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Human Rights and an Emerging World Order

Opening Address by Hon Mr Justice Aubrey Bishop

> "The year 2000 is operating like a powerful magnet on humanity, already reaching down into the 1990s and intensifying the decade. It is amplifying emotions, accelerating change and heightening awareness, compelling us to re-examine ourselves, our values, and our institutions ... The year 2000 is not just a new century..."

That is an excerpt from the best-seller *Megatrends 2000,* by John Naisbitt and Patricia Aburdane, published in 1988. The authors are theologians who, though they contemplated a world-wide readership at the time of their authorship, might not specifically have had in their focus the six judicial colloquia on "Developing Human Rights Jurisprudence" and the seventh here in Guyana. Nonetheless these judicial conferences can be seen as appropriate examples that justify their thesis. They are of the same genre. It is therefore within that context that this presentation is made.

A review of the events of the present century will reveal that concern for the development of the international protection of human rights is a relatively recent trend. Only states and international governmental organizations are possessed of international legal personality - states to a greater degree than international governmental organizations.

In consequence, individual human beings have never been able as of right to enjoy rights under international law, although their position with respect to duties under international law is somewhat different. This is shown by the War Crimes Tribunals which were established after the Second World War and, more recently, the tribunal established following the war in former Yugoslavia.

The rule as regards rights of individual human beings, or perhaps more properly the absence of them in the contemporary epoch, appears to be in retreat, most notably in the case of the countries bound by the European Convention on Human Rights, where, for very special reasons, the citizen is, in certain circumstances, able to press his legal rights against his own government and get satisfaction at the end of a not over-long process. But the countries bound by the European Convention have a certain commonality with respect to those aspects of their national traditions that are of the greatest criticality to the success

of such a process: they have comparable standards of living and a shared devotion to democratic tenets. In these countries, good human rights protection becomes good politics, since by reason of their governments being held strictly accountable to their constituents, their performance in this regard must either accord with certain standards or, in the alternative, result in their ouster from political office.

And this very process is aided by the transparency of political action in these countries. Inevitably, such transparency will be at its maximum only in the long term but, relative to the rest of the world, it is more than sufficient in the short term to assure censure for those political operatives whose behaviour falls below the societal consensus regarding the limits of acceptable behaviour. It is by adherence to this societal consensus that these governments derive their legitimacy, and so preserve the stability and continuity of the major social institutions of their respective countries.

Clearly, that this should be the case does not derive from any special endowment of the populations involved. Rather, a concatenation of events over the years has given rise to a number of what may be termed "supra-national institutions" that bind the countries of Western Europe in the pursuit of common goals desired by their several populations. There is no fear in the maintenance of open national borders *inter se* since, in purely economic terms, there is little likelihood that migration of the indigenes of one country to another would have the effect of severely injuring the economy of that other. That is so because, by and large, there is a rough comparability of all the economies and, therefore, the several countries benefit from the opening of their borders.

The relative openness of the societies, an openness which emerged over time and which is probably a survival imperative of the system at present, assures a continuing scrutiny of governmental acts and at least some effort on the part of political decision-makers to respond to the demands of their constituents, or to those whom they deem appurtenant to their constituency of accountability: that part of the populace considered by political decision-makers to be capable of influencing their tenure of office and to whom, therefore, they consider themselves to be accountable.

The European Convention on Human Rights was signed in 1950 under the auspices of the Council of Europe - a body consisting of a number of the democratic states of Western Europe. The successes of the Commission and of the Court created by that Convention are well known. There is significantly a substantial overlap in the membership of the Council of Europe and the European Union, and it may be that the effectiveness of the former, in the human rights arena, has been undergirded by the co-operation in other areas by at least that part of the membership that is common to both organizations.

It would seem that the process of real European unification began with the creation of the European Coal and Steel Community in 1951, the idea having been nurtured by Jean Monnet and Robert Schuman who were of the view that the merger of the coal and steel industries of France and Germany would lead to such a convergence of political interests

between the two countries as to eliminate, for all time, the possibility of war between them. The Treaty of the Coal and Steel Community, which entered into force in 1953, included, in addition to France and Germany, Italy, Belgium, the Netherlands and Luxembourg. Over time, this nucleus has grown into the European Union, which encompasses a considerably expanded membership as well as competencies, to the point where there is now a shared responsibility in areas of the greatest economic and political significance: areas which had previously been the exclusive province of each nation state, whether acting individually or in unison. The 1992 Maastricht Treaty is perhaps the latest movement in this direction, and a common European currency is planned, though receptivity to this idea among the Member States continues to vary so widely that the introduction of a single currency will most likely have to be postponed for at least a few years, if not longer. The controversies that attend this issue have been heated, especially in the United Kingdom where that country's decision with regard to its acceptance of the new currency will probably hinge on the results of the next (1997) general election, the introduction of the new currency being widely perceived, and perhaps not unreasonably so, as a substantial diminution of sovereignty. Here, a vital question must be whether the change seems likely to generate greater offsetting benefits.[1]

