Coalition for the International Criminal Court (CICC)
Questionnaire to ICC Judicial Candidates
2009 Elections

Please reply to some or all the following questions as comprehensively or concisely as you wish

Name:	Duke E.E. Pollard
Nationality:	Guyanese
Nominating State:	Cooperative Republic of Guyana
List: A ____ or B __√__	

Background:

1. Why do you want to be a judge at the ICC?

Quite apart from constituting the apotheosis of his professional career as an international legal expert, election of the Guyana candidate to the ICC would provide the candidate with an excellent opportunity to make a contribution, however modest, to the establishment of an international community based on the rule of law. As the national of a small state vulnerable to aggression from larger actors in the international community, the Guyana candidate welcomes the prospect of sitting on the Bench of the ICC which is designed to play a determinative role in investigating, arresting, prosecuting and penalising perpetrators of executive lawlessness in the international community including crimes against the peace. The Guyana candidate, together with his Caribbean Community colleagues at the United Nations were always supportive of initiatives to establish an international order based on the rule of law. This explains their collective role in the elaboration and promotion of Article 62(2)(a) of the Vienna Convention on the Law of Treaties (VCLT) addressing the non-applicability of the *rebus sic stantibus* principle to boundary treaties, their active representation in the United Nations Special Committee on the Question of Defining Aggression and the United Nations Council for Namibia, their conceptualising and promoting of the exclusive economic zone concept which introduced desired stability and a measure of equity in the allocation of the resources of ocean space and, more recently, in relocating the ICC on the agenda of the General Assembly in 1989 through the masterly intervention of President ANR Robinson of Trinidad and Tobago, thereby providing the stimulus for the International Law Commission's (ILC's) draft articles on the ICC. In effect, Guyana's candidacy is informed by the Caribbean region's visceral concern for the political independence and territorial integrity of small states which is irretrievably bound up with national security based on respect for the rule of law in the international community as exemplified by the ICC. Indeed, it would be in the nature of a cruel irony if the Caribbean States were to be excluded from the Bench of the ICC, given their role in the establishment of this important institution.

2. What do you think will be the biggest challenges facing you as an ICC judge?

Accustomed as he is to an international judicial culture characterised by unqualified personal and institutional independence, the Guyana candidate will be challenged to adjust to arrangements prescribed by the relevant provisions of Articles 36 and 112 of the Rome Statute. Another significant challenge is likely to be successfully resisting the insidious, subtle, disingenuous political insinuations of one or another Member State representative to adopt a preferred judicial policy in the performance of professional duties.

3. What do you believe are currently some of the major challenges facing the Court and what do you believe will be some of the major challenges in the coming years?

As an innovative international judicial institution whose time has finally come, the establishment of the ICC constitutes one of the boldest assaults on national sovereignty by reason of the complementarity principle and the competence of the Court to determine the willingness and ability of States Parties genuinely to carry out an investigation or prosecution of a crime within the contemplation of Article 5 of the Rome Statute. This compromise of national sovereignty is comparable only to that involved in the establishment of the United Nations with the entry into force of its Charter. As an international judicial institution designed to reflect the Rome Statute principles of fair geographical, gender and legal system representation, and to relegate impunity for international crimes to the dustbin of history, the provisions of the Rome Statute pose several formidable challenges for this institution, in order to establish and secure its credibility and legitimacy with States of the international Community, particularly weak vulnerable political entities. These challenges which are likely to persist in the coming years are as follows:

- Functioning efficiently, effectively and with unqualified credibility such as to secure and maintain individual and institutional independence from political control, given the language of commitment set out in Article 16, Article 36 and Article 112(2)(b)(d) and (4) of the Rome Statute.

- Balancing the international community's goals of restorative and punitive justice – reconciling the interests of victims and the rights of the accused, including his right to a fair and expeditious trial. There is a legitimate perception among concerned international actors that victim participation in the judicial process provided for in Articles 15(3), 19(3) and 68(3) of the Rome Statute strengthens the hand of the prosecutor vis-à-vis the accused and compromises the important principle of "equality of arms" between the parties and which is required for a fair trial.

- Resolving the tension between Article 54(3)(e) which allows the Prosecutor to conclude confidentiality agreements with informants for the purpose of generating new evidence and Article 67(2) of the Rome Statute which requires the Prosecutor to give the accused access to both incriminating and exonerating information in his possession.

