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Walking the Tightrope

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WALKING THE TIGHTROPE

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Thank you very much. Let me first say that, maybe I am still too young and recently out of University, but I feel almost on every occasion that I stand before an academic audience, the same level of nervousness that I felt when I went to University in 1983 at the London School of Economics. I told Professor Cross as well, that it is a very unnerving feeling for me today, because it is only twice in the last ten years that I have ever read a speech; and I speak on average four or five times a month to all kinds of bodies—outside of Parliament, that is. And it is because upon becoming a politician, I felt it was fashionable to treat all politicians as pariahs incapable of sincerity or belief. I therefore took a vow upon entering public life that when I spoke, I would speak only to what I truly believe; and hence I would speak from the head and the heart, rather than from the aid of paper.

Unfortunately, when you enter an academic environment, if it is not reflected on paper, it is treated as an immediate failure by those who are to judge you. The only other time that I have spoken with the aid of a written speech, has been when I addressed a recent graduation at the Mona Campus at the University of the West Indies, in Jamaica; because they too, and perhaps even more so than you, unwittingly created that aura, buttressed, of course, by the garb that they wore that it was a no-no for someone as lowly as a politician to come before them and dare to speak without the benefit of early and deliberate preparation as evidenced by paper.

Nonetheless, I shall try to walk that tightrope again today, literally and figuratively, since I have entitled this discussion paper, "Walking the Tightrope..." (pun intended).

I am also told that you have been recently addressed by three distinguished individuals: first, my distinguished predecessor, who is now Chief Justice of Barbados; secondly, my colleague with whom I did the Bar Finals in London, the Prime Minister of St. Lucia; and finally, Dr. Antoine, his wife, Lecturer at the University of the West Indies, Cave Hill Campus, in Barbados. Consequently, I feel a sense of comfort now, by virtue of the fact that those who have spoken to you before are persons with whom I am well familiar and in whom I have great confidence; and I have heard from some

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+ The following is a transcription of a speech given by the author at Nova Southeastern University's 2004 Goodwin Seminar.

of them that the interaction has been stimulating and worthwhile and that they have enjoyed the opportunity of being able to address you.

I want to thank you also, because it is not often that one gets the opportunity to address audiences that are not necessarily rooted within the jurisdiction that you have to represent, and especially as a small state when you believe that every opportunity should be taken to be able to sensitise persons as to the differences and vagaries that may perhaps be peculiar in some instances to small states.

I want in particular to thank Professor Cross, whom I met some time ago in Barbados when I addressed a conference, which she attended at which I delivered a speech entitled "The Law as an Instrument of Oppression, and a Tool of Empowerment". Since that time, we have had a number of opportunities to meet again, and therefore, while I really ought to be at home in Barbados today, I felt duty bound to accept this invitation and to reciprocate in being able to continue to articulate what our participation in the International Community represents.

I have been informed that my predecessors focused primarily on the soon to be established Caribbean Court of Justice. Hence, I will not treat to this issue although I do chair the preparatory committee for the establishment of the Court.

My appreciation to be able to speak to you is further heightened because very often there is an absence of sensitivity as to what we confront as a small state. Indeed, the norm across the developed world and more particularly within international institutions is to assume that the settlement of one set of rules in one country is capable of being both appropriate and applicable to all states and bodies globally on the basis of a "one size fits all" prescription. This, I must confess, has not been our experience – there can be no such prescription!

One such example, is our negotiations in the area of regional and international trade agreements as we seek to establish the need for special and deferential treatment. The constraints of our size coupled with our inability to distort the patterns of regional or international trade, strengthen our arguments for special and differential treatment. We hold 0.000 percent of global trade in goods, and 0.001 percent in global trade in services, neither being capable of distorting global trade in goods and services.

Equally, our settlement of standards within the regulation of the international financial services network has become problematic. Consequently, we have argued once again that the rules must relate to the risk that is confronted, rather than a "one size fits all" prescription, which in effect is tantamount to a non-tariff barrier in relation to the expansion of our international financial services. This imposes extremely heavy burdens on our administrative, financial and other resources in order for us to be compliant and avoid

being an international pariah; even though the risk of significant money laundering and terrorism financing is not found in our states but still is still prevalent in the metropoles of London and New York.

While it is entirely possible therefore to speak to a range of experiences in our interaction with the global community, it is intended in this discussion today to restrict my comments to the impact of judicial activism on the nature of our obligations either already accepted or in fact being considered by sovereign nations in the area of international law; in particular, international human rights law.

The second half of the twentieth century as you all know witnessed an explosion in the birth of new states across the globe. Indeed, this is best exemplified by the fact that at the time of the establishment of the United Nations the number of member countries was approximately 51. Today, there are over 191 countries involved in that organization. It is clear that this phenomenon would have undoubtedly had an impact on the development of international law.

