Florida State University Journal of Transnational Law & Policy

Volume 21 | Issue 1 Article 1

2012

# The Role of the Caribbean Court of Justice in Human Rights Adjudication: International Treaty Law Dimensions

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*Caribbean Court of Justice*

# THE ROLE OF THE CARIBBEAN COURT OF JUSTICE IN HUMAN RIGHTS ADJUDICATION: INTERNATIONAL TREATY LAW DIMENSIONS*

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## INTRODUCTION

In this lecture I propose to consider the role of the Caribbean Court of Justice (CCJ)[1] in human rights adjudication, placing particular emphasis on the possible influence of international human

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* The Annual Lillich Memorial Lecture in International Law delivered at Florida State University, Florida, United States, Mar. 14, 2011.

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1. The Agreement Establishing the Caribbean Court of Justice 2001 was adopted in Bridgetown, Barbados on February 14, 2001, and entered into force on July 23, 2003. THE CARICOM SYSTEM: BASIC INSTRUMENTS 441 (Duke E. Pollard ed., 2003).

rights treaties in such adjudication. I do not propose to consider in any depth the origin or theoretical aspects of human rights.[2] Suffice it to say I will be speaking primarily against the background of first-generation rights which concerns basic civil and political entitlements such as the right to life, the right to due process and protection of law, the protection of private property, the right to privacy and family life, and freedom of association. These civil and political rights constitute the most widely accepted categories of human rights and are enshrined in a number of global and regional agreements as well as protected in the Bill of Rights provisions in Caribbean constitutions. Constitutional reform in some countries has given rise to constitutional codification of some second and third-generation rights (prominent among these is the right to engage in activities designed to improve the environment,[3] or more simply, the right to a clean and healthy environment[4]), but these categories of rights are yet to engage the courts in a sustained or meaningful way.[5]

A number of factors accentuate the challenge of deciding which perspective would be most appropriate for the CCJ to take with regard to international treaty statements of human rights. First, the Court is a recently established institution[6] and is still in the initial stages of delivering decisions from which its judicial philosophy may be studied and identified. Relatively few opportunities for human rights adjudication have presented themselves so far, but even so, it is already clear that decisionmaking on human rights will often be coupled with issues sounding in international law and constitutional law.[7] Secondly, the Court must pay due regard to relevant decisions of the Judicial Committee of the Privy Council (JCPC or Privy Council) which, for largely historical reasons, have shaped adjudication in common law countries, including those in the Caribbean. In one sense, therefore, there is no *tabula rasa* and the Court must justify its departures from pre-existing precedents.

Thirdly, there may be conflicting judicial objectives in human rights adjudication which the CCJ must somehow reconcile.

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2. These topics are covered in several books on the subject. *See, e.g.*, BRYAN GALLIGAN, RETHINKING HUMAN RIGHTS: LAW, ETHICS, AND PUBLIC AFFAIRS (Bryan Galligan & Charles Sampford eds., 1997); J.G. MERRILS & A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1992).

3. *See* CONST. OF THE CO-OPERATIVE. REPUBLIC OF GUYANA Feb. 20, 1980, art. 25.

4. *See* Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, § 13(1)(l)(2011) (Jam.).

5. *Cf.* Att'y Gen. v. Mohamed Alli, (1987) 41 W.I.R. 176 (Guy.).

6. The CCJ was inaugurated on April 16, 2005 (Queen's Hall, Port of Spain, Trinidad and Tobago) and has, therefore, been operational for just under six years.

7. *See e.g.*, Att'y Gen. v. Joseph, [2006] C.C.J. 3 (Barb.).

The Court naturally will strive to uphold international treaty obligations accepted by Caribbean States on the basis that the governments do not intend a breach of those obligations, but it is equally bound to uphold the constitutions as the supreme law of the land. Extreme difficulty arises where the treaty and the Constitution conflict or appear to conflict with each other. The CCJ will then be called upon to navigate between the conflicting edicts of constitutional supremacy and international responsibility. Recent decisions of Inter-American Court on Human Rights (IACHR) create special problems in this regard and are considered later in this lecture.

In order to provide some background on the CCJ and the Caribbean region, I propose to first say a few words about the Caribbean Community, the origin and nature of the CCJ, and the Court's two jurisdictions as they relate to human rights litigation. With regard to that relationship, an essential point of departure must be consideration of the general principles which control the competence of the CCJ to take account of international human rights treaties and the advances which the Court has made over traditional law in this field. Application of these general principles requires acknowledgment of the linkages between the Bill of Rights in Caribbean constitutions and international declarations and treaties on human rights. It will be seen that there are two points of connection: first, the Bills of Rights were inspired by developments in international human rights law; second, many Caribbean states have actively accepted and participated in international human rights agreements.[8] Application of international human rights norms might surface in several different contexts, such as the: (1) interpretation of the extent of existing civil and political rights; (2) creation of new rights not contemplated by the Constitution; and (3) recognition of rights which are or appear to be in conflict with the Constitution. In regard to the latter category, some recent decisions of the IACHR carry critical implications for the role of the CCJ in human rights litigation decisionmaking and must also be considered.

## I. THE CARIBBEAN COMMUNITY

The CCJ was established against the background of a largely dysfunctional regional integration movement which was itself

8. However, in recent times two Caribbean States have actually denounced human rights treaties in order to preserve their domestic law on the death penalty. Jamaica withdrew from the Optional Protocol to the International Covenant on Civil and Political Rights in 1998, and Trinidad and Tobago withdrew from the Inter-American Convention on Human Rights and the Inter-American Court on Human Rights in 1998.

a product of 500 years of British colonial rule.[9] After World War II, when British colonial territories asserted the right to self-determination and won political independence from the United Kingdom, many believed that the ten Caribbean territories would become independent as one nation, hence the formation of the West Indian Federation in 1958.[10] For various reasons the Federation failed.[11] The departure of Jamaica in 1962 to pursue political independence marked the collapse of the regional enterprise, and the individual territories then gained independence on a national basis.[12]

The signing of the Treaty of Chaguaramas Establishing the Caribbean Community in 1973,[13] including an Annex which created the Common Market,[14] was an attempt to resurrect the regional project but limit it to functional and economic cooperation between politically independent states. The Revised Treaty of Chaguaramas, adopted in 2001,[15] sought to deepen regional integration by creating a CARICOM Single Market and Economy (CSME) among the 15 member states of the Community. Among other things, the CSME provides for the free movement of the factors of production and a community trade policy with rules against anti-competitive conduct.[16]

At first the Community was a "closed club" of common law countries. There were no civil law members in 1973, but just over twenty years later, in 1995, Suriname joined CARICOM and is now a full participant in the CSME. Haiti became a member of the Community in 2003, but is not yet a participant in the agreements on economic integration. Accordingly, CARICOM has both civil law and common law members, but it remains true that the 13 Commonwealth members[17] continue to form the core of the Community. The regional grouping is therefore characterized by the pres-

9. *See generally* ERIC WILLIAMS, CAPITALISM AND SLAVERY (1994) (providing a history dating from the 15th to the 20th centuries).

10. HUGH W. SPRINGER, REFLECTIONS ON THE FAILURE OF THE FIRST WEST INDIAN FEDERATION 8-11 (1962).

11. *Id.* at 12-35.

12. The CARICOM nations gained independence as follows: Jamaica (6 August 1962); Trinidad and Tobago (31 August 1962); Guyana (26 May 1966); Barbados (30 November 1966); The Bahamas (10 July 1973); Grenada,(7 February 1974); Dominica (3 November 1978); St. Kitts and Nevis (19 September 1983); Saint Lucia (22 February 1979); St. Vincent and the Grenadines,(27 October 1979); Belize (21 September 1981); Antigua and Barbuda (1 November 1981).

13. *See* Pollard, *supra* note 1 at 184. To view the full text of the treaty, see *id.* at 186-95.

14. *Id.* at 196-223.

15. *Id.* at 472.

16. *Id.*

17. In addition to the 12 independent states (listed *supra* note 12), Montserrat, an Overseas Territory of the United Kingdom, is also a member of CARICOM but not yet a full participant in the CSME.

ence of small states that are adherents of the Westminster system of government emphasizing the allocation of governmental power among the Executive, Legislature and Judiciary and protecting that allocation of power by the constitutional doctrine of the separation of powers.[18]

Adoption of the Westminster system is not the only indication of the continuation of colonial influence on Caribbean governance arrangements. At the time of political independence, the countries retained the British Monarch as the Head of State and the Monarch's Privy Council as the final Court of Appeal. Several efforts to replace these British institutions with local institutions failed largely because, in the view of some, 500 years of British rule had cemented the idea of psychological subservience to colonial institutions.[19] Even so, three states (Guyana, Trinidad and Tobago, and Dominica) have removed the Queen as their Head of State and have a national as President. Discussions aimed at severing the links with the Privy Council are longstanding and echo the hostility of colonial courts and legislatures in the United States towards having appeals to His Majesty in Council which were finally abolished in the eighteenth century, prior to the effective establishment of the United States Supreme Court. in 1783.[20]

## II. ESTABLISHMENT OF THE CCJ

The earliest record of Caribbean revolt against the Privy Council is an editorial published in *The Jamaica Gleaner* on March 6, 1901, opining that: "Thinking men believe that the Judicial Committee of the Privy Council has served its turn and is now out of joint with the condition of the times." At a 1947 meeting of colonial governors in Barbados, all Englishmen, the governors expressed that the Privy Council was far too removed from the social realities of the colonies to be effective as a court of last resort. The Organi-

18. Hinds v. The Queen, [1977] A.C. 195 (P.C.) 200, 205 (appeal taken from Jam.).

19. *See* Sidney W. Mintz, *The Caribbean Region*, 103 DAEDALUS 45 (Spring 1974).