- Establishing the gravity threshold provided for in Article 17(1)(d) in such a way as to promote the enduring legitimacy and credibility of the ICC, especially among the small states of the international Community.

- Managing efficiently the confirmation of charges stage of proceedings set out in Article 61 of the Rome Statute so as to ensure that the accused has a fair and expeditious trial without prejudicing the interests of victims and prosecutorial efficiency.

- Reconciling the provisions of Article 27(2), proscribing impunity for perpetrators of international crimes within the contemplation of Article 5, and Article 98(2) of the Rome Statute entitling a state to refuse surrender of a suspect contrary to an existing international obligation.

- Accommodating witness-proofing in the judicial process like the ICTR and ICTY so as to enhance the confidence and participation of the weak and vulnerable – the youth, elderly and victims traumatised from sexual violence.

- Securing legitimacy and credibility among the Non-Aligned countries, given current policies of the permanent members of the Security Council.

  Note In establishing the gravity threshold the ICC has determined that the following criteria are determinative:
  a) The systematicity and large scale of the wrongful conduct; and
  b) The social alarm caused the international Community.
  But a more relevant criterion/benchmark would appear to be the social alarm created in the state concerned.

List A or B Criteria:

While this question is relevant to either list A or list B candidates, we know that some candidates have competence that would qualify for both lists. Candidates with competence in both criminal and international law should feel free to answer any question in 4 a) or 4 b) to give the reader a more complete view of their background and experience.

4 a) For candidates on list A:

- How would you describe your competence in criminal law and procedure?
- How would you describe your experience as judge, prosecutor, counsel, or in another similar capacity, in criminal proceedings?

As a senior judge of the Caribbean Court of Justice (CCJ), the Guyana candidate, deliberates and makes determinations on legion issues of criminal law and procedure, involving, sometimes, the application of the ultimate sanction, consistently with national constitutions of Caricom States and relevant international human rights instruments like the ICCPR and the ICHR.

4 b) For candidates on list B:

- How would you describe your competence in relevant areas of international law, such as humanitarian and human rights law?
- How would you describe your professional legal experience that is of relevance to the judicial work of the Court?

In respect of competence in international humanitarian law, the Guyana candidate, during his sojourn in the United Nations as acting President and member of the United Nations Council for Namibia, was required to make legal submissions on the four (4) Geneva Conventions (1949) in relation to the insurgency movement by the South West Africa Peoples' Organisation (SWAPO) against the South African Apartheid regime. Similarly, the Guyana candidate was required to make legal submissions on the Geneva Conventions (1949) for the Guyana government in respect of insurgency movements in Angola involving MPLA and UNITA against military forces of the Government of Portugal. In this context, it is not generally known that Guyana was a strategic transit point for air-borne Cuban soldiers proceeding to southern Africa via a South

Atlantic route. In point of fact, Guyana's involvement in this episode elicited an extremely strong rebuke from Secretary of State, Henry Kissinger, but to no avail.

As a senior judge of the CCJ, the Guyana candidate is required to interpret and apply the national constitutions of Caricom States, all of which incorporate fundamental rights provisions. These provisions are based on the European Convention on Human Rights and the Canadian Charter of Rights which are required to be interpreted consistently with relevant international human rights instruments in the absence of a clear legislative intent to the contrary. An excellent case in point is provided by Article 154 of the Guyana Constitution which expressly recognises the entitlement of persons to the rights set out in the following international instruments:

- Convention on the Rights of the Child;
- Convention on the Elimination of All Forms of Discrimination Against Women;
- Convention on the Elimination of All Forms of Racial Discrimination;
- Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment;
- Convention on Economic, Social and Cultural Rights;
- Convention on Civil and Political Rights;
- International Convention on the Prevention, Punishment and Eradication of Violence Against Women.

Equally relevant is the Guyana candidate's experience as a treaty lawyer for a period in excess of four decades, commencing from the Vienna Conference on the Law of Treaties (VCLT) 1968. Given that most human rights/humanitarian instruments are set out in treaties, a thorough understanding of treaty law is of critical importance for the correct interpretation and application of such instruments. Consider in this context the controversial decision of the European Court of Human Rights (ECHR) in *Behrami and Behrami v France* and *Saramati v France, Germany and Norway*: App. Nos. 7141201 + 78/66/01 Grand Chamber Decision, 2.5.07. In this case the Court determined, contrary to the applicable norms of state responsibility, that actions of NATO – led peace-keepers in Kosovo were not attributable to NATO or Member States whose commanders had operational control of forces on the ground but to the United Nations, the former having acted pursuant to Security Council resolution in accordance with Chapter 7 of the Charter.