It also meant that there could no longer be a discourse and focus in international texts on what Lord McNair refers to in his "Law of Treaties" as the "Great Powers". In fact, the variables pertaining to circumstances, capacity and culture would initially seem to be irrelevant since the focus of international human rights law relates to principles that ought to be universal. The growth in the use of multi-lateral treaties after the establishment of the United Nations would also have reduced the extent to which customary international law and its emphasis on state practice would by implication prejudice the potential influence of the development of these new nations.

With the apparent equality of States offered by the establishment of the United Nations and their admission to membership, all would appear, on first blush, to be propitious for a new, more democratic framework for the conduct of both international relations and the development of what has become the new form of international human rights law. Regrettably this has not been the case. Those who might have assumed so may on reflection be forgiven for this form of naïve idealism.

Even in the corridors of the United Nations today as we speak, it is arguable that inequity still governs both the structure of the membership and the veto power, which continues to be vested in the five permanent members of the Security Council. Were this to be the extent of the challenge, there might be hope for optimism on the part of developing countries, especially small states like Barbados. However, it is the invisible hand of the cultural values of the developed world that has come to define the doubts being experienced by many of us in small states. In recent times, this perspective has often been reflected in the judgments of many international human rights bodies which have sought to redefine the obligations of states through re-

interpreting those obligations under international treaty law in a manner that was never understood by the states at the time of the acceptance of the obligations, or indeed at the time of the reservations being submitted right before that time.

This process of re-definition and re-interpretation has often been reflected in the values of the Western world deemed to be "enlightened" but insensitive to those from other regions. They have resulted from the lobbying and petitioning by a number of human rights bodies and Non-Governmental Organizations which reflect a strong political agenda and which would wish to reshape the world in their absolute image. It is significant that in 1993 the Bangkok Declaration reflected that the concentration on western values was the centerpiece of the more recent development of human rights norms: The Bangkok Declaration as settled by the majority of the Asian countries.

It is this phenomenon of the continuous expansion of the definition of what constitutes human rights, (not by the state accepting new obligations, but by the judicial bodies), that significantly affects the rights of nations to appropriately and properly plan for themselves and their citizens according to their norms, their customs and their respect for fundamental rights.

It is critical to emphasise that in the English Speaking Caribbean, there is a very healthy respect for human rights, as this has been universally understood for years. In addition to this respect for human rights, it is fair to say that our record on human rights as originally understood in the early decades of the development of the laws following the 1948 Universal Declaration of Human Rights has been among the best in the world, both the developed and developing. This has largely sprung from the strong abhorrence for injustice, oppression and inequity that we feel in light of our own experiences and history over the course of the last few centuries.

So what is this definition of human rights to which I keep referring? It is simply this, and this is what it has always been in its purest form, namely, universal legal guarantees protecting all individuals and groups, simply by virtue of being human, against action and omissions that interfere with fundamental freedoms and human dignity.

What is the key for that definition? Two phrases – firstly, "universal legal guarantees" and secondly, "fundamental freedoms and human dignity". Words that are generic in their scope and therefore without further particularity to treaty provisions which are capable of all kinds of subjective interpretation. Fortunately, these words were buttressed by specific treaty provisions in almost every single instance, whether they be by the International Covenant on Civil and Political rights, the American Declaration of Human Rights, or the European Declaration of Human Rights, to mention a few.

Every single Commonwealth Caribbean country at the time of Independence settled a written Constitution, unlike Britain (from whom we

would have derived most of our governmental structures), whose constitution still remains unwritten to date. Each one has as its cornerstone in its constitution a Fundamental Rights Chapter. There is a clear protection for the rights that we have all come to consider as fundamental to life, to liberty and the preservation of human dignity. They assert the need to assure due process and the protection of the law to all of our people. They prohibit slavery and genocide and the taking of life other than by the due process provided for in the laws of our country. The freedoms of expression, association and assembly are found in each of them, in varying forms of words but nevertheless found.

In other words, Commonwealth Caribbean constitutions are strong and unequivocal in the need to protect these rights and in the definition of these rights. There was no need for us to avoid this clear definition because its inclusion ensured that there was then an obvious protection of the rights of individuals and groups of individuals (minorities in particular) against abuses that are patently repugnant to the norms of civilized behaviour. Consistent with the same philosophy that led to these clear written constitutions, there was a commitment to reflect the same adherence to the protection of these fundamental rights in our international obligations.

So what did we do? We signed the major human rights conventions like that of the International Covenant of Civil and Political Rights; like that of the American Convention of Human Rights; and at the time of signing them, there was little or no debate in our countries because it was uncontroversial. It was accepted that a treaty that spoke of these noble things could only be good. May I also remind you that these treaties spoke to those universal values to which you could adhere and that were relevant irrespective of whether you are a Christian or Muslim; black or white; or old or young. It should be noted that in all of the treaties to which we adhered there was authorization for the use, albeit for serious offences, of the death penalty. This is evident not only in the American Convention of Human Rights and the International Covenant of Civil and Political Rights but also in the protocol in the American Convention of Human Rights to abolish the death penalty, where its use and application is still permitted in times of war. I will say more about that later because it recognizes that the viability of the state must be preserved at all costs if mankind is to be preserved ultimately.

