, which is now perfectly normal in England and in other countries, was expressed by all participants at the African colloquium. It is recorded in the concluding

statement which follows:

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APPENDIX

REPORT OF JUDICIAL COLLOQUIUM ON THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

HARARE, ZIMBABWE

(Here set out)

HARARE DECLARATION OF HUMAN RIGHTS

Between 19 and 22 April 1989 there was convened in Harare, Zimbabwe, a high level judicial colloquium on the Domestic Application of International Human Rights Norms. The colloquium followed an earlier meeting held in Bangalore, India in February 1988 at which the Bangalore Principles were formulated. The operative parts of the Principles are an annexture to this Statement.

As with the Bangalore colloquium, the meeting in Harare was administered by the Commonwealth Secretariat on behalf of the Convenor, the Hon Chief Justice E Dumbutshena, (Chief Justice of Zimbabwe) with the approval of the Government of Zimbabwe and with assistance from The Ford Foundation and Interights.

The colloquium was honoured by the attendance at the first session of His Excellency the Hon R G Mugabe, President of Zimbabwe, who opened the colloquium with a speech in which he reaffirmed the commitment of his Government to respect for human rights, the independence of the judiciary, the rule of law and a bill of rights which is justiciable in the courts.

The participants were:

Chief Justice E Dumbutshena, Zimbabwe (Convenor)
Justice A Ademola, Nigeria
Chief Justice E O Ayoola, The Gambia
Justice P N Bhagawati, India
Chief Justice B P Cullinan, Lesotho
Justice A R Gubbay, Zimbabwe
Justice M D Kirby, CMG, Australia
Justice Rajsoomer Lallah, Mauritius
Mr Recorder Anthony Lester, QC, United Kingdom
Chief Justice E Livesey Luke, Botswana
Chief Justice F L Makuta, Malawi

Chief Justice Cecil H E Miller, Kenya
Chief Justice F L Nyalali, Tanzania
Justice E W Sansole, Zimbabwe
Chief Justice E A Seaton, Seychelles
Chief Justice A M Silungwe, Zambia
Jutice J N K Taylor, Ghana
Justice L E Unyolo, Malawi

The participants examined a number of papers which were presented for their consideration. These included papers which reviewed the development of International Human Rights Norms particularly in the years since 1945; a paper which examined the domestic application of the African Charter on Human and Peoples' Rights; a paper on personal liberty and reasons of State and a paper on ways in which judges, in domestic jurisdiction, may properly take into account in their daily work the norms of human rights contained in international instruments whether universal or regional.

The participants paid especially close attention to the provisions of the African Charter on Human and Peoples' Rights. That Charter was adopted as a regional treaty by the Organisation of African Unity in 1981 and entered into force on 21 October 1986. At the time of the Harare meeting, 35 African countries had ratified or acceded to the Charter.

Various opinions were expressed by the participants concerning ways of strengthening the implementation of the Charter including:

- the interpretation of the provisions in the light of the jurisprudence which has developed on similar provisions in other international and regional statements of human rights;

- the clarification and strict interpretation of some of the provisions which are derogating from important human rights; and

- enlargement, at an appropriate time, of the machinery provided by the Charter for the consideration of complaints and the provision of effective remedies in cases of violation.

In particular the participants noted that:

- The opening recital of the Charter of the United Nations contains a ringing re-affirmation of 'faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women';

- The Charter of the Organisation of African Unity includes reference to "freedom, equality, justice and legitimate aspirations of the African peoples";

- The Preamble to the African Charter of Human and Peoples' Rights proclaims that fundamental human rights stem from the attributes of human beings and that this justifies their international protection;

- The freedom movement in Africa has had as a central tenent the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence which dignity and independence can only be realised fully if the internationally recognised human rights norms are observed and fully protected;

- There is a close inter-linkage between civil and political rights and economic and social rights; neither category of human rights can be fully realised without the enjoyment of the other. Indeed, as President Mugabe said at the opening of the colloquium: "The denial of human rights and fundamental freedoms is not only an individual tragedy, but also creates conditions of social and political unrest, sowing seeds of violence and conflict within and between societies and nations."