It might not, therefore, be unreasonable to propose that the commonalities of the Western European states have been generative of massive co-operation between them; these very commonalities have led to a situation where the protection of human rights that transcends national boundaries is perceived by them as being conducive to the greater good and to the strengthening of the social fabric of all the Western European states. Similarities of aspirations and constructive organization present them already as a resolute cohesive group.

The protection of human rights in Western Europe seems to derive primarily from the European Convention on Human Rights, and not from the system created under United Nations sponsorship which took shape in 1966 in the form of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The European Convention, it would appear, was tantamount to what may be termed a declaratory codification of a way of doing things. This declaratory codification has emerged from the particular circumstances by which these countries are encompassed: circumstances that tie economic co-operation to an enhanced quality of life for all.[2] These particular circumstances emphasize the sound protection of the rights of the citizenry, even against the possible excesses in which nominally democratic polities have been known to indulge. They are seen as a way of guaranteeing that enhanced quality of life by obviating the economic and other social dysfunctionalities that are the inevitable consequences of absolutism and arbitrariness.

It is precisely in this sort of milieu that we are likely to find the best national and transnational protection of the rights of the citizens. It cannot therefore be emphasized too strongly that the European Convention on Human Rights, as it evolved, far from creating a new dispensation, was no more than a reflection of a pre-existing state of affairs - a state of affairs that was new only in that it was a natural outgrowth of intensified co-operation that

1 *See* Report on Britain and sentiments attributed to Lord Mackay, Lord Chancellor, *The Economist*, 10-16 August 1996, p 41.

2 *See* Charter of the United Nations, Chapter IX: International Economic and Social Co-operation, Article 55, where, at (a), the resolve is to promote higher standards of living, full employment, and conditions of economic and social progress and development.

had been politically mandated by a number of like-minded states in areas which offered the greatest advantages for the people, and extended well beyond the initial collaborative effort in the unification of their coal and steel industries.

Briefly then, the fact that human rights prescriptions now operative within the states comprised in the Council of Europe may, in their substantive content, coincide with the prescriptions comprised in certain international conventions on human rights, most notably the 1966 International Covenant on Civil and Political Rights, entered into under United Nations auspices, is a coincidence, in that it may, with propriety and accuracy, be claimed that the European Convention on Human Rights is rather more firmly anchored in a pre-existing consensus that derived from a particular matrix: the events and commonalities of societal circumstances to which reference has earlier been made. The pre-existing consensus was evidence of the socio-political conditions necessary for the forward thrust of human rights and administration of its evolving principles in courts of law, wherever appropriate.

But there should be caution against using the experience of Western Europe in the area of human rights as a basis for extrapolating protection models for the rest of the world, where circumstances are not at present conducive to such implantation. This is not to say they are without human rights solutions, but that infinite cultural, ethnic and political perspectives render the European model difficult for immediate adaptation as a universal.

The treatment of the individual in international law, as earlier pointed out, has been that of an "object", that is, an entity to whom things can be done, but who has no right to assert rights under the international legal order. It is still, to a great extent, true that, for most governments the world over, the treatment by a state of its own nationals is a matter pertaining to their domestic jurisdictions and should be of little concern to the international community at large.

At one point in time even a mild enquiry in this area could be interpreted as constituting an unwarranted and unlawful interference in the domestic affairs of a sovereign state and deemed wholly unacceptable. Individuals did figure in international law to a very limited extent if they were foreigners in a particular state, and had entered the jurisdiction of that state lawfully. An injury to an individual in such circumstances was deemed to be an injury to the state of that individual's nationality and that state was endowed with the capacity, in its own unfettered discretion since it was not acting as an agent for the injured individual, to espouse the cause of its national with respect to the conduct of the other state. Such espousal is of course seen by the state as being an assertion by it of its rights in redressing an injury to itself.

