The international role of the judiciary: Melbourne: Speech by Lord Woolf, Lord Chief Justice of England and Wales: 13th Commonwealth Law Conference, 33rd Australian Legal Convention

I am delighted to be in Melbourne attending another great Commonwealth Law Conference. Commonwealth Law Conferences are hugely enjoyable occasions and that is certainly true of this event. The hospitality, even by Australian and Victorian standards is exceptional. If I may, I will single out for praise just one member of the organising committee. I do so, because he has taken on a special role in relation to judicial contributions. I refer of course to Justice Bernard Teague. From my personal knowledge, I am able to pay justifiable tribute to Bernard for his indefatigable work to make the conference a success.

However, as I fear you are about to learn over the next 45 minutes, not everything that happens at Law Conferences is enjoyable. We attend because we find that what we learn assists us to perform our role in our own countries more effectively whether the role is that of a judge, a lawyer or an academic.

For the judiciary, certainly for the English judiciary, that role has been transformed during my judicial lifetime (which has just entered its 25th year). Until the 1970s, the role had hardly changed in over a century. A judge's concern was to decide cases, but little more than that. The general attitude to reform was encapsulated in the oft-quoted remark by a judge of the previous century: "*reform, reform, do not talk to me of reform; things are bad enough already*". Trials were conducted almost exclusively orally and were extremely adversarial. Rumpole was not entirely a figment of a barrister author's vivid imagination. Such advocates could be readily identified at the bar. One of my favourites at the time was Sam Stamler QC - not so much a Rumpole of the Bailey, but a Rumpole of the Strand. Today oral advocacy has a lesser role and written advocacy has become far more significant. However, the changes in the judicial role upon which I want to focus today are much more significant.

Just as the common law has been evolving with increasing rapidity, so has the role of the common law judge. The judge's responsibility for delivering justice is no longer largely confined to presiding over a trial and acting as arbiter between the conflicting positions of the claimant and the defendant or the prosecution and the defence. The role of the judiciary, individually and collectively, is to be proactive in the delivery of justice. To take on new responsibilities, so as to contribute to the quality of justice.

At the forefront of these new responsibilities is achieving access to justice for those within the judge's jurisdiction. But it is not on a judge's many new domestic responsibilities that I want to concentrate today. Rather, it is the international dimension of the judiciary's new responsibilities that I wish to stress. Chief Justice Murray Gleeson made reference to these new responsibilities in his admirable article, *Global influences on the Australian judiciary*, in the Australian Bar Review, when he said:

"In an open society, a nation's legal system, and its judiciary, will always be exposed to international influences. Even when unrecognised, or unacknowledged, they will be reflected in the substantive and adjectival law applied by judges, in the structure and status of the judiciary, and its relationship with the other branches of government."

The judiciary to which I am referring here are not the judiciary of the growing number of international and super-national courts and tribunals that are being established in different parts of the world. This, not because I do not support the contribution those courts and tribunals are making towards upholding the rule of law. On the contrary, I recognise their contribution is critical. These courts (for example, the long-established International Court at the Hague, the European Courts of Justice and of Human Rights, the new International Criminal Court and the Special Court for Sierra Leone about which Geoffrey Robertson spoke earlier in the conference) deserve our strongest support. We should provide that support by ensuring that international courts are properly resourced and are supplied with judges to serve upon them of the highest calibre from amongst the legal communities of our respective jurisdictions and, wherever practical, from amongst our own judiciaries.

But today, rather than members of international courts and tribunals, I am referring to the judiciary who

day-by-day in each of our jurisdictions are responsible for providing justice to members of the public. It is my contention that all judges in every jurisdiction are, by the way they undertake their responsibilities, contributing to the quality of justice internationally.

Today no country is cocooned from its neighbours. Human beings do not live in hermetically-sealed containers. While we remain citizens of our individual nations, what happens in any part of the globe can affect us all. We not only have a global economy, we are part of a global society. As Severe acute respiratory syndrome (SARS) has dramatically demonstrated, the health of any nation can be at risk if an infection afflicts any other nation. The same can be true of justice and the observance of the rule of law. The process may be slower, the rate of contagion not so high, but the spread of infection from one legal system to another is likely to be unstoppable unless a cure for the disease is found.

Terrorism and crime are no respecters of national borders. It is not countries which are subject to the rule of law which are the breeding ground of terrorism. It is where the rule of law has broken down that terrorism takes root. Crime thrives where law enforcement is weakest. It is no accident that the citizens of countries which observe the rule of law do not have to seek asylum.