But in truth and in fact, for what offences and in what circumstances is the death penalty used in the region? It is used for murder and treason. In spite of the fact that these conventions referred to above provided for the use of the death penalty, Caribbean states, however, took the additional precaution of entering specific reservations to those provisions, as did Barbados in 1982 when it became a party to the American Convention). This clearly reflected our continued intention to apply the death penalty as is provided for

in both the constitution of Barbados and the Offences Against Persons Act which latter act codifies the common law as it was inherited. We understood that any obligations attained in international law would be constrained by the nature of that reservation that was entered by us.

To become a little more specific for you now, because I'm sure many of you are saying, "Where is she going with this?"

Barbados as you know is a small island in the Caribbean which joined the family of nation states on the 30th of November, 1966. Its philosophy, which is key, as articulated by its then Prime Minister, the Right Excellent Errol Barrow at his inaugural address to the United Nations, was captured by this phrase "friend of all, satellite of none". That has continued to guide the conduct of our foreign policy and our international relations, as small as we are.

It is fair to say that this philosophy emanated from a state which has long been known to buck the trend when necessary in support of what it believes. Our country is internationally recognized for its commitment to the rule of law and its belief in the central importance of fostering tenets of democracy within the context of social justice. Many of you may not know that your own battle of independence here in America, which was fought on the precept of "no taxation without representation", was pre-dated by more than one century by the Charter of Barbados signed at Oistins in 1652, when that precept was articulated by those in Barbados who were defending the rights of the Crown against the incursions of Cromwellians in London. So that this dates back beyond our memory. We have been firm in our belief since Independence, clearly emerging once again from our historical roots, that each state must play its role in the international community. There must be an unwavering effort on the part of states to advance the goals of humanity and to improve the lot of the citizens of the world, many of whom have been long oppressed.

Social justice is a critical part of any foreign policy formulation both at the domestic and the international level. I state these facts because it is important to understand that the intrinsic values reflected by the modern state of Barbados are those that are consistent with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man and the American Convention of Human Rights – generally, the objective to remove inequity, oppression and lack of dignity from the backs of the people of the countries of the world as we move forward. Indeed, we have through our existence as an independent state since 1966 been regarded as a model adherent to human rights obligations.

The tide, I fear, is now beginning to turn – and unjustly so! This is specifically as it relates to the country's application of the death penalty accord-

ing to its laws, which have been intact throughout and unchanged. I will now seek to provide a brief history in order to explain why.

In 1994, the Judicial Committee of the Privy Council (JCPC), which is the highest court of Barbados pending the establishment of the Caribbean Court of Justice, delivered a judgment as the final court, not then of Barbados but of Jamaica, in the case of Pratt and Morgan. This decision was to have significant and long-ranging consequences for most Commonwealth Caribbean States. In that case, the Court held that while the application of the death penalty was not unconstitutional in Jamaica, the detention of a convicted person on death row for more than five years constituted cruel and unusual punishment and hence was unconstitutional.

While this case was binding only on Jamaica, because it sat as the court of Jamaica, it was persuasive for other Commonwealth Caribbean jurisdictions. Indeed, it represented a sea change for the JCPC. The JCPC would reaffirm that principle over the next decade when sitting as the final Court of other Commonwealth Caribbean jurisdictions. In time, they were to come to use other reasons in a clear effort to restrict the circumstances in which the death penalty could be applied. In recent times, the debate has revolved around the mandatory nature of the death penalty.

May I say to you, that three years after that JCPC ruling in relation to Jamaica, one of the bodies charged with the application of human rights interpretation, that is, the United Nations Human Rights Committee, held in the case of Johnson v. Jamaica, that in the absence of compelling circumstances, mere length of time on death row does not constitute cruel inhuman and degrading treatment or punishment and hence does not constitute a breach of the Covenant of International Civil and Political rights. Three years, after the JCPC in England gave its ruling on this matter, the body which is actually charged with the interpretation of the same Covenant that the JCPC uses as the basis for their justification, says that length of time does not constitute cruel and unusual punishment.

It is interesting because in Pratt and Morgan, the JCPC has reflected that the norm in Europe was seven years, but yet set a five-year deadline for Commonwealth Caribbean States. And, three years later when the United Nations Human Rights Committee is ruling in Johnson v Jamaica, this same JCPC is reducing the five years or sixty months to fifty-six months in the cases coming from Trinidad – no certainty, no clear line that allows you to act.