The concept of protection for foreigners lawfully within the jurisdiction of a state was articulated many years ago by Elihu Root, a former United States Secretary of State, in a speech to the Annual Meeting of the American Society of International Law in 1910, a speech in which he asserted the existence of a certain standard of treatment prescribed by

international law for foreigners lawfully within the jurisdiction:[3]

> "Each country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and the same redress for injury which it gives to its own citizens, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization.
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> There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its own existence is that its system of law and administration shall conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens."

Over time, the vague standard espoused by Elihu Root in 1910 came to be generally accepted in Latin America and the Caribbean - the standard, that is, purged of the excesses to which it was subject in the years following Root's address and earlier and, most scandalously, when in 1902 warships of Britain, Germany and Italy had assembled in battle formation over the coast of Venezuela by way of coercing the government to pay debts that were alleged to have been incurred on behalf of the state. And the casual invocation of nationality as a basis for asserting, by a state, its power of diplomatic protection on behalf of a national *vis-à-vis* a foreign state was forever proscribed by the International Court of Justice in the *Nottebohm* case between Liechtenstein and Guatemala.[4] The Court explicitly stated that it was not passing comment on the validity of the nationality conferred upon Nottebohm by Liechtenstein, but merely that, in the absence of a substantial social "link" between Nottebohm and the Principality, it could not constitute a basis upon which Liechtenstein could assert its power of protection on behalf of its newly acquired national.

It should be fair to say that almost until the present and, with the exception of the states bound by the European Convention on Human Rights, only foreigners who were lawfully within the jurisdiction of a state enjoyed the protection of international law in circumstances where treatment by that state fell below a certain standard, and the rights of such foreigners were to be asserted by the states of their respective nationalities in circumstances where such nationalities represented a substantial social link between them

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3 Elihu Root, "The Basis of Protection to Citizens Residing Abroad", opening address by the president of the American Society of International Law at the fourth annual meeting of the Society in Washington, 28 April 1910, Proceedings of the American Society of International Law, AJIL Vol 4 (1910), pp 517-28.

4 "[The] facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization [as a national of Liechtenstein] in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. It was granted without regard to the concept of nationality adopted in international relations.

Naturalization was asked for not so much for the purpose of obtaining legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein, but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations - other than fiscal obligations - and exercising the rights pertaining to the status thus acquired.

Guatemala is under no obligation to recognize a nationality granted in such circumstances. Liechtenstein consequently is not entitled to extend its protection to Nottebohm vis-à-vis Guatemala and its claim must, for this reason, be held to be inadmissible." *Nottebohm case, Liechtenstein v Guatemala*, ICJ Reports 1955, p 4ff.

and the states concerned. The rights of citizens continued, by and large, to be without international protection, with the exception of certain states of Western Europe, notwithstanding the existence of a multitude of international conventions on human rights that remained, to all appearances, largely moribund and unenforceable.

In recent years, researchers and students of international law have witnessed significant and sometimes fundamental transformations in the international community and in the conduct of relations between sovereign states. There was first the process of decolonization that was, for the greater part of its history, accompanied by a bipolarization of the world into Eastern and Western Bloc powers. A decolonization, of sorts, has also proceeded amongst the Eastern Bloc states, the Soviet Union and Soviet hegemony having collapsed as a result. There is, in consequence, no longer a bipolar but a multipolar distribution of power in the international community. Efforts to prevent the re-emergence of dictatorship in the East seem, for the time being, to monopolize the attention of the industrialized financial donor countries of the West, while Third World countries, which at present constitute the bulk of independent and sovereign states, seem not eminently relevant to the foreign policy concerns of these states. Third World countries no longer have two superpowers to court their favour, one of these having disintegrated into component units, a process that reflected a new distribution of political power that followed the demise of the Soviet elite. That process is not unlike decolonization in that the units appear, in retrospect, to have been held together within an empire, with the issues of national self-determination only now re-emerging, and the new political dispensation not yet settled into new and stable patterns.

Third World countries have emerged from the collapse of a number of colonial empires. These countries are often racked by violence and chronic political instability. A number of them, most notably Liberia, Somalia, Sierra Leone and Algeria, amongst others that might be named, are now referred to as "failed states", and it has even been suggested by a number of latter-day imperialists that the time for recolonization is at hand - recolonization being perceived as a device for "saving" them.