> These Caribbean territories . . . are not like those in Africa and Asia, with their own internal reverences, that have been returned to themselves after a period of colonial rule. They are manufactured societies, labor camps, creations of empire; and for long they were dependent on empire for law, language, institutions, culture, even officials. Nothing was generated locally; dependence became a habit.

*Id.* at 45 (quoting Trinidadian novelist V.S. Naipaul); *see also* SIMEON C.R. MCINTOSH, CONSTITUTIONAL REFORM: RETHINKING THE WEST INDIAN POLITY 264 (2002).

20. U.S. CONST. art. III, §1 (providing for the vesting of the judicial power of the United States). The first Congress enacted the Judiciary Act of 1789, which established that the Supreme Court would comprise of a Chief Justice and five Associate Justices. Since 1869, the number of justices has been fixed at nine.

zation of Commonwealth Caribbean Bar Associations followed in 1970, recommending that the region establish a Court to replace the Privy Council as the final court of appeal in both civil and criminal matters. Also in 1970, Jamaica placed the matter on the agenda of the Sixth Conference of Heads of Government of the Caribbean Community. At the Eighth Meeting of the Conference in 1989, the Heads of Government agreed in principle to establish a Caribbean Court of Appeal. The West Indian Commission emphatically endorsed the idea in their 1992 Report: "*Time for Action.*"[21] Just under ten years later, in 2001, the Treaty establishing the Caribbean Court of Justice was adopted in Barbados and entered into force in 2003.[22] The Court became fully operational in 2005 and since then has heard and decided over 75 cases.[23]

The Court was established with two jurisdictions. Part II of the CCJ Agreement provides for the original jurisdiction of the Court with regard to treaty disputes between the States, and Part III contains provisions on appellate jurisdiction whereby the Court would replace the Privy Council as the final court of appeal for Caribbean countries.[24] That the primary driving force for establishment of the Court was the need to provide for binding judicial determination of disputes under the Revised Treaty of Chaguaramas is reflected in the fact that all Member States of CARICOM participating in the CSME are obliged to accept the original jurisdiction of the Court. By contrast, acceptance of the appellate jurisdiction is optional. States may choose to replace the Privy Council with the CCJ or may keep the Privy Council as their final court of appeal. For reasons still plaguing Caribbean cultural and legal identity, only three Member States have opted to replace the Privy Council with the CCJ so far: Barbados in 2005, Guyana in 2005, and Belize in 2010. However, the decisions of the CCJ will probably have persuasive value in other jurisdictions in the region that have not yet accepted the appellate jurisdiction of the Court.[25]

The twin jurisdictions of the CCJ make for interesting comparison with the United States Supreme Court. The establishment of the Supreme Court with final appellate jurisdiction in cases involving important questions about the Constitution or federal law ended the controversial system of appeals from the American colo-

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21. W. INDIAN COMM'N, TIME FOR ACTION: REPORT OF THE WEST INDIAN COMMISSION (1992).

22. In accordance with Article XXXV, the CCJ Agreement entered into force on ratification by three Member States on July 23, 2003. Pollard, *supra* note 1 at 456.

23. *About the Caribbean Court of Justice*, http://www.caribbeancourtofjustice.org/about-the-ccj (last visited Feb. 24, 2012).

24. Pollard, *supra* note 1 at 442, 448, 452.

25. Winston Anderson, The Reach of the Caribbean Court of Justice in Developing a Distinct Caribbean Jurisprudence (on file with author).

nies to the Privy Council in London. The Supreme Court also has original jurisdiction to hear disputes affecting relations between States, and cases affecting, for instance, diplomats and ambassadors. It is a little stated fact that the landmark case of *Marbury v. Madison* that established the doctrine of judicial review was brought and decided under original jurisdiction.[26]

## III. ORIGINAL JURISDICTION AND HUMAN RIGHTS

Original jurisdiction would appear to be the natural home for the application of international treaty law on human rights. In the exercise of its original jurisdiction, the CCJ has "compulsory and exclusive" jurisdiction to interpret and apply the Revised Treaty of Chaguaramas Establishing the Caribbean Community and the CSME.[27] Exercise of original jurisdiction must be based on the application of such rules of international law as may be applicable to the case before the Court.[28] These rules are derived from treaties accepted by the contesting states, international custom as evidence of a general practice accepted as law, and general principles of law recognized by the States of the Community.[29] The CCJ has applied these sources in rendering the ten judgments that it has given to date under original jurisdiction.[30] Furthermore, upon satisfaction of certain pre-conditions, individuals may make applications to the Court to use its powers under original jurisdiction to protect their rights enshrined in the Revised Treaty.[31]

In at least one instance, the CCJ has cited the precedents of an international human rights tribunal in deciding a claim brought by a Community national against a CARICOM State,[32] but it is

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26. Marbury v. Madison, 5 U.S. (1 Cranch) 137 *passim* (1803).

27. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy art. 211, July 4, 1973, http://www.caricom.org/jsp/community/revised_treaty-text.pdf [hereinafter Revised Treaty].

28. Agreement Establishing the Caribbean Court of Justice art. XVII, Feb. 14, 2001, http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf [hereinafter CCJ Agreement]; Revised Treaty, *supra* note 27, at art. 237.

29. Statute of the International Court of Justice art. 38, ¶. 1, (1945), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

30. *See, e.g.*, Trinidad Cement Ltd. v. Guyana (No. 2), (2009) 75 W.I.R. 327.

31. *See* Revised Treaty, *supra* note 27, at art. 222; CCJ Agreement, *supra* note 28, at art. XXIV. Individual applications must satisfy the following pre-conditions: (1) The applicant must be a "community national" or a natural or juridical person of a member state; (2) The State parties must have intended that the right in the Revised Treaty should ensure to the benefit of the applicant directly; (3) The applicant must prove that he was prejudiced in the enjoyment of the right; (4) The contracting party entitled to espouse the claim must have "omitted or declined" to do so; or must have "expressly agreed" that the applicant can proceed with the claim; and (5) The interest of justice must require that the applicant be allowed to bring the proceedings.

32. *Trinidad Cement Ltd.*, (2009) 75 W.I.R. at 340 (citing Velasquez Rodriquez v. Honduras, Compensation, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 4 (July 21, 1989)).

doubtful that an applicant could bring a claim for protection of first-generation human rights under original jurisdiction. The fact is that the regime of human rights is conspicuous by its absence from the Revised Treaty of Chaguaramas, which is overwhelmingly preoccupied with regional economic integration and development. The rights conferred are all economic or financial in nature. The Court has ruled that the individual applicant may be entitled to *"core rights"* under Chapter 3 of the Treaty, including the right to migrate to seek employment, the right to establish business and provide services, and the right to move capital and goods freely throughout the territories of Member States.[33] The Court has also recognized that applicants may enjoy *"ancillary rights"*; that is, rights not expressly spelled out as such in the treaty but which could be inferred from obligations assumed by Member States, such as the right to have the common external tariff imposed on goods imported from outside the region. Additionally, certain rights under the World Trade Organization/General Agreement on Tariffs and Trade may be applicable.[34] In instances where the Court has cited judicial precedents in international human rights adjudication, the citation has helped to clarify the economic rights of the private litigant specified in the Revised Treaty rather than been accepted as the basis for independent human rights found in any of the constitutional Bills of Rights.[35]

The Revised Treaty makes a passing reference to the Charter of Civil Society adopted by the Heads of Government in 1997, but it is questionable whether the Charter provides any real opportunity for independent protection of civil and political rights. In accordance with the expressed desire of its founders, the Charter is not legally binding and it was only referred to in the preamble of the Revised Treaty, not in the dispositive sections of that document. In fact, it has now been recognized that a significant human rights deficit exists in the regional integration movement, and there have been proposals for adoption of a CARICOM Human Rights Treaty that would correspond with the European Convention on Human Rights.[36] If adopted, its enforcement would likely

33. *See id.* at 302, 319.

34. *See* Revised Treaty, *supra* note 27, at art. 116.

35. *See, e.g., Trinidad Cement Ltd.*, (2009) 75 W.I.R. at 340.

36. *See* SHELDON MCDONALD, DRAFT FINAL REPORT – CONSULTANCY TO CONDUCT AND FORMULATE THE MOST SUITABLE ARRANGEMENTS TO PROVIDE FOR THE PROTECTION OF HUMAN RIGHTS IN THE CARIBBEAN (Sept. 16, 2005) (on file with CARICOM Secretariat); Hon. Justice Winston Anderson, *The Inter-American System and Its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ* 35 W. INDIAN L.J. 27, 45 (2010).

be the responsibility of the CCJ acting under its original jurisdiction authority.[37]

## IV. APPELLATE JURISDICTION AND HUMAN RIGHTS

The CCJ's appellate jurisdiction is probably a more fertile area for human rights adjudication simply because there the CCJ acts as the final court of appeal overseeing the interpretation of the Constitution and laws of the State. A primary feature of Caribbean constitutions is a Bill of Rights, which catalogues certain fundamental rights and freedoms enjoyed by persons in the territory of the State.