The U.N. Human Rights Committee felt that there ought to be other compelling circumstances, failing which, you would force governments to act expeditiously in carrying out the death penalty in circumstances where they may well be reason not to carry it out. It is important to note that in my own country, even before Pratt and Morgan, the death penalty had not been

carried out for almost ten (10) years, and that was because there were cases, which regularly went to our local Privy Council (an advisory body to the Governor-General) for the exercise of the prerogative of mercy. So the JCPC's decision has placed Commonwealth Caribbean countries' backs against the wall and forced them now to "work to a stopwatch" which makes no sense, as the Human Rights Committee well appreciated.

May I say, that after many years of this oppression, our own government, in 2002, passed a specific legislative amendment to the Constitution, expressly stating that the reasons set out by the JCPC in Pratt and Morgan and Neville Lewis v. Attorney General of Jamaica that led to the restriction of the use of the death penalty, were to be avoided. The amendment reinforces that if these circumstances occurred, that they would in no way constitute a breach of the Constitution. This is an assertion of our sovereignty. We are now in the process of drafting a new Constitution, and we will seek to reflect the will of the people of Barbados with our understanding of the international obligations, which Barbados has accepted.

The most recent litigation, however, has surrounded the issue of what has now been commonly referred to as "the mandatory death penalty". In the last three years human rights advocates and lawyers across the region, in London, and within the Americas, have argued that this system, which has been in use for centuries and which has been held to be compliant with all of the human rights conventions is suddenly now unconstitutional domestically and in breach of the human rights conventions to which we are signatory.

Over the last year, I have appeared before the JCPC on two occasions. The first time I appeared was three weeks after it delivered a ruling against the Government of Trinidad and Tobago in the case of Balkissoon Roodal v. The State of Trinidad and Tobago that the mandatory death penalty was in breach of the Trinidad Constitution.

Barbados' case was argued three (3) weeks later with the knowledge that the principle of *stare decisis* would imply that the JCPC would be unlikely to move from the Trinidad and Tobago ruling. The JCPC, in an unexpected move, asked the parties to come back and re-argue the case before a larger panel of judges. When we returned it was not just to argue as The State of Barbados, but our appeal was joined with appeals from Trinidad and Tobago and Jamaica. The three appeals were heard at the same time in a case that involved over thirty (30) lawyers, and for the first time ever, in its history, the JCPC sat as a body of nine (9) judges. Normally this body sits as five (5), and for rare, complex legal decisions they sit as seven (7). In sitting as a body of nine (9), history was being made.

In July, the JCPC held that Barbados' use of the death penalty, even if referred to as "mandatory", was consistent with the Constitution of Barbados since it was expressly saved by the Savings Clause of the Constitution. The

JCPC also reversed the ruling in the Trinidad and Tobago decision in Roodal and held that the "mandatory" death penalty is also consistent with Trinidad and Tobago's Constitution. In Jamaica's case, however, because it has changed its legislation for capital offences and created a hybrid set of offences since its Independence, it was held that Jamaica's use of the mandatory death penalty was unconstitutional.

What was the majority? In Barbados and Trinidad and Tobago's case, it was won by the slimmest of margins, namely, a five (5) to four (4) majority. Nevertheless, it reversed what had been ten (10) years of political onslaught in the form of judicial activism.

What are the real features of this system that has been styled the "mandatory death penalty"? In truth and in fact any person charged with murder in Barbados may avail themselves of a range of statutory and common-law defences. Indeed the definition of murder is very precise and results in a very small percentage of persons (I believe it is about eight percent (8%)) being convicted of murder and thus sentenced to death. Why is this? Because there are a range of Pre-conviction defences, ranging from self-defence to accident, from provocation to diminished responsibility and insanity and equally related bars to a finding of fitness to plead, to incapacity by infancy to insufficient *mens rea.*

There are also Post-conviction mechanisms that have worked exceedingly well for us, both pre- and post-Independence, which can be used to avoid capital punishment. These include appeals to the Privy Council under the Constitution. Under Section 78 of the Constitution there is a local Privy Council chaired by His Excellency the Governor General that membership comprising accomplished, well-respected and experienced persons. These persons have been drawn from the ranks of Deputy Prime Ministers and Prime Ministers; from persons who have been Presidents of international organizations; and from persons who have served in social services or the private sector at the very highest level; in other words, what would otherwise in bygone era, be referred to as a council of wise persons.

Under the new *Constitutional Amendment Act,* passed in 2002, which will only be effective in the near future once these four (4) cases that are going through their appellate process are completed, there is actually a strengthening of the framework and proceedings by requiring the Privy Council to invite written representations from any person sentenced to death before considering the exercise of the prerogative of mercy. This was done because we accepted that that was a good thing to do, and also to ensure the sharing of all materials as required by the local Privy Council for those persons so as to permit them to be able to comment thereon. We also have several rules of procedural fairness that guarantee the impartiality of our system,

and also ensure that there are benefits afforded to support an accused person, namely:

(1) the unanimity rule for the jury in relation to convictions of murder;

(2) the provision of legal aid through an attorney-at-law of choice, (not a public attorney, not a public defence counsel). Consequently, persons charged with murder have available to them the best legal counsel on the island. And indeed, everyone who has made his/her name as an advocate in Barbados has worked for legal aid representing persons, and that perhaps accounts for why the conviction rate is as low as eight percent (8%);

(3) allowing in the last decade defence lawyers to be present during the police interview of any murder accused, so that even before the charge of murder is brought down, defence counsel are present to guarantee fairness and an absence of any bias or unfair tactics.