A theme which has justifiably reverberated through the halls of this building since the conference started on Monday is that the observance of the rule of law is critical to progress in both the under-developed and developed worlds. Cherie Booth expressed admirably my own sentiments when she said that the rule of law, based as it is on Human Rights values, is the key which can unlock greater economic and ethical wealth. The problems confronting the different nations in the Commonwealth are far from identical. However, Cherie Booth was making the point (echoed today by Chris Patten) that, if real progress is to be achieved, it is necessary to improve the observance of the rule of law in every part of the Commonwealth and, indeed, of the globe.

Two months ago I attended the All Africa Conference on Law, Justice and Development in Abuja, Nigeria. Kofi Annan, Secretary General of the United Nations and James Wolfensohn, President of the World Bank, were both due to attend. Not surprisingly, in view of what was happening in other areas of the world, they were not able to do so, but papers were delivered on their behalf. Both recognised the importance of establishing effective justice systems in the developing world. I was particularly impressed by the comments of James Wolfensohn. Amongst the things he said were:

"[What] we know is absolutely critical - absolutely critical - is that there should exist a legal and judicial system which functions equitably, transparently and honestly. If these forms of legal and judicial systems do not exist in Africa, there is no way that you can have equitable development."

And:

"Africa needs strong, well-established rule of law regimes to enable it to trade itself into prosperity and out of poverty."

Kofi Annan expressed very much the same views.

Many of the countries to which reference was being made at the All Africa conference were Commonwealth countries. The state of the legal systems within those countries should be, and I believe is, very much a matter of concern to the more prosperous and better developed members of the Commonwealth. But it is not only out of self-interest that we feel outraged when we see the system of justice being traduced within another member of the Commonwealth. We know that the citizens of that country should, like our own, be protected by a system of justice that shares the values of our own. While in some Commonwealth jurisdictions, such as South Africa, the common law has a less dominant role, what should not differ from one country to another is the adherence to the rule of law.

I hope it is clear from my earlier comments, that I believe that the way in which the rule of law is administered by a judge in one jurisdiction either contributes to, or detracts from, the observance of the rule of law generally. Without taking away from the importance of this central thesis, I wish to turn now to the more direct contribution that is made by the judiciary of each of our jurisdictions. I will also mention the

legal professions within our jurisdictions, whose contribution is equally important.

Perhaps the most obvious example of the type of contribution to which I am referring is that which the judiciary make to their own jurisprudence by referring to the jurisprudence of other jurisdictions when they give judgment. This is particularly true in the field of human rights because those rights represent international norms. One of the reasons why I personally am enthusiastic about the European Convention of Human Rights (ECHR) being made part of our domestic law (Human Rights Act 1998) is that it has enabled the judges in my jurisdiction to play a part which in the ordinary course of their duties trying domestic cases had hitherto been unavailable, namely contributing by their decisions to the evolving international jurisprudence of human rights. In the past, British judges could do this in the Privy Council, but that provided limited opportunities. Now they can join the great majority of judges in other jurisdictions in making a direct contribution.

As a member of the Privy Council, I had a limited exposure to the jurisprudence of other members, but nothing like that which I have now. The new exposure of our judiciary is of particular importance since, until the ECHR became part of our domestic law, there was no common law jurisdiction which directly gave effect to the c in its courts. The Republic of Ireland had its Bill of Rights, of course, and has done an admirable job in keeping the common law flag flying in Europe though its contribution, as will be appreciated, has been that of a close relative of the Commonwealth rather than that of an actual member of the family.

Another example is provided by the Commonwealth Conference. The great majority of those attending are domestic practitioners or, like myself, domestic judges. However, by our discussions we are learning how to achieve higher standards of justice in our own jurisdictions.

On the Sunday prior to the conference, we had a meeting of Chief Justices of common law jurisdictions. One of my colleagues expressed surprise that I was able to be here after having already spent a week at a conference in Sydney. I answered that I would not have considered myself to have been doing my duty if I had not been able to make arrangements to be here (an opinion about which, I fear, you may already have reservations). Personalities aside, I am quite satisfied that attending conferences of this nature is part of the essential preparation of the judiciary for their duties. I say this in relation to what they can contribute and receive. Contribute not only in the business of the meetings, but also during the social events because of the ideas which informal exchanges of views can generate. The international contacts that are made can provide reference points for consultation and guidance for future development.

Another opportunity for exchanging views, the benefits of which I can vouch for personally, are the exchanges which take place now with increasing frequency between the judiciary of two or more jurisdictions. I know, for example, that my decisions have been influenced by the exchanges I have had with my Indian colleagues. Initially, I was astounded by the proactive approach of the Indian Supreme Court, but I soon realised that, if that Court was to perform its essential role in Indian society, it had no option but to adopt the course it did and I congratulate it for the courage it has shown.