Yet the instability that is evident in most of these countries is but a natural consequence of colonial rule which, throughout history, has always been primarily concerned with the preservation and furtherance of the interests of the colonial power as contradistinguished from the interests of the colonized: the indigenous populations of varying ethnic and social composition often being mutually antagonistic, a circumstance that often derived from the arbitrariness with which the boundaries of colonies were determined and which had the ancillary benefit for the colonizer of postponing to the indefinite future any challenges to its political paramountcy. Such challenges did emerge in our own time largely as a result of the Second World War, when the political expectations of the colonized world appear to have been elevated everywhere. They were met with dramatically varying degrees of alacrity, but decolonization was to occur on a world-wide scale, with the emergence, at a rate unprecedented in history, of a plethora of newly independent states.

These newly independent states were able to carry over into their new status very little of value from the colonial period. The British said that they were bent on "leading the natives step-by-step" to self-government and independence. The French were proclaiming their "*mission civilisatrice*", and both the French and the Belgians had even invented an *evolue* status for those amongst the "natives" who were thought to have acquired the attributes of Europeans, although the numbers admitted to this exalted status were so calibrated as to obviate any diminution of European dominance in their respective territories, that calibration being carried through with such parsimony that it came to be seen by some as reflecting an absence of good faith. The result was that the process, contrary to the intent of its progenitors, came itself to constitute a force for decolonization, a force that convinced the alleged beneficiaries of the arrangement that the only way for them to obtain justice in their own lands was to effectuate the ouster of their colonial rulers.

At independence, there was a change in the identity of those who controlled the political centres of the former colonies, those who wielded the preponderance of political power therein and very little else. The task of nation-building was especially formidable, in that it became necessary to weld into a single nation or state diverse population elements that had been mutually antagonistic for generations. With the withdrawal of the colonial ruler, each group now sought to further its own interests at the expense of the others. Material resources being in short supply almost everywhere, governments performed a delicate balancing act in seeking to hold on to power by the distribution to their supporters of what material benefits were within their gift; and since the benefits were inevitably inadequate to the demands, kaleidoscopic change and its concomitant instability became the order of the day in many countries.

Constitutions were often no more than decorative instruments ineffective for ordering the political life of particular countries. That ordering was determined by less formal and shifting coalitions driven by opportunism. In such circumstances, some will argue, governments lack legitimacy and, as a consequence, major political institutions of society will take a veritable eternity to become institutionalized, if a crucible for human rights observance is to be laid. Trust, for the time being, ends at the boundaries of an ethnic or linguistic group, since all these discrete elements seem mutually antagonistic and unconcerned with the destiny of the nation or state, an entity that is perceived by them only hazily and, moreover, as one with limited political relevance. The explanation is that the political loyalties of such people are narrowly constricted in the sense of being parochial or provincial.

A generation of trust that transcends ethnic and linguistic group boundaries is what is needed for the construction of the state where major institutions are to be taken seriously by the populace as instruments for advancing the beneficial causes of the human race and the systems that enable the effective pursuit of related objectives. Human rights law is administered in courts or tribunals of law; but law is not the only institution that serves or could serve human rights or the development of a new world order.

A trend in this direction has begun. There is increasing globalization of economic activity,

and state boundaries are acquiring a steadily diminished significance as a consequence, and even the role of the state itself appears to be in decline.[5] Furthermore, many governments world-wide now operate in a milieu of transparency that is probably unprecedented. And this circumstance, facilitated by the phenomenal rapidity of contemporary communications. renders them more accountable than ever to those whom they govern. Populations, desperate to improve their material lot, in the circumstances of political transparency are more than hitherto aware of what is actually happening - more aware of what is actually being done or omitted by their governments.

The point being advanced here is that international relations, in systemic perspective, are undergoing a period of purposive, beneficial transition. It will be a process not noted for its alacrity, but one that is continuing nonetheless. And if there is respect for the axiom that a system comprises a set of interrelated parts, such that an alteration in the value of any one part results in an alteration in the value of all other parts, and if heed is given to the view that an open system, such as the system of international relations, is one that is capable of having exchanges within its environment, it would appear that the survival imperatives of the new system will, of necessity, differ from the survival imperatives of the system it is replacing. The world has witnessed the collapse of the known colonial empires as well as the decolonization of the states of the former Soviet Union and the former Soviet satellites in Eastern Europe. The bipolarization of the world dominated by two superpowers has now been transformed into a multipolar universe with a wide dispersal of power and influence throughout the system. Regrettably, however, the former colonies that were part of the vast colonial empires are not yet apparently vitally prominent in the foreign policy patterns of the rich industrialized countries.