Litigation on the Bills of Rights began shortly after independence in the early 1960s, and a preliminary issue therefore concerns the appropriate attitude for the CCJ to take towards previous decisions of English courts and the Privy Council regarding these rights and freedoms. The Court has opted to adopt a pragmatic approach by recognizing the English influence and the continuing validity of previous Privy Council decisions whilst indicating that it will depart from those decisions in the future where there are good reasons for doing so. In the leading judgment in *Attorney General of Barbados v. Joseph* the Court said:

> The main purpose in establishing this Court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came

37. A conceptual issue is whether such a CARICOM treaty would logically add anything of import to the Bills of Rights in Caribbean constitutions. Individuals (and groups supportive of such individuals) may at present presumably employ the Bill of Rights to vindicate allegations of breaches of human rights; these rights tend to cover all persons within the State leaving little room for one CARICOM State to sue in respect of injuries suffered by its nationals in the territory of another CARICOM State. It is unlikely that one CARICOM State would bring an action to protect the rights of the nationals of the "defaulting" State in circumstances short of a total breakdown of law and order which would raise more fundamental issues of membership in the Community.

and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this Court.[38]

### *A. General Principles Governing Judicial Attitude to International Human Rights Treaties*

In the exercise of its appellate jurisdiction, the CCJ takes into account that the relationship between international and domestic law has been conceptualized under two principal schools of thought: monism, whereby international law is *per se* part of domestic law without need to legislate it into law, and dualism, which requires actual enactment of international treaties into domestic law.[39] The English Court of Appeal reviewed the two theories in *Trendtex Trading Corp. v. Central Bank of Nigeria* and held that regarding international custom the monist approach was to be adopted;[40] that is to say, the custom automatically formed part of the common law and was applicable in domestic law except where the custom conflicted with statutory law[41] or established precedent of common law.[42] However, as regards international treaties, strict dualism is applied on the basis of the separation of powers doctrine; even if the Executive accepts a treaty, it cannot form part of local law unless and until incorporated by act of the Legislature.

It is now generally accepted that the uncompromising dualist approach to treaties originated in *The Parlement Belge*, even though the actual decision by Sir Robert Phillimore in that case seems more limited to rejecting the principle that Her Majesty could enter into a treaty to deprive a British subject of his legal rights without confirmation by Parliament.[43] In any event, the rationale of dualism was explained by Lord Atkin in *Attorney General for Canada v. Attorney General for Ontario* in the following broad terms: "[w]ithin the British Empire there is a well- established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the

38. Att'y Gen. v. Joseph, [2006] C.C.J. 3, ¶ 18. *See also* Garraway v. Williams, [2011] C.C.J. 12 (AJ) at ¶ 26 (Justice Anderson delivering the judgment of the Court).

39. MARGARET DEMERIEUX, FUNDAMENTAL RIGHTS IN COMMONWEALTH CARIBBEAN CONSTITUTIONS 109-13 (1992) (using the labels "incorporationist" and "transformative" rather than monism and dualism).

40. Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] 2 W.L.R. 356, 364-65 (C.A.).

41. *See e.g.*, Mortensen v. Peters, (1906) 8 F.(J.) 93 (Scot.).

42. *See e.g.*, Chung Chi Cheung v. The King, [1939] A.C. 160 (H.L.) 168 (appeal taken from H.K.).

43. The Parlement Belge, (1879) 4 P.D. 129, 138, 149-55.

existing domestic law, requires legislative action."[44] More recently, Lord Oliver reaffirmed in *Maclaine Watson & Co. v. Dep't of Trade & Industry* that, "as a matter of . . . constitutional law . . . the royal prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights on individuals or depriving individuals of rights which they enjoy in domestic law without intervention of Parliament."[45]

A further development relevant to determining the impact of treaty law within the domestic sphere was confirmed in *ex parte Brind*.[46] Whilst an unincorporated treaty cannot be applied as such, the courts could take notice of a treaty accepted by the Executive when provisions in legislation are ambiguous. In these circumstances the courts operate under the presumption that Parliament did not intend to breach treaty obligations undertaken by the Executive. Ambiguous provisions will then be interpreted to conform rather than conflict with the treaty.

In *Attorney General* v. *Joseph*, the CCJ affirmed that Barbados and the other Commonwealth Caribbean Member States of CARICOM are dualistic states following the British tradition.[47] There are, indeed, several reported decisions in which treaties have been denied effect in domestic proceedings precisely because no statute incorporated them into domestic law.[48] Caribbean courts seem not to have seriously analyzed whether the prohibition on recognizing treaty effects in domestic law is properly confined to treaties imposing obligations on citizens, and as a consequence, the opening left by Sir Phillimore in *The Parlement Belge* has been largely ignored.[49]

### *B. Contexts for Consideration of Human Rights Treaties*

There are at least three separate contexts in which the CCJ, in its appellate jurisdiction, may be called upon to consider the impact of treaty-based human rights where the treaty has been accepted by the State but has not been incorporated into its domestic law by legislation. First, an applicant might seek to influ-

44. Att'y Gen. for Canada v. Att'y Gen. for Ontario, [1937] A.C. 326 (H.L.) 347 (appeal taken from Can.).

45. Maclaine Watson & Co. v. Dep't of Trade & Industry, [1989] 3 All E.R. 523, 545.

46. *Ex parte* Brind, [1991] A.C. 696 (H.L.) *passim*.

47. Att'y Gen. v. Joseph, [2006] C.C.J. 3 (AJ).

48. *See, e.g.*, Winston Anderson, *Implementing MEAs in the Caribbean: Hard Lessons from* Seafood and Ting, 10 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 227, 227 (2001); Winston Anderson, *Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation*, 8 CARIBBEAN L. REV. 75 (1998); Winston Anderson, *Treaty Implementation in Caribbean Law and Practice*, 8 CARIBBEAN L. REV. 185 (1998).

49. *See* Att'y Gen. v. Joseph, [2006] C.C.J. 3. Note, however, the judgment of Justice Wit, discussed *infra*.

ence the interpretation of the nature and extent of existing civil and political rights protected by a State's Bill of Rights. Second, an applicant might seek to create new rights which were not contemplated at the time when the State's Constitution was adopted. Third, an applicant might seek to have the CCJ recognize rights created by the treaty even though these rights in their content or effects conflict or appear to conflict with the State's Constitution. These are not necessarily water-tight categories, but they do provide useful bases for examining various aspects of the interface between the two systems.

1. International Human Rights and Purposive Interpretation of Bills of Rights

In *Attorney General v. Joseph*, the CCJ did not reflect on, and therefore did not rule on, a line of Caribbean cases that have considered the interpretation of Caribbean Bills of Rights in light of their relationship with international human rights treaties. However, it is generally accepted that the statements of human rights in Caribbean constitutions are based largely on the European Convention on Human Rights, which in turn was inspired by the United Nations Declaration on Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), together known as the International Bill of Rights. All 15 CARICOM Member States are signatories to the UDHR; of these, 12 have adopted the ICCPR and 10 have accepted the ICESCR.[50]

At the inter-American level, all 15 CARICOM States are members of the Organization of American States (OAS) and therefore adherents to the OAS Charter[51] and the American Declaration of the Rights and Duties of Man.[52] Also, by virtue of membership in the OAS, CARICOM Member States have agreed to accept the jurisdiction of the Inter-American Commission on Human Rights, which is competent to make recommendations and issue reports regarding alleged violations of human rights occurring in the territories of Member States. Six of the fifteen Member States have al-

50. Of the 15 CARICOM Member States, the following are not signatories to either the ICCPR or the ICESCR: Antigua and Barbuda, Montserrat, and St. Kitts and Nevis. Additionally, Haiti and St. Lucia are not signatories to the ICESCR.

51. Charter of the Organization of American States, Dec. 13, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3.

52. American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OEA/Ser. L./V./II.23, doc. 21 rev. 6 (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser. L.V/II.82, doc. 6 rev. 1 (1992).

so accepted the American Convention on Human Rights[53] and three (Barbados, Suriname, and Haiti) have opted to go further and accept the binding jurisdiction of the Inter-American Court on Human Rights.

A point worthy of emphasis is that although these treaties have been accepted by the Executive, they are not, as a rule of general practice, incorporated into domestic law by legislation in the Commonwealth Caribbean States as required under the dualist theory attributed to *The Parlement Belge*. Under traditional doctrine they can have no direct effect in domestic law except to the extent that they embody rules of customary international law. Equally, international declarations and resolutions on human rights may come to represent custom.