In sum, in order for a person to be *executed* following a capital punishment conviction in Barbados, his/her offence must have been proved beyond a reasonable doubt before a unanimous jury, during a trial in which he/she would have been represented by an attorney-at-law of choice, funded by the State. He/She would have had their full due process rights respected during which he/she could have availed himself/herself of a number of legal defences or incapacities, both under statutory and common law. After the conclusion of the trial, (an accused) then has the right to go all the way to the Court of Appeal and the JCPC, soon to be the Caribbean Court of Justice. Even after that, they then have the right to petition the local Privy Council, for the exercise of the prerogative of mercy; and the statistics show that more often than not, since Independence, the sentence has been commuted rather than affirmed.

Parliament itself, however, has also been sensitive to the need to restrict the death penalty as a mandatory penalty, the only penalty available to a judge in certain circumstances. It is significant that under *Sentence of Death (Expectant Mothers) Act*, that no woman convicted of an offence punishable by death is to be sentenced to death while she is pregnant. Her sentence will be commuted to life imprisonment instead. Equally, other offenses that in our past have been known to carry the conviction of death no longer do so, for example:

- killing in the course of the furtherance of some other offence, usually a felony known as the Felony Murder Rule in our history;
- attempted murder;
- threatening murder through letters;
- conspiracy to murder;
- aiding suicide;
- aiding/acting in pursuance of a suicide pact; and

o infanticide.

These offences all carry life imprisonment. There has been a genuine attempt to restrict those offences to a minimum. Some ask us 'Why don't you have two categories of murder?' But the same philosophy that I spoke about guides us. Most systems that have two categories of murder have– first-degree murder for who you kill and not the fact that someone was killed. In Barbados we believe that every life is sacrosanct and that the loss of one life should not attract a greater penalty than the loss of another person's life. And that what is important are the issues of intent and defence as opposed to the subjective issues of who you kill or the manner in which they were killed, unless they pertain to those offences.

However, the determination of the validity of this mandatory death penalty in international law is much more complex. In spite of the fact that all human rights treaties apply it, in the last decade there has been a galvanizing effort on the part of international human rights advocates and lobbyists to further their political agenda. In this hemisphere, the most persistent challenge has come within the Inter-American system. In the Organization of American States the treaty (the American Convention) covers many more rights than the matter of the death penalty, even though what one hears discussed is the death penalty. Suffice it to say, that Inter-American court two years ago in the Trinidadian case of Hilaire held that the mandatory death penalty was in breach of the American Convention on Human Rights. Subsequent to that, because of that Constitutional Amendment in 2002, they carried the Barbados Government, before the Inter-American Commission. In spite of the fact that we reserved our right to be heard because we had two weeks notice of the hearing, they heard the matter in our absence and rendered an opinion. Subsequent to our extremely strenuous objections, we were again, one year later, allowed to make a submission, after the first opinion had been rendered by the Inter-American Commision.

This petition to carry us before the Inter-American system was not from a Barbadian law firm, but from a firm of solicitors out of London *Simons, Muirhead and Burton*, who on occasion have been the attorneys at law on record for the Inter-American Commission before the Inter-American Court. So the very lawyers of the Inter-American Commission carried us before the Inter-American Commission. I hope you can begin to see the picture. Nevertheless, we presented our case, but in spite of this, the opinion of the Inter-American Commission was rendered on the Friday before.

We have now been referred to the Inter-American Court and we have until the tenth of December of 2004 to find persons out of our seventeen in-house counsel in the Chambers of the Attorney-General (who deal with every legal matter coming through the Government of Barbados) to try and find

time now to research and present a case in Costa Rica that will clearly take a long time and much effort.

In fine, our contention is that the Inter-American Court and the Inter-American Commission are treaty-created and treaty-regulated bodies. As such they cannot go beyond the powers vested in the treaty that creates them or the 1969 Vienna Convention of Treaties, or the customary international law as it relates to the interpretation of treaties. We contend that they are seeking to use a provision in the Convention that for the last twenty years has been sufficient to keep us compliant. However, all of a sudden, with no change in our legal system, and with no change in the Convention, we are deemed overnight to be in breach. And what is that one word? The word is the word "arbitrarily". And what is the definition of arbitrarily? The meaning that they would wish to apply is one that says that the inability of Parliament to give Judges discretion as to what sentence to impose, is now to be regarded as an arbitrary process.