The globalization of economic activity proceeds apace and inexorably. It is suggested that the globalization of concern for the protection of human rights is also proceeding apace, and as a logical concomitant. With the institutionalization of the societal consequences of these processes, an international law of human dignity will be accorded its true place, having been urged for decades by the distinguished international lawyer Professor Myres McDougal[6] - an advocacy decried, initially, as an exercise in metaphysics, but which has recently registered itself possibly as the wave of the future. And it should not be forgotten that the late Sir Hersch Lauterpacht, who was Whewell Professor of International Law at Cambridge University, before becoming a judge of the International Court of Justice, witnessed how his pioneering work on the protection of human rights by international law[7] was also discounted as an empirically ungrounded illusion. But within the past fifty years or so, his views have gained the approbation of a substantial body of international scholars and jurists.

And with the treatment by a state of its own nationals, together with the other nationals within its territorial confines, becoming a proper focus of international law, the now largely and apparently moribund international human rights conventions might at last be imbued with real life, not because they have suddenly been perceived to be of value, but rather

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5 *See* Joseph Camilleri, Anthony P. Jarvis and Alberto J. Paotini (eds), *The State in Transition: Reimaging Political Space* (Boulder: Lynne Rienner, 1955); Jean-Marie Guehenno, *The End of the Nation State* (Minneapolis: University of Minnesota Press, 1995); and Kenichi Ohmae, *The End of the Nation State: The Rise of Regional Economics* (New York: The Free Press, 1995).

6 *See* Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven: Yale University Press, 1980).

7 *See* Sir Hersch Lauterpacht, *International Law and Human Rights* (New York: F.A. Praeger, 1950).

because they will have become reflective of processes internal to the world's states, processes that are concerned with the protection of human rights. Within the Caribbean area of endeavour we have made a start in this direction. It may be recalled that in October 1992, the heads of government of the Caribbean Community (CARICOM), at their special meeting in Port of Spain, Trinidad and Tobago, adopted the recommendation of the West Indian Commission that a Charter of Civil Society for the Caribbean Community be subscribed to by members of the Community for the purpose of establishing the guiding principles of the Community.[8]

To further the human rights process, Guyana is doing its part. Between 1994 and 1996 Guyana sent four contingents of its troops to Haiti under the aegis of the United Nations, where they formed part of an international force seeking to enhance the process of the return of democratic government in that troubled country. And, only a few weeks ago, in August 1996, there was an international conference, summoned here in Guyana by Dr Cheddi Jagan, the President. Its sole concern was the establishment and advancement of a New Global Human Order. Perhaps this particular initiative will proceed at the outset on the basis of a regional collaborative effort, extending ultimately to the entire world and making that world a more humane place.

In this context, the Seventh Judicial Colloquium, convened in Georgetown, Guyana, to consider the domestic application of international human rights law, would have underscored the well-founded view that:

> "In democratic societies fundamental human rights and freedoms are more than paper aspirations.... And it is the special province of judges to ensure that the law's undertakings are realized in the daily life of people. In a society ruled by law, all public institutions and officials must act in accordance with the law. The judges bear particular responsibility for ensuring that all branches of government - the legislature and the executive, as well as the judiciary itself - conform to the legal principles of a free society."[9]

Seven judicial colloquia within a span of eight years, in the closing years of the present century, exemplify the magnetic pull of the 21st century of which Naisbitt and Aburdane speak. The time seems propitious enough to anticipate the success of this Seventh Colloquium, having regard to the additional fact that seven is a perfect number and holy.

Imbued with the high expectation and exhilaration that this Seventh Colloquium has inspired in all Guyanese, I am sure I speak for them when I simply say: "Welcome to our dear land of Guyana. May the deliberations be profitable".

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8 A draft document entitled "Charter of Civil Society for CARICOM" has been prepared but has not yet been adopted by Caribbean governments.

9 "The Bloemfontein Statement", Sixth Judicial Colloquium on the Domestic Application of International Human Rights Norms, Bloemfontein, South Africa, 3-5 September 1993, *Developing Human Rights Jurisprudence, Vol 6: Sixth Judicial Colloquium on The Domestic Application of International Human Rights Norms*, (1995), p vii-viii.