*a. Early Cases*

One of the earliest Caribbean cases to consider the impact of an international human rights document accepted by the Executive but not implemented by Parliament was *Trinidad Island-Wide Cane Farmers' Ass'n v. Seereeram*.[54] In deciding that the right of a cane farmer to freedom of association under the Trinidad and Tobago Constitution included the right *not* to join (or, indeed, to resign from) the Cane Farmers' Association, Justice Phillips referred to Article 20 of the UDHR, of which, he noted, Trinidad and Tobago was a member. Clause 1 of the UDHR recognized the right to freedom of peaceful assembly and association, and clause 2 provided that "no one may be compelled" to belong to an association. He opined that clause 2 "is a necessary concomitant of clause 1 and was inserted *ex abundante cautela*."[55] Based on Article 20 of the UDHR, Justice Rees thought that freedoms to associate and assemble or not were so inextricably bound that they ought to be considered as one integral freedom guaranteed by the Constitution, stating:

> [F]reedom of association, broadly speaking, connotes freedom of the individual to associate with whomsoever he desires in the pursuit of lawful objects. It seems to me, therefore, contrary to the submissions of counsel, that this right

53. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

54. Trinidad Island-Wide Cane Farmers' Ass'n v. Seereeram, (1975) 27 W.I.R. 329 (Trin. & Tobago).

55. *Id.* at p. 357.

> necessarily implies a right not to be compelled to associate with any particular group or organization.[56]

Another case of interest is *Bata Shoe Co. v. Commissioner of Inland Revenue,* which considered and condemned legislation creating retrospective criminal offences as being contrary to the Bill of Rights in the then-extant Guyana Constitution.[57] Article 10(4), which prohibited retrospective criminal legislation, was modeled on Article 11(2) of the UDHR and also Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In treating the international human rights instruments this way, the Guyanese courts showed that the domestic law reflected recognized rules in international human rights law and therefore added further credence to the domestic provisions.

The issue before the Privy Council in *Attorney General v. Antigua Times* was whether artificial persons could claim the protection of the Bill of Rights of the Constitution of Antigua and Barbuda.[58] This was important in the context of allowing a newspaper to enjoy a constitutional right to freedom of expression, including the right to disseminate ideas free from interference by the political directorate or the legislature. The Privy Council held that nothing in the context of the Constitution excluded artificial persons insofar as they were capable of enjoying the fundamental rights and freedoms protected by the Constitution. Thus the phrase "any person" in section 5 of the Constitution included a corporate body, and accordingly the applicant was entitled to apply to the High Court for redress under that section. In coming to this view, the Court drew support from the importance that corporate bodies play in the economic life and development of society. However, the foremost reason for its decision appears to have been the international lineage of the Antiguan Bill. The Court noted that the protection by the Antigua Constitution of fundamental rights and freedoms owed much to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was itself largely based on the UDHR. The Court then stated:

> The Universal Declaration, as its title suggests, is concerned mainly, if not exclusively, with *human* rights, that is with the rights of individual human beings, but the European Convention appears to apply to apply to artificial persons, at least in some of its articles . . .With that ancestry it

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56. *Id.* at 356.
57. Bata Shoe Co. v. Comm'r of Inland Revenue, (1976) 24 W.I.R. 172, 208.
58. Att'y Gen. v. Antigua Times, [1976] A.C. 16 (P.C.) 24.

> would not be surprising if Chapter I of the Constitution of Antigua were to apply as well to natural persons . . . .[59]

In the unsatisfactory case of *Abbott v. Attorney General,* the applicant argued that Trinidad and Tobago, as an adherent to the UDHR, should have outlawed capital punishment in order to conform to UDHR's Article 5, which prohibits "cruel, inhuman or degrading treatment or punishment."[60] Justice Bernard in the High Court rather puzzlingly treated the Declaration as a treaty and cited the authority of *Attorney General for Canada v Attorney General for Ontario* to hold that legislation would be required to alter existing domestic law in order for the court to give effect to it.[61] In considering the applicability of Article 5 he referred to the common law rule that a convention or treaty "and such things" do not form part of the law of this country "until and unless it is reduced into legislation passed by Parliament," adding that "this principle hardly bears repetition."[62]

But the UDHR is obviously not a treaty, and therefore the rules in the *Parlement Belge* do not apply. If anything, to the extent that the UDHR can be taken to represent customary international law, the rules governing incorporation of custom as outlined in the *Trendtex* case[63] would seem to be those most applicable. As Margaret DeMerieux points out, the *Abbott* case might have been more wisely argued and judicially considered *not* as to the binding force of the UDHR on the courts of the country "but as to whether, being a body of principles or even aspirations in the area of fundamental rights, it should be seen (or not) as being reflected in the state's Bill of Rights."[64] In short, it seems safe to say that the international customary law status of the UDHR should have been considered.

*b. Minister of Home Affairs v. Fisher*

The case of *Minister of Home Affairs v. Fisher* represents a high point in the use of international human rights instruments to determine the appropriate judicial attitude towards interpretation of the fundamental rights in the Constitution. The issue before the Privy Council was whether the word "child" in section

59. *Id.* at 25.
60. Abbott v. Att'y Gen., 22 Trin. & Tobago L. Rep. 200 (1977).
61. Att'y Gen. for Can. v. Att'y Gen. for Ont., [1937] A.C. 326 (H.L.) 347 (appeal taken from Can.).
62. *Abbott*, 20 Trin. & Tobago L. Rep. at 218.
63. Trendtex Trading Corp. v. Cent. Bank of Nigeria, (1977) 2 W.L.R. 356, 364-65 (C.A.).
64. DEMERIEUX, *supra* note 39, at 114.

11(5)(d) of the Bermuda Constitution included illegitimate children of a Jamaican mother who had married a Bermudan.[65] The decision was important in relation to preventing the deportation of the children from Bermuda and securing their reinstatement in schools there. In deciding that illegitimate children were included, the Court ignored decisions to the contrary which had emphasized presumptions as to legitimacy arising in a line of statutes dealing with property, succession, or citizenship. Instead the court emphasized that the Constitution should be interpreted on broader principles, recognizing the protection of the family and rights of the child expressed in the UDHR, Article 8 of the ECHR, ECJ decisions on Article 8, the Universal Declaration of the Rights of the Child, and Article 24 of the International Covenant on Civil and Political Rights. Speaking for the Court, Lord Wilberforce offered that "[t]hese antecedents . . . call for a generous interpretation [of the constitution] avoiding what has been called 'the austerity of tabulated legalism.' "[66]

*c. The Post-Fisher Era*

Much of the case law after *Fisher* has been concerned with the impact of human rights decisionmaking on provisions in the constitutions dealing with the death penalty. *Fisher* gave deference to decisions of the European Court of Human Rights under the European Convention on Human Rights. Similarly, the Eastern Caribbean Court of Appeal (ECCA) used decisions of international human rights bodies as aids in deciding whether the mandatory death sentence was contrary to the constitutional prohibition against inhuman and degrading treatment in the landmark cases of *Spence v. The Queen*[67] and *Hughes v. The Queen*.[68] Departing from established assumptions in case law, the ECCA decided that the imposition of a mandatory death sentence for murder was, indeed, unconstitutional. In coming to this conclusion, the ECCA studied and adopted findings in complaints that had come before the Inter-American Commission and in which the Commission had found the mandatory death penalty to be unlawful because it proscribed individualized sentencing and did not take into account the personal culpability of the accused.

In delivering the leading judgment, Chief Justice Byron accepted that human rights agreements such as the American Con-

65. Minister of Home Affairs v. Fisher, (1979) 3 All E.R. 21 (P.C.).

66. *Id.* at 25.

67. Spence v. The Queen, (1999) 59 W.I.R. 216 (C.A.), *aff'd,* [2001] UKPC 35 (P.C.).

68. Hughes v. The Queen, (2001) 60 W.I.R. 156 (C.A.), *appeal dismissed* [2002] UKPC 12. (P.C.).

vention could not have the effect of overriding the domestic law or the Constitutions of the sovereign independent states of the Caribbean. However, the Chief Justice also accepted that these agreements, in the absence of clear legislative enactment to the contrary, could be used to interpret domestic provisions, whether in the Constitution or statute law, so as to conform to the state's obligations under international law. Accordingly, he felt able to rely on the jurisprudence developed in the Inter-American Human Rights System to decide the meaning of Section 5 of the Constitution of St. Vincent and the Grenadines, dealing with inhuman and degrading treatment. The Chief Justice said:

> Over the past two years the Inter-American Human Rights Commission has been considering the meaning of [the provision against inhuman and degrading treatment] and its impact on the mandatory death penalty in relation to cases coming from the Caribbean. The cases that are relevant to this issue have been *Downer and Tracy v. Jamaica* (2000) (unreported), *Baptiste v. Grenada* (2000) (unreported), and *Thompson v. St Vincent and the Grenadines* (2000) (unreported). I have studied these judgments and conclude that the principles they espouse are consistent with the provisions of s 5 of the Constitution. The principles that have emerged from these cases can be summarised by saying that the death penalty is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. The imposition or application of the death penalty must be subject to certain procedural requirements. It must be limited to the most serious crimes. Consideration of the character and record of the defendant and the circumstances of the offence which may bar the imposition of the penalty should be taken into account.[69]

In the context of traditional land rights, the Belize Supreme Court decided in *Cal v. Attorney General of Belize* in favour of traditional Mayan title because of the Inter-American Commission's findings for the Mayans and Belizean obligations to indigenous peoples under the OAS Charter.[70] According to Chief Justice

69. *Id.* ¶ 41, at 172. The approach taken by the ECCA in *Spence* and *Hughes* was expressly approved by the Privy Council, which referred with approval to developments in the Inter-American Human Rights System.