The participants were encouraged in their work by the declaration of President Mugabe that the nations of Africa, having freed themselves of colonial rule and the derogations from respect for human rights involved in such rule, have a particular duty to observe and respect the fundamental human rights for which they have sacrificed so much to win, including the struggle against racial discrimination in all its aspects. The ultimate achievement of the freedom struggle in Africa will not be complete until the attainment throughout the continent of proper respect for the human rights of everyone -

as an example and inspiration to humankind everywhere. In the words of Nelson Mandela, to which President Mugabe drew attention, "Your freedom and mine cannot be separated".

The participants agreed as follows:

1 Fundamental human rights and freedoms are inherent in humankind. In some cases, they are expressed in the constitutions, legislation and principles of common law and customary law of each country. They are also expressed in customary international law, international instruments on human rights and in the developing international jurisprudence on human rights.

2 The coming into force of the African Charter on Human and Peoples' Rights is a step in the ever widening effort of humanity to promote and protect fundamental human rights declared both in universal and regional instruments. The gross violations of human rights and fundamental freedoms which have occurred around the world in living memory (and which still occur) provide the impetus in a world of diminishing distances and growing interdependence, for such effort to provide effectively for their promotion and protection.

3 But 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. It is in this context that the Principles on the Domestic Application of International Human Rights Norms stated in Bangalore in February 1988 are warmly endorsed by the participants. In particular, they reaffirmed that, subject always to any clearly applicable domestic law to the contrary, it is within the proper nature of the judicial process for national courts to have regard to international human rights norms - whether or not incorporated into domestic law and whether or not a country is party to a particular convention where it is declaratory of customary international law - for the purpose of resolving ambiguity or uncertainty in national constitutions and legislation or filling gaps in

the common law. The participants noted many recent examples in countries of the Commonwealth where this had been done by courts of the highest authority - including in Australia, India, Mauritius, the United Kingdom and Zimbabwe.

4 There is a particular need to ensure that judges, lawyers, litigants and others are made aware of applicable human rights norms - stated in international instruments and otherwise. In this respect the participants endorsed the spirit of Article 25 of the African Charter. Under that Article, States Parties to the Charter have the duty to promote and ensure through teaching, education and publication, respect for the rights and freedoms (and corresponding duties) expressed in the Charter. The participants looked forward to the Commission established by the African Charter developing its work of promoting an awareness of human rights. The work being done in this regard by the publication of the Commonwealth Law Bulletin, the Law Reports of the Commonwealth and the bulletin of Interights (The International Centre for the Legal Protection of Human Rights) was especially welcomed. But to facilitate the domestic application of international human rights norms more needed to be done. So much was recognised in the Principles stated after the Bangalore Colloquium which called for new initiatives in legal education, provision of material to libraries and better dissemination of information about developments in this field to judges, lawyers and law enforcement officers in particular. There is also a role for non-government organisations in these as in other regards, including the development of public interest litigation.

5 As a practical measure to carrying forward the objectives of the Principles stated at Bangalore, the participants requested that the Legal Division of the Commonwealth Secretariat arrange for a handbook for judges and lawyers in all parts of the Commonwealth to be produced, containing at least the following:

- the basic texts of the most relevant international and regional human rights instruments;

- a table for ease of reference to and comparison of applicable provisions in each instrument; and

- up to date references to the jurisprudence of international and national courts relevant to the meaning of the provisions in such instruments.

6 If the judges and lawyers in Africa - and indeed of the Commonwealth and of the wider world - have ready access to reference material of this kind, opportunities will be enhanced for the principles of international human rights norms to be utilised in proper ways by judges and lawyers performing their daily work. In this way, the long journey to universal respect of basic human rights will be advanced. Judges and lawyers have a duty to familiarise themselves with the growing international jurisprudence of human rights. So far as they may lawfully do so, they have a duty to reflect the basic norms of human rights in the performance of their duties.

In this way the noble words of international instruments will be translated into legal reality for the benefit of the people we serve but also ultimately for that of people in every land.

Harare
Zimbabwe

22 April 1989