In our system, Parliament has the exclusive right to make the law and hence prescribe the penalty for offences. The courts have the right to interpret and apply the law. What they have effectively done by their assertion is to cause a blur in the separation of powers as guaranteed by the Constitution of Barbados in relation to the role of Parliament and the role of the Judiciary.

Equally, when you go to that legal bible of definitions - "Words and Phrases"- that is used in every common law jurisdiction, arbitrarily is defined as follows : "that to act arbitrarily is to act "without any reasonable cause;" or, to act "capriciously," or to act 'without any apparent reason.'"

Now a system that guarantees all that I said it guarantees, is now to be determined as one that is acting "without any reasonable cause" or "capriciously" or "without any apparent reason" in spite of the many safeguards which I have already outlined. We will await the verdict of the Inter-American Court, but I must tell you, that our colleagues in the region, did otherwise. Trinidad chose to denounce the American Convention of Human Rights and they came out of the Convention. Jamaica chose to step away from other Human Rights Conventions. The popular thought in Barbados is probably that we should do the same. However, the Government of Barbados feels fundamentally that we have worked too long and too hard to promote and to respect human rights norms and laws for us to be the victim of a form of judicial activism that constitutes a virtual amendment to the treaty as opposed to an interpretation of it. Further, it operates effectively as an amendment that falls outside of the broad framework outlined by the 1969 Vienna Convention or, indeed, the customary international law as it relates to the interpretation of treaties.

We also put forward arguments as to why our death penalty legislation is not a breach of customary international law. All of us know that no more

than half of the countries in the world have repealed the death penalty. Therefore, it cannot be styled as a *jus cogens* right. It cannot be styled as a crime against humanity, in the way that slavery and genocide have been categorised. Thus, where is the ability to reinterpret the obligations imposed on Member States? The Inter-American Court sets out the terms for the restrictions to be imposed, in respect of the use of the death penalty, in its Advisory Opinion rendered in 1983. This, however, was not addressed by the Court.

Now, the question must be asked whether the Courts are bound by previous decisions and/or opinions forever? Surely, they are not. But what they also are not entitled to do is to so interpret provisions such that they are in effect amended without the patent consent of the State Parties. For to do so is to undermine the system of international law as the glue that keeps international law effective. It is the principle that says that States, in good faith, choose to be bound by the obligations which they accept willingly - *Pacta Sunt Servanda*. Are we, therefore, to see the erosion, little by little, of this rule in this scenario because of the inability of States to accept the new obligations imposed on them which they are unable and unwilling to accept?

All of these questions will lead to significant debate in the countries in which we live. There is a need for greater accountability on the part of international human rights bodies that interpret and apply treaties. I know, as a politician, to whom I am accountable. You know, as officers of this faculty, to whom you are accountable in terms of your obligations and your contracts. Most of us have some form of accountability. There is no form of accountability for judges in the international human rights system, because there is no automatic right of appeal to the ICJ or any other body outside of the regional system. And this will have to be placed for political discussion and debate firmly and squarely within the fora to which these Courts belong if we are to ensure that we do not have respectable countries opting out of serious human rights conventions. It is the duty of all (States and the Courts) to ensure that the system is not undermined and prevented from being able to achieve what it was designed so to do.

We also believe that judicial activism is not necessarily to be deprecated. However, it is more appropriate within the arena of domestic jurisdictions, where it becomes easier to have a system of checks and balances. This is because where the activism leads to results which go too far outside the realm of accepted limits (in relation to the cultural mores, the views and the perspectives of a country), a democratically elected legislature (as has happened in this country) and as has happened in my country, can choose to pass laws to redress what they see as a judicial usurpation of the legislature's role.

This is acceptable within the domestic legal framework provided that redressing the law is consistent with the same fundamental rights and free-

doms as guaranteed by the Constitution. So we are not saying that the legislature amends the laws without limits but that it is done in a manner that is consistent with constitutional obligations.

Therefore, we feel the need for a serious debate in the various international fora. There will have to be a recognition that there will be more resentment and there will be a reluctance on the part of States to negotiate and conclude more international agreements. In particular, those treaties that diminish the importance of cultural diversity and seek to create a homogenized world in the image of only a twentieth-century western-developed world will be affected. It should be recalled, however, that many of these western developed countries did not reach this state of development within the forty or fifty years that they are now requiring of us, but took a century or two, in some instances, to be able to adjust their societies to the said norms they would now wish us to readily accept.

Equally, there will be further implications at the domestic level. There are some players who are now arguing that there should be a reform of the powers of the State governing their capacity to enter into international treaty obligations. Right now in our system, the executive can do so without reference to the Parliament. This is different from the United States of America that requires the approval of the legislature and the United Kingdom where Parliamentary debate, and not approval, is needed. These issues will have now to be put on the table, because countries are being required increasingly by international tribunals to change domestic policy to adjust to international obligations that they have never accepted and with which they cannot abide.