70. Cal v. Att'y Gen. of Belize, (2007) 71 W.I.R. 110 (Belize).

Conteh, the Inter-American norms "resonate[d] with certain provisions of the Belize Constitution."[71] Although not strictly falling within the category of adjudication on the Bill of Rights, the CCJ's original jurisdiction decision in *Trinidad Cement Ltd. v. Guyana* may be considered with similar effect.[72] The opinion referred to and relied upon the Inter-American Court's decision in *Velasquez Rodriquez v. Honduras*[73] that concluded punitive damages could be awarded against a State in an international proceeding in certain circumstances. Nonetheless, in *Trinidad Cement Ltd.*, the CCJ held that such an award would not be appropriate on the facts of the case. Additionally, there is every expectation that the Inter-American Human Rights standards expounded in *Gleaner Co. v. Abrahams*[74] will influence constitutional disputes concerned with whether the award of enormous sums in defamation suits could unreasonably stifle the fundamental right of freedom of expression.

Accordingly, it is probably uncontroversial to say that the CCJ can properly rely upon international human rights treaties as well as judicial decisions taken under those treaties in their interpretation of Caribbean Bills of Rights. The legal basis for this reliance probably requires restatement and clarification by the CCJ but is likely derived from the general propositions enunciated in *ex parte Brind*[75] coupled with the clear policy adopted in *Minister of Home Affairs v. Fisher*.[76] General or traditional statements of civil and political rights in Caribbean Bills of Rights are likely to be given an enlightened interpretation in accordance with modern development in international human rights adjudication. The end result tends to be the protection of fundamental human rights and freedoms in a more contemporary way and by more contemporary remedies than otherwise might have been the case.

### 2. Treaty Creation of New Domestic Rights

A different and more difficult situation arises when international human rights treaties are not being adduced to interpret and inspire provisions in the Bills of Rights, but rather to create

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71. *Id.* ¶ 118, at 150.

72. Trinidad Cement Ltd. v. Guyana (No. 2), (2009) 75 W.I.R. 327 (citing Velasquez Rodriquez v. Honduras, Compensation, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 4 (July 21, 1989)).

73. Velasquez Rodriguez v. Honduras, Interpretation of the Compensatory Damages Judgment of 17 Aug. 1990, 95 I.L.R. 22.

74. Gleaner Co. v. Abrahams, [2003] UKPC 55, ¶.64, at 219; *See also* Stokes v. Jamaica, Case 12.468, Inter-Am. Comm'n H.R., Report No. 23/08 (2008).

75. *Ex parte* Brind, [1991] A.C. 696 (H.L.) *passim*.

76. Minister of Home Affairs v. Fisher, (1979) 3 All E.R. 21 (P.C.).

new rights that were never contemplated by the Constitution. Such rights are often derivatives of civil and political rights, such as an applicant's right to petition international human rights bodies to ensure respect for his civil and political rights. The right to petition these bodies is often enshrined in conventions adopted by the State after independence. Unfortunately, these conventions have never been incorporated into domestic law. In deciding whether the applicant has this procedural right, the CCJ and other domestic courts must consider whether it is possible to engraft the international human rights agreement onto domestic legal instruments without the benefit of parliamentary intervention.

Not surprisingly, the earliest decisions denied that the applicant had any such right and concomitantly rejected that the State needed to await the report of international human rights tribunals before imposing the penalty decreed by the domestic court. Two Bahamian cases illustrated this approach. In the 1998 case of *Fisher v. Minister of Public Safety & Immigration*, the Privy Council (by a majority of 3 to 2) denied that the carrying out of the death sentence while a petition was pending before the Inter-American Committee on Human Rights meant that execution became inhuman or degrading treatment.[77] The Privy Council affirmed this decision the following year by a similar majority in *Higgs v. Minister of National Security* when it restated the traditional law governing the application of international law in domestic court, relying upon the venerable *Parlement Belge* for the proposition that an unincorporated treaty could not change the law of the land.[78]

These decisions were reversed within a year by a 3-2 majority of a differently constituted Privy Council. The reasoning of the majority in *Thomas v. Baptiste*,[79] which was applied by the majority in *Lewis v. Attorney General of Jamaica*,[80] was that rights conferred on individuals by ratification of the American Convention on Human Rights became a part of the domestic criminal justice systems of Trinidad and Tobago (under the "due process of law" clause in Section 4(a) of its Constitution) and Jamaica (under the "protection of law" clause in Section 13 of its Constitution). These terms in the Constitution of Trinidad & Tobago were a "compendious expression . . . invok[ing] the concept of the rule of law itself and universally accepted standards of justice observed by civilised nations" and were as applicable to appellate processes as to trial pro-

77. Fisher v. Minister of Pub. Safety & Imm. (No. 2) (1998) 53 W.I.R. 27 at 35.
78. Higgs v. Minister of Nat'l Sec. (1999) 55 W.I.R. 10.
79. Thomas v. Baptiste, (1998) 54 W.I.R. 387 (Trin. & Tobago).
80. Lewis v. Att'y Gen., (1999) 57 W.I.R. 220 (Jam.).

ceedings.[81] These constitutional provisions "entitled a condemned man to be allowed to complete any appellate or analogous legal process that was capable" of reducing his sentence before that sentence was carried out by executive action.[82]

The minority entered a vigorous dissent in *Thomas*.[83] Lords Goff of Chieveley and Hobhouse of Woodborough started from the premise that the due process clause was part of the Constitution and therefore part of municipal law. They affirmed that the Executive lacked competence to make or change that law by virtue of its power to enter into international human rights treaties. It followed that the terms of these treaties were not capable of conferring upon the appellants any rights which domestic courts of the Republic were obliged or at liberty to enforce in suit.[84] By way of analogy, they made reference to unincorporated treaties that declared certain conduct to be criminal wherever committed; obviously, such declarations could not form the basis of criminal prosecutions in the State and any prosecution in respect of such conduct would be a clear breach of constitutional rights.[85] For them, the due process clause was similarly impervious to change by the Executive acting without legislative intervention.[86]

Lord Hoffman similarly dissented in *Lewis v. Attorney General of Jamaica*.[87] He first noted that there was an obligation on Members of Her Majesty's Privy Council to discharge their duty as enforcers of the laws and constitutions of the countries from which the appeals emanate without regard to their personal opinion on the death penalty. He then pointed out that the majority had engaged in a sleight of hand to arrive at their conclusion without paying regard to the consequential violation of dualist foundation of the Caribbean legal system.[88] He said:

> the majority have found in the ancient concept of due process of law a philosopher's stone, undetected by generations of judges, which can convert the base metal of executive ac-

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81. *Thomas*, 54 W.I.R. at 394.

82. The majority in *Thomas* appears to have taken an interpretative approach, but the logic of this is difficult to accept where the effect is clearly to create a right that does not exist in the Constitution and was never contemplated by the Constitution. This point is brought home by the fact that in several instances CARICOM countries joined the international conventions decades *after* adoption of their constitutions.

83. *Thomas*, 54 W.I.R. at 429.

84. *Id.* at 431.

85. *Id.* at 433.

86. *Id.* Whether this approach is necessarily the same as that attributed to Sir Robert in *The Parlement Belge* is open to debate, a point alluded to *supra* text accompanying note 43.

87. Lewis v. Att'y Gen., (1999) 57 W.I.R. 220 (Jam.).

88. *Id.* at 307.

> tion into the gold of legislative power. It does not, however explain how the trick is done. *Fisher* and *Higgs* are overruled, but the arguments [in those cases] are brushed aside rather than confronted . . .
>
> If the Board feels able to depart from a previous decision simply because its members on a given occasion have a doctrinal disposition to come out differently, the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean.[89]

*a. The CCJ in Attorney General v. Joseph*

The most authoritative decision on the use of unincorporated human rights treaties to create new rights in Caribbean domestic law is now the CCJ's decision in *Attorney General v. Joseph.*[90] In this case, the Court upheld the treaty right of the applicants to have their petition to the Inter-American Human Rights System heard before their death sentence could be carried out but rejected the reasoning of the Privy Council in *Thomas* and *Lewis* as infringing the rules of dualism and being vulnerable to the criticism leveled by Lords Hoffman, Goff, and Hobhouse. Delivering the leading judgment, Justices de la Bastide and Saunders said:

> Many of the trenchant criticisms of Lord Hoffmann in *Lewis* and Lord Goff and Lord Hobhouse in *Thomas* appear, with respect, to have merit. The majority judgments in those two cases did not explain how mere ratification of a treaty can add to or extend, even temporarily, the criminal justice system of a State when the traditional view has always been that such a change can only be effected by the intervention of the legislature, and not by an unincorporated treaty.[91]

Instead of simply adopting the majority decision of the Privy Council in *Thomas* and *Lewis*, the CCJ conducted a wide-ranging review of the relevant authorities. Placing significant reliance on the Australian case of *Minister for Immigration & Ethnic Affairs v. Teoh*, the CCJ found that the protections granted by the Privy Council were justified.[92] The treaty-compliant behavior of the Government of Barbados had given rise to an indefeasible legitimate expectation that the condemned men would not be executed until

89. *Id.*
90. Att'y Gen. v. Joseph,[2006] CCJ 3 (AJ).
91. De la Bastide v. Saunders, (2006) 69 W.I.R. 104, 141.
92. Minister of State for Imm. & Ethnic Affairs v. Teoh, (1995) 183 C.L.R. 273 (Austl.).

reasonable time was allowed for the Inter-American Human Rights system to run its course and the Barbados Mercy Committee to consider the results thereof under Section 78 of the Barbados Constitution. Such an expectation was in keeping with the increasing grant of rights to individuals under treaties and the corresponding promotion of universal standards of human rights.