I believe we have a responsibility to learn from each other not only in regard to substantive law, but also in relation to practice and procedure. When considering procedural reforms of our legal systems it would be a foolish reporter who did not look at the experience overseas. I certainly did so for my report on Access to Justice and, as you would expect, I received most generous assistance wherever I turned - in particular, from the different jurisdictions in Australia.

Another benefit that can result from judicial exchanges is an improvement in international judicial co-operation. Sometimes this can be achieved by establishing international conventions. Such an approach is ideal if everyone is willing to participate and agree. Then, the judiciary's role can be limited to merely providing advice on what would be the most appropriate form for the convention to take. However, there can be a particular reason for a country not being prepared to join a convention, even though there is a real need for practical co-operation between two jurisdictions.

When this happens we have found that the judiciary can themselves, through direct contact, achieve what may be necessary. In the UK we now have a substantial Pakistani community. In the past there have been

difficulties because of the lack of a convention to which Pakistan is a party to regulate the position where a marriage breaks up and a parent takes a child back to Pakistan (or vice versa). Until recently, there was no simple process of obtaining the return of the child. The court procedures could be slow and ineffective. Fortunately, a solution was found. The President of our Family Division made a visit to Pakistan and a delegation of Pakistani judges made a return trip to England. Out of this exchange, a protocol was established between the two judiciaries on their own initiative. The Protocol provided that, in the absence of special reasons, a child would be returned to its former country of residence so that issues as to care could be dealt with by the courts of that country. To ensure the smooth operation of the protocol, each country has identified a senior judge and has agreed that these two individuals will liaise if any difficulties arise. My informant tells me that the protocol is working well with considerable benefit to the children involved. It is intended to replicate the model with other countries that our not parties to the Hague Convention.

Another example is provided by the arrangement which exists between France and the UK to achieve better judicial co-operation in relation both to criminal and civil matters. Each country now sends a liaison judge to the other country so as to facilitate co-operation between the two legal systems. This has made a significant contribution to an improved understanding between two jurisdictions, one of which is of civil and the other common law. We have realised that, not only do we have to learn from other common law systems, but also from the civil systems as well.

I regard it as important that, where we can, we should harmonise our legal systems, again not only with other common law jurisdictions, but also with civil jurisdictions. In this regard it is without doubt true that the European Union and the ECHR are acting as catalysts. This is not, as is sometimes suggested, to the disadvantage of the links with Commonwealth and common law jurisdictions. In fact, it enables us to bring added value to our interchanges - a continental flavour. Our civil procedure is now much closer to the French. As I like to describe it, it is situated somewhere in the middle of the English Channel (au milieu de la manche).

I turn now to what is perhaps the most important part of a judge's international responsibilities - making a contribution to other systems. The position, as I see it, is briefly as follows. If I am right that the legal systems of different jurisdictions are dependant upon each other, then the judiciary are not only responsible for promoting the quality of justice in their own jurisdiction, they are equally, so far as practical, responsible for making a contribution to the jurisprudence of other jurisdictions.

Individual judges and lawyers have in the past and, I hope, will continue in the future to make significant contributions to other jurisdictions, particularly with a view to enhancing the observance of human rights. In this regard, I am especially proud of the work done by the English bar and solicitors to obtain justice for those on death row in the United States. I know that the Australian and New Zealand judiciary go and sit in the small jurisdictions in the Pacific area which do not have the resources to provide the quality of judges that they themselves would wish from amongst their own citizens. The UK is, I believe, the only jurisdiction providing judges prior to retirement to the Court in Hong Kong, although Australia and New Zealand provide very distinguished retired members of the judiciary. The Special Court of Sierra Leone has amongst its judges a number of members who were judges of African States. These examples should be precedents for other smaller jurisdictions to follow. It is an approach which enables them to demonstrate that their judiciary has the necessary quality and independence, but which is not inconsistent with national pride - a real disadvantage of appeals to the Privy Council.

In addition, I am sure we could do more to help each other by providing training. The training of judges needs to be in the control of judges from the country concerned, but judges from other jurisdictions can provide assistance when required. I know a great deal of valuable assistance is being provided already by and to different jurisdictions. I was particularly impressed by the contribution being made by Australia's Federal Court to the Indonesian judiciary and was extremely grateful to Chief Justice Michael Black for allowing me to witness the 'graduation ceremony' for the members of the Indonesian judiciary who most recently completed a training course in Australia. For the new democracies of Eastern Europe, where the judicial and legal systems are still recovering from the cold war days, there are already many similar programmes in place.