The death penalty is the example I have used because of the case in which we have been involved. Nevertheless, there are other issues that will affect us more like corporal punishment. In the Caribbean, parents have long used this as the instrument of correction without there being any detrimental consequences to any of us who were subjected to this form of discipline. Let me make it clear that I am not talking about abuse. Abuse is abuse and corporal punishment is corporal punishment. There is also the issue of same-sex marriages, on which all of us may have different views. In strong Christian societies like ours, it is felt that this must not be permitted by the laws of the country – a view incidentally shared by the religious right in the USA.

These are the tensions that will inevitably arise once you start broadening the definition of human rights from the core that can bind all humanity together irrespective of race, colour, sex or religion. The reality is that there is often internationally the political advocacy asserting these rights prior, then, to the judgements being delivered. One is, therefore, led to the inescapable conclusion that there is a political agenda being advanced even if in some instances that were not the case.

Many Caribbean societies are simply not prepared to confront these issues nor are their citizens prepared to hear that these are their international obligations, even if it means, as I have said earlier, that their countries will have to renounce these international obligations. It should be noted that, in the case of Barbados, we have decided to fight from within the Inter- American system because we believe that we are more compliant with the majority of the human rights obligations imposed by the American Convention on Human Rights than 95% of the countries in the hemisphere as we go through provision by provision by provision.

However, throughout the region the popular refrain as we confront these other issues is likely to be the same as with the death penalty – withdraw. It is significant that this is all the more likely to be the reaction today, more so than even thirty (30) to forty (40) years ago when there was greater hope within the country and there was not such a sense of powerlessness felt by people as they confront the vast changes in the wider community and work environment.

To date, technological advancement and the rapid pace of globalization in transportation and the movement of information and capital have caused so much change to envelop our society that people are more prone to hold on firmly to those things which they feel they can resist rather than allow change to take its normal gradual course as has happened in previous generations. The world is simply moving too fast and when those winds blow upon us, people hold on to what they can to establish a form of rootedness and bearings.

By the same token, there are other rights being stemmed, in particular development rights. On the face of it, these appear to be very noble - the right to education, the right to health, the right to adequate food, shelter, clothing, social security, the right to participate in cultural life, the right to development.

But can these really be styled as "rights" which impose obligations on the States? While the initial answer may be that they are simply declaratory, there is no doubt that international jurisprudence has reflected a disposition on the part of these international tribunals to be more activist and liberal in their interpretation of such rights. In the construction of the obligations of the State, not just in Conventions but in soft law, this would be catastrophic for us as countries since there are fiscal and other constraints we experience. If the courts, domestic or international, were now to start holding the State liable for the inability to provide some of these rights, we may be unable to satisfy these judgments while meeting our normal developmental and legal responsibilities as governments.

It is instructive to note that I speak from the perspective of a country, Barbados, which provides free education from the pre-primary to tertiary

levels. We provide free access to prescription drugs for all persons under sixteen (16) and over sixty-five (65) years of age and for those persons suffering from selected chronic diseases. We also provide subsidized public transportation. However, were we to enshrine these rights in our Constitution it would present tremendous difficulties for us as a small state which has an inherent vulnerability not only to international economic shocks but also to natural disasters. Unfortunately, we have seen this with Grenada, Haiti, Cayman Islands and Jamaica in this year alone.

This unbridled rush to establish these new norms as rights with the possibility of their becoming at some point justiciable is unfortunate. These are best left as ideals and aspects of our political philosophy that will in the future guide us in the best way possible. Only last week in London, we, the Law Ministers of the Small States of the Commonwealth met, and among other things, we discussed what was happening in the area of human rights. These are countries mainly from the Pacific region, from Africa and from the Caribbean. And I quote now directly from the communiqué which stated as follows:

"Ministers emphasized their commitment to the protection of fundamental human rights, "universal legal guarantees protecting all individuals and groups simply by virtue of being human, against actions and omissions that interfere with fundamental rights and human dignity." Their discussion reflected strongly-held views over some aspects of current human rights rhetoric. There was anxiety in particular over the assertion of new human rights, which emerge not from considerate action by all states but from organizations with no democratic mandate.

"Although the international conventions on social and economic rights accept that progressive realization of those rights must take account of the available resources, there was concern that ideals and aspirations could be too readily translated into justiciable guarantees requiring sovereign states to commit themselves to particular patterns of expenditure.

"Ministers discussed the role of human rights courts in the interpretation and scope of human rights. They recognized that State power had to be subjected to scrutiny as part of the system of checks and balances between the branches of government, but were concerned at the undue global influence of some regional courts, as they reflected an activist approach to the interpretation of treaty obligations and were not subject to appeal to any global body.

"The role of some human rights organizations was seen as problematic. Their work could be seen as an expression of global citizenship but activism by unrepresentative organizations, operating in parts of the world distant from the States whose actions they sought to constrain, could create harmful disillusionment with the whole human rights movement, the overall results of which have been so beneficial."