The *Joseph* case was a seminal development in Caribbean law in that it seemingly placed the overlay between human rights treaties and domestic human rights adjudication on clearer footing than the vacillations and inconsistencies of Privy Council decisions. But the case also raised fundamental questions. In *Thomas*,[93] the Privy Council had also cited *Teoh* to emphasize that a legitimate expectation was not capable of creating binding rules of substantive law–about the only point on which the five Law Lords agreed.[94] In their view, to employ legitimate expectations to create substantive protections "would be tantamount to the indirect enforcement of the treaty."[95] There is also the logical argument that for an applicant to invoke the doctrine of legitimate expectation, he must first prove that he had a material expectation. This argument could be defeated by the contrary conduct of the Government, certainly with respect to prospective applicants.

The CCJ in *Joseph* was careful to limit application of the doctrine to consideration of specific acts of the Government of Barbados towards the applicants, in particular the issue of the death penalty. The emphasis placed on Government treaty-compliant behavior suggests that conduct to the contrary would, indeed, defeat such an expectation. Similarly, the Court refused to pronounce upon the question of whether the doctrine of legitimate expectation applies with respect to other human rights issues. Together, these considerations portend a consequence that could well limit the utility of the decision and relegate it to being little more than a case decided on its special facts.

*b. The "Adoptionist" Approach*

Another approach to the creation of rights by unincorporated treaties was adopted by Justice Wit in *Joseph*. The Justice disagreed with the majority for basing their decision on the concept of "legitimate expectation" if only because, "this construction is of course . . . highly artificial and . . . might easily be made ineffective

93. Thomas v. Baptiste, (1998) 54 W.I.R. 387 (Trin. & Tobago).
94. *See also Lewis*, 57 W.I.R. at 307 (Lord Hoffman dissenting).
95. *Thomas*, 54 W.I.R. at 425.

by the Executive."[96] Justice Wit advocated a departure from the traditional dualistic thinking on the subject so as to recognize that treaties adopted by the State could confer rights on individuals. Starting from the premise that international treaty obligations are binding upon the State as a whole, he reasoned that the three organs of the State have a responsibility for ensuring compliance with these obligations. In circumstances where the Executive and the Legislature had failed to carry out the obligation to comply, it then fell to the Judiciary, within the confines of the constitutional order, to ensure compliance.

Justice Wit claims to have found sufficient legal planks to support judicial recognition of treaties accepted by the State but not legislated by the Parliament. Relying on certain ambiguous provisions in the Constitution for the notion that "law" as used in the Constitution did not exclude international law,[97] the learned Justice, who hails from a monist tradition, found authority for suggesting the Legislature, though the most important creator of law, was not the sole creator and had competence to curtail the law-making activity of the other branches.[98] For him, adoption of treaties by the Executive gave rise to domestic rights in the individual *per se* subject to any contrary provisions in constitutions or legislation.

This seemingly radical approach may yet win broad judicial acceptance, although the best foundations are probably not to be found in reasoning that relies on judicial responsibility for compliance with treaty obligations–an alleged duty that many of the leading authorities on dualism have denied.[99] It could be argued that an individual's competence to enjoy treaty rights created for his benefit by the Executive is better founded simply upon the Executive's capability to create rights (as contrasted with obligations) for the citizen. *Thomas,* a Privy Council decision, recognized that domestic law could be made by the Executive, albeit under delegated powers.[100] For centuries domestic courts have accepted that the Executive, acting in the international realm, can create legally binding rights and obligations for the individual within the

96. *De la Bastide*, 69 W.I.R. at 233-34.

97. *Id.* at 237-38 (citing § 117 of the Barbados Constitution which defines law to *include* (and therefore not necessarily limited to): "(1) any instrument having the force of law and (2) any unwritten law").

98. *Id.* at 238.

99. *See, e.g.*, Att'y Gen. for Can. v. Att'y Gen. for Ont., [1937] A.C. 326 (H.L.) 347 (appeal taken from Can.); Maclaine Watson & Co. v. Dep't of Trade & Industry, (1989) 3 All E.R. 523 (H.L.) 545; *ex parte* Brind, [1991] A.C. 696 (H.L.). There could also be difficulties with this approach where the Executive deliberately accepts a treaty without undertaking the required domestic action knowing that its treaty partners are unlikely (for whatever reason) to mount legal challenges to the default.

100. *Thomas*, 54 W.I.R. at 431.

State.[101] Although frequently overlooked, one of the critically important implications of the rule that customary international law is applicable as part of the common law is that the conduct of the Executive thereby creates the common law. Generally speaking, it is the habitual practice and *opinio juris* of the Executive that participates in the making of international custom. Indeed, positive practice is not required; all that must be established is that the State, normally the Executive, was not a persistent objector—that is, an objector to the formation and continuation of the custom.

However, if implicit conduct can create law for the individual, then *a fortiori* explicit conduct must possess similar competence. After all, it is the conduct of the same entity that is involved in both cases. As further support for this argument, treaties ratified exclusively by the Executive may generate rules of customary law which are then regarded as common law in the normal way.[102] As just described, the ability of the Executive to create domestic rights for citizens by its treaty-making power was affirmed by the CCJ itself in *Joseph*, albeit by reference to the doctrine of legitimate expectation.

Judicial opposition to direct applicability of treaty rights is built upon the rather weak foundation of two nineteenth century cases. It is doubtful that *The Parlement Belge*[103] really stands in the way of a revised consideration of the nature of treaty rights conferred upon the citizen. Sir Phillimore was at pains to point out that he objected to the direct applicability of a treaty between Her Majesty and the King of the Belgians, which purported to grant immunity to a defendant foreign ship, out of concern that the Monarch might thereby be able to *take away* rights possessed by the subject (in this case, the right to sue the defendant ship) without intervention by Parliament.[104] He referred to Blackstone, but insisted that the "learned writer . . . must have known very well that there were [sic] a class of treaties the provisions of which were inoperative without the confirmation of the legislature."[105] Even

> the Declaration of Paris 1856, by which the Crown in the exercise of its prerogative deprived [the United Kingdom] of belligerent rights . . . did not affect the private rights of the subject; and *the question before me is whether this treaty*

101. Barbuit's Case, (1737) 25 Eng. Rep. 777, 777. *See also* Trendtex Trading Corp. v. Cent. Bank of Nigeria [1977] 2 W.L.R. 356 (A.C.) (Eng.).

102. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, (Feb. 20).

103. The Parlement Belge, (1879) 4 P.D. 129.

104. *Id.* at 150-55.

105. *Id.* at 150 (quoting Sir Phillimore).

> *does affect private rights, and therefore required the sanction of the legislature.*[106]

Nowhere was the judge purporting to deny that the State could *confer* rights pursuant to a treaty; indeed, the statement just quoted may suggest the very opposite.

The earlier case of *Rustomjee v. The Queen* represents a greater obstacle to the possibility being explored.[107] In the Treaty of Nanjing, Her Majesty and the Emperor of China agreed that the Emperor should pay into the hands of Her Majesty the sum of $3 million in respect of the debts due to British subjects from Chinese nationals and the Chinese government. An application by one of the subjects to recover from the sums received by the Crown was rejected, with all of the judges refusing the suggestion that the Queen could be the agent of any person. Such a notion was variously described as "too wild a notion to require a single word of observation beyond that of emphatically condemning it,"[108] "utterly unfounded,"[109] and a "proposition [that] startles one," not least of all because it was "derogatory to the sovereign's dignity."[110]

The continued relevance of these observations to contemporary jurisprudence could be questioned given the rise of judicial review and reform of rules governing civil proceedings that now allow actions in tort and contract against the Crown. Justice Blackburn's suggestion that to allow the suit would mean the courts' usurpation of Parliament's function of ensuring Executive responsibility[111] is suspect on similar grounds as well as on the consideration that in the Westminster system practiced in the Caribbean the Executive is in effective control of the Legislature. Chief Justice Cockburn's view that the effect of the treaty was to place the fund at the disposal of the Sovereign to distribute in her discretion[112] could be taken to suggest that he regarded the relevant treaty provisions as non-self-executing and a suggestion that strictly construed the treaty did not create directly enforceable rights.

Most problematic are the observations of Justice Lush that the agency argument was "repugnant to every constitutional principle" because:

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106. *Id.* (emphasis added).
107. Rustomjee v. The Queen, [1876] Q.B. 487 (Eng.).
108. *Id.* at 492 (quoting Cockburn, C.J.).
109. *Id.* at 493 (quoting Blackburn, J.).
110. *Id.* at 497 (quoting Lush, J.).
111. *Id.* at 496 (quoting Blackburn, J.).
112. *Id.* at 492 (quoting Cockburn, C.J.).