Before coming to Melbourne I attended the 5th Worldwide Judicial Conference in Sydney. At that

conference, the Hon Clifford Wallace, who has worked as hard (you could not work harder) as Justice Kirby to improve the standards of justice throughout the world, made a suggestion that I would warmly endorse. He suggested that each developed jurisdiction should pair up with one of the jurisdictions of the emerging democracies to mentor that jurisdiction as long as this was required. I believe he had very much in mind the precedent of the relationship between Indonesia and the Federal Court of Australia to which I have already referred. He would welcome volunteers.

It should not be thought that the benefits of such programmes are all one way or that it is only small countries that have need of assistance. I have had the good fortune relatively recently to visit three large jurisdictions - much larger than my own - at particularly opportune times. In each case, I have witnessed the start of a process of change prompted by those countries realising that adherence to the rule of law is of critical importance to their future development.

The first country was South Africa, which I visited in 1994 soon after Mandela had been released. I went to Bloemfontein with three colleagues for a conference on human rights at the South African Court of Appeal presided over by their Chief Justice. The conference was between the judges of South Africa and the judges of other African jurisdictions. We met for the first time in the library of the Court - the visiting judges (most of whom were black) in their lounge suits and the white judges of South Africa in their black robes. Initially the two groups stood apart, but then merged and started to talk avidly. From that meeting, I believe, grew the tree which now flowers as one of the great Commonwealth Courts, the Constitutional Court of South Africa.

The second country was China. I made two visits about 15 years apart. The change was dramatic, brought about, I believe, by exposure to foreign legal systems. On the first visit, although the Vice President (who was head of the Supreme Court) was interested in the western legal systems, he had no conception of how a legal system could operate. On the second visit in 2001, there was a hunger for advice so as to develop a system of justice which would support China's growing trade.

The final country was Russia. The World Bank held a conference there last year on reforms of legal systems. As a result of the visit, I was convinced that Russia was committed to adherence to the rule of law. The conference was due to be opened by President Putin. In the event, he could not attend. I was one of a privileged few flown in his private jet to meet him in Moscow at the Kremlin. I was astonished to find that this was not a private meeting, but was to be broadcast on Russian television. I had been told that the President would welcome a question on human rights and the question I posed on capital punishment certainly received a positive response.

But to return closer to my chosen subject. A case in the UK which, I believe demonstrated a defining realisation of the importance of the interactive responsibilities of our judiciary was the General Pinochet litigation. Passing over the reasons for there having to be two hearings of the appeal, I believe the result of the case sent a strong message as to how different jurisdictions, Spain and the UK, could require even one of the most powerful citizens of another state to return home to be held to account for his possible guilt of crimes against humanity.

My Scottish colleagues have recognised the need to be innovative in order to overcome geographical hurdles to achieve justice. I refer to their response to the Lockerbie terrorist incident. The decision to sit in a Scottish enclave in Holland was a remarkably imaginative way of enabling justice to be achieved for the relatives of the victims on the flight which happened to be passing over Scotland at the time the bomb exploded.

It is the fact that challenges posed by novel situations of this nature can be overcome, that makes the judicial role today so rewarding. They are achievements for the jurisdictions involved, but more importantly they contribute to the accumulated experience across all jurisdictions. If it has been done once, it can be done again. These contributions result in the reach of the rule of law extending more rapidly today than ever before.

We must not, however, be complacent. In recent years, there have been deeply worrying threats to the independence of the judiciary in some jurisdictions. Commendably, in a few other jurisdictions, and

particularly in South Africa, the senior judiciary have publicly joined the protest of the UN rapporteur, politicians and the media. Others have, in private, provided support. However, it could be helpful if, in these situations, the collective voice of, say, the Chief Justices of the Commonwealth could be heard. But how could this be done. There is no organisation of Chief Justices in existence at present to take on this responsibility.

After much thought, I have come to the conclusion that it is doubtful whether such an organisation is practical or even possible. The need is intermittent, but when it arises it is urgent. There is a regular turnover in those who hold the office of Chief Justice. It is most unlikely any general mandate could be given without a meeting of those in office at the relevant time. Opinions could differ as the nature of the problems differ. Certainly the desirability of finding an answer, requires this issue to be on the agenda.

What I have said emphasises the importance of, not only lawyers, but judges as well coming together at conferences such as this, the event last week in Sydney and the Chief Justice's meeting on Sunday to discuss issues such as this. As Chief Justice Murray Gleeson also said in the article to which I referred earlier:

"Engagement between Australian judges and their overseas counterparts, whether of a civil law or common law background, is essential."

I entirely agree and would adopt the same words in relation to the British judiciary. And I suspect the other Chief Justices present would do the same in relation to their judiciary. This is an important reason, among the many reasons, why I am so grateful to the organisers of this conference and my Australian colleagues for this opportunity to become more "engaged" during my visit to Australia.