It is clear that these matters will continue to dominate discussion for some time to come. Indeed, there has been much debate internationally about your own government in the U.S.A. and its failure to ratify what people consider to be noble human rights treaties – The United Nations Convention on the Rights of the Child and CEDAW-the UN Convention on the Rights against the Discrimination against Women and the Kyoto Protocol relating to the environment.

While one cannot always support the reasoning advanced for not signing and ratifying these treaties, there must be sympathy and empathy with the U.S. Government's position when one reads the book "Why Sovereignty Matters" by Jeremy Rabkin. Mr. Rabkin reflects an understandable concern on the part of this country about the creeping encroachment of customary international law (not only treaties) on domestic policy. He argues this following the developments in the 1980s in the Filartiga v. Pina-Iralia case and the third restatement of Foreign Relations law. There has been a disproportionate influence over the course of the last two and a half decades in the U.S. system by reason of the decisions of the Supreme Court and others effectively opening a back door for international norms to become part and parcel of domestic law without the tacit approval of Congress.

We in the Caribbean have to seriously examine our options as we go forward. This would include discussing the feasibility in the near future of a Caribbean Human Rights Convention adding in addition to the existing non-binding Charter to Civil Society. Unfortunately, the American Convention on Human Rights seeks to bring together three (3) distinct cultures: that of Latin America, North America and the Caribbean. It may well be, that without prejudice to our right to remain within the American Convention, we would have to look at a system that is more reflective of our norms and our mores while still respecting those fundamental rights that are necessary for the advancement of humanity and the best precepts of social justice.

Indeed, with the advent of The Caribbean Court of Justice, it would seem appropriate to engage in this regional dialogue because this Court could then properly be the interpreter of those convention rights should we be able to settle on such a convention. It is expected, as with every court, that there must be sensitivity – not that courts do what States or people want them to do. However, there is a greater sensitivity to the mores and customs of the region if you are from the region than if you are sitting four thousand (4000) miles away, having never visited the country, and not necessarily understanding the people, their religion or their way of life.

Ladies and gentlemen, this discussion, I anticipate, will dominate regional and Commonwealth dialogue for the next five (5) to ten (10) years because as with everything else in international law it does not happen overnight. There is a clear signal that this time judicial activism has gone too far.

Our countries, which have been model observers of human rights obligations for decades, are now being suddenly regarded as pariahs in the international community on this single issue of the death penalty, (a penalty permitted by every human rights convention). We can run or we can stay and fight and work within the system. We are choosing to stay and fight and work within the system. These are interesting times.

We may well want to look at the other provisions that are available to us which would allow for additional legal arguments such as the provision in the 1969 Vienna Convention of Treaties. This may allow us to argue that there has been a fundamental change of circumstances leading to a breach of the treaty, not originally drafted for this purpose, but drafted for purposes that are related to fundamental changes of circumstances outside of the control of the state. These however have never been understood to be such by the interpreting body.

Equally, there must be a consideration of the wider case law that reflects the more restrictive interpretation to interpretation by international tribunals as they decide asylum cases, immigration cases and those pertaining to economic rights. After all, these are issues that are all central to the vital interest of the majority of the developed world. Ironically judicial activism was not as ever present in these areas as they have been applied in our death penalty line of cases. This is despite the fact, that within our jurisdiction, they are central to our ability to assure the security of our population and by extension, our economy.

I ask, therefore, that you reflect on these things after my speech today, not because I expect you to be able to go and do anything substantial or significant immediately. However, it is important that by understanding the context within which we now find ourselves and the challenges which we face as small states, those of you who occupy academic positions and who are responsible for expanding knowledge, begin to appreciate that there are on-going debates on wider global issues within your neighbourhood in which you may well wish to participate.

I do not expect that many of you will necessarily be in agreement. Nevertheless, I share today my perspective, not asking you to accept it as your only perspective, but simply to treat it as a valid perspective of a small state and what it has had to fight, and where it must go to balance its commitment to fundamental human rights norms with its right to self-determination. I ask you also to recognize that these interesting times call, therefore, for us to walk on a tightrope whilst attempting to balance these commitments.

We are not blasting or bashing human rights or human rights organizations. However, by the same token, we are not going to lie prostrate while people reinterpret the obligations of our States in a way that causes us to be deemed non-compliant without our active participation or agreement. This is

the tightrope that we must walk. It brings to mind the words of that famous reggae band out of London of Caribbean origins – Steel Pulse, who in its song "Walking on a Tightrope" expresses all the sentiment we feel.

These are indeed turbulent times for our participation in the international law regime. Yes, the waters are truly turbulent but when you come from an island state you learn to negotiate rough seas and you learn to negotiate high winds as you, too, in Florida ought to have learnt as a peninsula.

In this context, when you combine our geographical circumstances with our historical characteristics, you will appreciate why we have ultimately only to be one thing – resilient in all challenges which we confront, confident that at the end of the day those who labour in a good and just cause shall never labour in vain.

I am obliged to you.