> In making, and negotiating, and perfecting that treaty the Crown acts of its own inherent authority, not by the authority, actual or supposed, of any subject; and I think all that is done under that treaty is as much beyond the domain of municipal law as the negotiation of the treaty itself; and when this money was received, it was received by the sovereign in her sovereign character, not at all, in any view of it, actual or constructive, as the agent of any subject whatever.[113]

The reference to the agency point suggests that the preoccupation was with that issue, but beyond this, the judgment is clearly steeped in the jurisprudence of the nineteenth century. Today it is commonplace for States to use treaties as mechanisms to specifically confer rights upon individuals. In several instances individuals are given procedural rights to sue in respect of breaches by the State of these rights, as is the case of rights secured by the Revised Treaty.[114] Human rights would appear to be the classic case for recognition of the competence of the State to confer enforceable rights upon the citizen. To disregard these developments could well add mistakes to ancient misconceptions.[115]

One attraction of recognizing that treaties may create rights for the citizen in domestic law is the retention of legislative autonomy in the Executive and Legislature. The Executive remains free to withdraw from the treaty, although the impact of such withdrawal on rights that have accrued requires consideration. The Executive effectively controls the Legislature and may use Parliament to effectively repeal or modify rights within Constitutional limits. As Justice Wit acknowledges, recognition of treaty rights always remains subject to any contrary constitutional provisions. In sum, it seems clear that the law is evolving in this area and awaits a further definitive ruling by the CCJ. Justice Hayton foreshadowed as much in *Joseph* when he said:

> [N]o argument was heard on the possibility of . . . developing a broad principle that rights conferred by international human rights treaties are part of domestic law, irrespective of any alleged "mediation" provided by "due process" or "protection of the law" clauses in Constitutions. It may be that the law will so develop but, before coming to any far-

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113. *Id.* at 497 (quoting Lush, J.).

114. Revised Treaty, *supra* note 27, at ch. 3.

115. *See* Liam Burgess & Leah Friedman, *A Mistake Built on Mistakes: The Exclusion of Individuals Under International Law*, 5 MACQUARIE L.J. 221 (2005).

reaching conclusions, I consider that full detailed *inter partes* argument on these specific points is required.[116]

3. Treaty Rights In Conflict with the Constitution

The most difficult context for determining the appropriate judicial attitude to human rights treaties is where the treaty rights are considered to conflict with provisions in the Constitution. Adherence to the doctrine of constitutional supremacy would dictate that the constitutional provisions must prevail, but this runs counter to certain decisions of the Inter-American Court on Human Rights. Once fully appreciated, these decisions may be seen as offering seismic shocks to legal systems based on the Westminster model of governance.

*a. The IACHR in Boyce v. Barbados*

Following the CCJ decision in *Joseph,* which confirmed the commutation of their death sentences, the applicants nonetheless pursued further litigation in the IACHR regarding, among other things, the legality of the mandatory death sentence. The IACHR had little difficulty in finding the mandatory death penalty in Barbados inconsistent with the ratified, but unincorporated, American Human Rights Convention. Adopting the decision in *Hilaire v. Trinidad and Tobago,*[117] the Court reasoned that Article 4(2) of the American Convention allowed for the deprivation of the right to life by the imposition of the death penalty in those countries that have not abolished the death sentence while also establishing strict limitations.[118] First, the death penalty must be limited to the most serious crimes; second, the sentence must be individualized in accordance with the characteristics of the crime as well as the degree of culpability of the accused; and third, the procedural guarantees must be strictly observed. Obviously, the mandatory death penalty fell well short of these benchmark requirements.

For present purposes, the critical finding was that Section 2 of the Offences Against the Person Act (OAPA) (which imposed the mandatory death penalty) and Section 26 of the Constitution (the "savings clause" which "saved" the Act from being deemed "unconstitutional") were themselves incompatible with the American Convention. In coming to this conclusion the Court referred to Ar-

116. De la Bastide v. Saunders, (2006) 69 W.I.R. 104, 244..

117. Hilaire v. Trin. & Tobago, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 94 (2002).

118. Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 50 (Nov. 20, 2007).

ticle 2 of the American Convention, under which State Parties undertook to adopt "in accordance with their constitutional processes . . . such legislative or other measures as may be necessary to give effect to [the] rights or freedoms" enshrined in the Convention.[119] This obligation required adoption "of all measures so that the provisions of the Convention are effectively fulfilled in [the] domestic legal system."[120] Barbados was ordered to adopt such legislative or other measures as necessary to ensure that its Constitution and laws were brought into compliance with the American Convention, including, specifically, the removal of the immunizing effect of the saving of existing law clause in Section 26 of the Constitution.[121]

Similar decisions and orders were made in the subsequent case of *Cadogan v. Barbados* in which the High Court of Barbados had found the applicant guilty of murder and sentenced him to the mandatory death penalty under Section 2 of the OAPA. The Court of Appeal dismissed his appeal of his conviction and sentence[122] in what the CCJ described as a "well-researched" and "correct" judgment.[123] The CCJ dismissed an application for special leave to appeal this decision. The applicant next petitioned the Inter-American Commission, which filed the matter with the IACHR. That Court then considered whether Barbados had violated the applicant's right to a fair trial recognized under Article 8 of the American Convention in light of the fact that his mental health was not evaluated during his criminal trial.

In order to properly consider this allegation, the IACHR conducted an examination of the judicial proceedings that had taken place in the courts of Barbados. In doing so, the Inter-American Court made clear that it was not seeking to *review* the judgments of the domestic courts or of the CCJ.[124] However, it was concerned with *whether the state had violated precepts* in the American Convention relating to a fair trial.[125] As the courts were an arm of the state, it followed that it *was* necessary to examine the respective domestic judicial proceedings to establish their compatibility with the American Convention in order to decide whether the obligation to provide a fair trial had been violated.[126]

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119. *Id.* ¶ 80.

120. Further, this obligation meant that states "must also refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them." *Id.* ¶ 69 (citing Olmedo-Bustos v. Chile *("The Last Temptation of Christ")* IACHR, Feb. 5, 2001. Series C No. 73, ¶ 87).

121. *Id.* ¶ 138.

122. Cadogan v. R (No. 1), (2006) 69 W.I.R. 82 (Barb.).

123. Cadogan v. R (No. 2), (2006) 69 W.I.R. 249, ¶ 4 (CCJ).

124. *Id.* ¶ 24.

125. *Id.*

126. Cadogan v. Barbados, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204 (Sept. 24, 2009).

In deciding that Barbados had, in fact, breached Mr. Cadogan's rights under Article 8 of the American Convention,[127] the Court found that:

> [T]he State failed to order that a psychiatric evaluation be carried out in order to determine, *inter alia*, the existence of a possible alcohol dependency or other personality disorders that could have affected Mr. [Cadogan] at the time of the offence, and it also failed to ensure that Mr. [Cadogan] and his counsel were aware of the availability of a free, voluntary, and detailed mental health evaluation in order to prepare his defense in the trial.[128]

In its orders the IACHR repeated that Barbados "shall adopt within a reasonable time" legislative amendment of Section 2 of the OAPA and abolition of Section 26 of the Constitution.[129]

Even more critical than its substantive findings, were the IACHR's observations regarding the role of Caribbean courts in the enforcement of the American Human Rights Convention. In *Boyce v. Barbados* the IACHR chided the Privy Council for finding that the savings of existing law clause in the Constitution protected the Barbados Act.[130] The Inter-American Court considered that the Privy Council had conducted too narrow an examination of the validity of the Act and the savings law clause. The question for the Privy Council (and by extension other Caribbean courts) was not merely whether an Act alleged to be in breach of human rights was "constitutional" but rather whether it was "conventional": that is, whether it was consistent with the American Human Rights Convention.[131]

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127. *Id.* ¶ 90.

128. *Id.* ¶ 88.

129. *Id.* ¶ 128 ("In this regard, the State must adopt such legislative or other measures as are necessary to ensure that the Constitution and laws of Barbados, particularly Section 2 of the Offences Against the Person Act and Section 26 of the Constitution, are brought into compliance with the American Convention."). Another order required Barbados to "ensure that all persons accused of a crime whose sanction is the mandatory death penalty will be duly informed, at the initiation of the criminal proceedings against them, of their right to obtain a psychiatric evaluation carried out by a state-employed psychiatrist." *Id.* These prescriptions have now been accepted by Barbados in a consent order in proceedings before the CCJ in Grazette v. The Queen, [2009] CCJ 2 (AJ) and CCJ Appeal No. CR 1 of 2009, 4th May, 2009 (Consent Order).

130. Boyce v. Barbados, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 169, ¶ 78 (Nov. 20, 2007).

131. *Id.*

*b. Some Juridical Difficulties*

There are clearly deep-seated difficulties with the views taken by the IACHR. There is no easily identifiable juridical basis upon which the CCJ, as the highest domestic court, could properly undertake the task the IACHR assigned to apply the Inter-American Convention. Even the weak monist approach of Justice Wit in *Joseph* falls far short in providing the requisite foundation since the Judge acknowledged that rules in the "adopted" convention were subservient to legislation and the Constitution.[132] The decisions of the IACHR are consistent with the role of that court as an international tribunal which must necessarily apply international law to the disputes before it and with accepted international law notions that domestic courts form part of the State. Therefore any failure by these courts to apply the treaty amounts to breach by the State. There are already some indications of this in *Cadogan* where the IACHR reviewed the trial procedures before coming to the view that the applicant's treaty rights had been breached, even though the High Court, the Court of Appeal, and the CCJ found no such violation.[133] From this point it is a very short step to awarding damages in favour of a private litigant against the State with respect to entirely constitutional action by the judiciary but which the IACHR considers to constitute a breach of the Inter-American Convention.

The IACHR admonitions concerning the primacy of the American convention also raise fundamental questions concerning the place of the Constitution in human rights adjudication and in the legal system more generally. Generations of Caribbean law students, attorneys, and judges have been weaned on the trite legal principle that the domestic courts are the custodians of the supremacy of the Constitution and must declare *any* inconsistent law, to the extent of the inconsistency, void.[134] The most famous instance of this assertion is the case of *Collymore v. Attorney General of Trinidad & Tobago,* where Chief Justice Wooding reiterated that Caribbean courts were the guardians of the Constitution and of constitutional supremacy.[135]

As the ultimate interpreters of their Constitutions and of the rights and freedoms that they enshrine, Caribbean courts have found and punished violations of their Constitutions by the execu-

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132. *Id.* ¶ 138.

133. Cadogan v. Barbados, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 204 (Sept. 24, 2009).

134. *See e.g.*, CONST. OF BARBADOS, ch. 1.

135. Collymore v. Att'y Gen. of Trin. & Tobago, (1967) 12 W.I.R. 5, 9.

tive,[136] by the legislature,[137] and by the courts themselves.[138] In this way, the courts have not only reinforced their role as guardians of their Constitutions; they have also emphasized the status of their Constitutions, to use Kelsenian terms, as the *grundnorm* of the domestic legal order.[139] But this understanding does not sit well with the primacy given by the Inter-American Court to the American Convention over Caribbean constitutions.

A further difficulty relates to the judicial authority of the respective courts in human rights adjudication. The decisions by the IACHR in *Joseph* and *Cadogan* do not partner well with the traditionally understood role of Caribbean courts as the final arbiters of the jurisdiction conferred by Caribbean law upon international tribunals. In *Briggs v. Baptiste,* the Privy Council reaffirmed the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation.[140] Where the American Convention had not been incorporated, the recommendations of the Inter-American Commission and the orders of the Inter-American Court could not be directly applicable. Where, however, orders of the IAS *do* become directly enforceable, whether by virtue of the doctrine of "legitimate expectation" or by virtue of legislative incorporation, the Privy Council's position was that *national* courts should consider whether such orders were made within the limits of the jurisdiction conferred on the Inter-American Court by the American Convention. This is because, in the words of their Lordships:

> The interpretation of the Constitution is a matter for the national courts, and its scope and effect in domestic law cannot be enlarged by orders of an international court made outside the terms of the Convention to which the Government . . . assented. In determining such questions their Lordships would expect the national courts to give great weight to the jurisprudence of the Inter-American Court, but they would be abdicating their duty if they were to adopt an interpretation of the Convention which they considered to be untenable.[141]

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136. *See* Hochoy v. Nuge, (1964) 7 W.I.R. 174 (Trin. & Tobago); Hinds v. R, (1975) 24 W.I.R. 326 (Jam.); C.O. Williams Constr. Ltd. v. Blackman (1994) 45 W.I.R. 94 (Barb.).

137. *See Hinds,* 24 WIR 326; Indep. Jam. Council for Human Rights Ltd. v. Marshall-Burnett, (2005) 65 W.I.R. 268.

138. *See* Maharaj v. Att'y Gen. of Trin. & Tobago, (1977) 1 All E.R. 411.

139. Mitchell v. DPP, (1986) L.R.C. 35 (P.C.). *See generally,* SIMEON MCINTOSH, CONSTITUTIONAL REFORM AND CARIBBEAN POLITICAL IDENTITY (2002).

140. Briggs v. Baptiste, (1999) 55 W.I.R. 460, 471-72.

141. *Id.* at 472.

This statement by the Privy Council of the role of national courts, with the traditional understanding of Caribbean courts as sentinels to the Constitution, stands in stark contrast with the equally clear statement by the Inter-American Court of the role of those courts. The Privy Council's position is also consistent with the view that other streams of international law may become applicable in domestic law but remain subject to legislation and the Constitution of the State. A practical consequence of this difference arises in relation to the two IACHR decisions. In *Joseph* and *Cadogan* the IACHR seemed to require the deletion of Section 26 of the Barbados Constitution, but it is possible to argue that this ruling was far broader than was necessary to remedy the mischief of saving the mandatory death penalty.[142] Were this argument to be accepted, a further question arises concerning the extent of Barbados' obligation under the IACHR Order and whether domestic courts could properly make that determination.[143] Seemingly, further rationalization of the respective judicial roles is clearly required.

## CONCLUSION

The original jurisdiction of the CCJ is of limited relevance to human rights litigation at the present time, but in its appellate jurisdiction the Court has the opportunity and responsibility to engage in human rights adjudication. The CCJ's interpretation of rights codified in each state's Bill of Rights will clearly be open to influence by international conventions on human rights as well as judicial decisions taken under those conventions. In some instances the state's Constitution mandates Caribbean courts to consider relevant international human rights norms. For example, Article 39(2) of the 2003 Amendment to the Guyana Constitution provides that "[i]n the interpretation of the fundamental rights provisions in this Constitution a court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights." The reference in Article 39 to "a court" clearly includes the CCJ as the highest court for Guyana.

Where the treaty creates new rights not recognized or contemplated by the Constitution there are good grounds to suggest that such rights should be recognized in domestic law. The time may be

142. An order to amend § 26 so as to remove the "saving" of the mandatory death penalty would seem to have been sufficient to remedy the mischief found by the IACHR.

143. The matter is complicated by the provision familiar in international law that in the event of a dispute as to jurisdiction the international tribunal decides whether it has jurisdiction. *See, e.g.*, Article 36(6), Statute of the International Court of Justice (the Statute is annexed to the United Nations Charter of which it forms an integral part).

ripe for a reconsideration of the nature and reach of British dualism derived from *Rustomjee* and *The Parlement Belge*. Modern developments that shed light on the nature of the State and the role of the Sovereign in the creation and conferral of rights on individuals must be brought into the deliberations. In these discussions an important requirement could well be the preservation of the essential elements of the governance arrangements by ensuring that judicially recognized, treaty-based rights remain subject to legislative acts and the Constitution.

The most difficult questions arise where the rights adopted in the conventions conflict, or appear to conflict, with those provided in the Constitution of the country from which the appeal arises. Adherence to the doctrine of constitutional supremacy would seem to require that the constitutional provisions trump the convention, and this is strengthened by consideration of the legislative deficit that exists in Caribbean treaty-making.[144] This must be contrasted with the judicial instinct to do not merely everything possible to ensure that the State does not act in breach of its international treaty obligations, but also the judicial inclination to enlarge the rights of the individual at every possible opportunity.

The CCJ has not yet been provided with sufficient materials upon which it may distill a full explication of its philosophy in human rights litigation. It is reasonable to expect greater volumes of cases in the future, but the Court can anticipate little guidance from the U.S. Supreme Court or the Supreme Court of Canada as these countries have not accepted important human rights agreements such as the Inter-American Convention on Human Rights or the jurisdiction of the Inter-American Court of Human Rights. The U.S. Supreme Court in particular seems increasingly disinclined to entertain debate that unincorporated treaties could be material to domestic law. In these circumstances the CCJ is likely to place disproportionate emphasis on the views and recommendations of academics, such as those at Florida State University, in better defining its role in human rights litigation.

Academic contributions on this subject should probably take into account the CCJ's responsibilities for the development of an indigenous Caribbean jurisprudence exemplified in the CCJ Agreement mandating that the Court play "a determinative role in the further development of Caribbean jurisprudence."[145] The bifur-

144. Winston Anderson, *Treaty Making in Caribbean Law and Practice: The Question of Parliamentary Participation*, 8 CARIBBEAN L. REV. 75 (1998).

145. CCJ Agreement, *supra* note 28, at Preamble. *See also* CARIBBEAN COURT OF JUSTICE, *The 5th Anniversary of the Caribbean Court of Justice* (2010), stating the Mission of the Court:

cation of the twin jurisdictions of the Court has led to the assertion that the CCJ is both an international court (when discharging its original jurisdiction) and a domestic court (when exercising its appellate jurisdiction), and this is helpful in explaining the dual competencies of the Court. However, it might be misleading in that it tends to mask the fact that the fundamental mission of the Court is singular: giving legal distinctiveness to a single entity, to wit, the Caribbean Community comprised of its Member States. It may be useful to bear in mind that progress towards the definition of a distinct Caribbean legal identity means that approaches applicable to all Member States are more helpful that those applicable to only one or two states that have peculiar treaty obligations.

However, these are the musings of one who is increasingly steeped in the judging of individual cases, and I leave entirely to your imagination the recommendation of the perspectives that you consider most appropriate.

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The Caribbean Court of Justice shall perform to the highest standards as the supreme judicial organ in the Caribbean Community. In its original jurisdiction it ensures uniform interpretation and application of the Revised Treaty of Chaguaramas, thereby underpinning and advancing the CARICOM Single Market and Economy. As the final court of appeal for member states of the Caribbean Community it fosters the development of an indigenous Caribbean jurisprudence.