Nomination Process:

5. What are the qualifications required in your nominating State for appointment to the highest judicial offices? How do you meet these qualifications?

The Guyana candidate is currently a senior judge of the CCJ. The CCJ is the highest appellate court in the Caribbean Community. Appointment to the Bench of the Court is based on open competition. No political surrogates are involved except in a small way for the appointment of the President of the Court which requires an affirmative vote of three-quarters of the Contracting States acting on the affirmative recommendation of the Regional Judicial and Legal Services Commission (RJLSC), an apolitical institution consisting of representatives of regional non-governmental organisations (NGOs). Judges of the CCJ are appointed by the RJLSC on a competitive basis. The Guyana candidate has thirty years standing at the Bars of Guyana and Jamaica and is an experienced practicing municipal and international lawyer. The qualifications for a seat on the Bench of the CCJ are set out in Article IV of the Agreement Establishing the Caribbean Court of Justice which reads as follows:

"*10. A person shall not be qualified to be appointed to hold or to act in the office of Judge of the Court, unless that person satisfies the criteria mentioned in paragraph 11 and –*

(a) is or has been for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, or a court having jurisdiction in appeals from any such court and who, in the opinion of the Commission, has distinguished himself or herself in that office; or

(b) is or has been engaged in the practice or teaching of law for a period or periods amounting in the aggregate to not less than fifteen years in a Member State of the Caribbean Community or in a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting parties, and has distinguished himself or herself in the legal profession.

11. In making appointments to the office of Judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society."

6. Article 36 of the Rome Statute provides for two possible nomination procedures. Please describe in detail the procedure used for your nomination.

The Guyana National Group in the Permanent Court of Arbitration indicated their choice of candidate (The Honourable Justice Duke E.E. Pollard) to the competent authority of Guyana, the Ministry of Foreign Affairs. The Government of Guyana indicated its approval by endorsement of the candidate and informed the Secretariat of the Assembly of States Parties of the ICC through normal diplomatic channels accordingly.

7. Have you provided the statement required by article 36(4)(a) of the Rome Statute and by the nomination and election procedure adopted by the Assembly of States Parties? If not, why not?

Yes. (*See Annex I*)

Legal System and Language Abilities:

8 a) Which legal system does your country belong to? Do you have knowledge or experience working in other legal systems?

Guyana belongs to the Common Law system, **which, it is important to note, is currently unrepresented among the States of South America and the Caribbean as required by Article 36(8)(a)(1) of the Rome Statute**. The Guyana candidate has knowledge but no experience working in other legal systems.

8 b) What difficulties do you envision encountering working with judges from other legal systems? How would you resolve such difficulties?

The Guyana candidate has no difficulty working with judges of other legal systems. In point of fact one of the candidate's close associates on the Bench of the CCJ is from the civil law system (The Netherlands).

9 a) What is your knowledge and fluency in English, if it is not your native language? Do you have experience working in this language?

The Guyana candidate's knowledge and fluency in English are excellent.

9 b) What is your knowledge and fluency in French, if it is not your native language? Do you have experience working in this language?

The Guyana candidate's knowledge and fluency in French leave much to be desired. However, the candidate does read French.

Expertise and Experience:

10. Please explain your qualifications for this position. What aspects of your career, experience or expertise do you consider especially relevant to the work of an ICC judge?

The Guyana candidate is currently a senior judge of the Caribbean Court of Justice (CCJ), probably the most innovative, politically, financially and institutionally independent international judicial institution in the world, given the institutional arrangements in place for the appointment of judges, day-to-day administration and funding for the CCJ. The CCJ, uniquely, has a municipal law jurisdiction as the highest appellate court in Caricom and an international law jurisdiction where it determines disputes concerning the interpretation and application of the constituent instrument of Caricom – the Revised Treaty of Chaguaramas. As an appellate court the CCJ is required to interpret and apply fundamental rights provisions of national constitutions of Caricom States. As mentioned above, these provisions are based on the European Convention on Human Rights and the Canadian Charter of Rights. Fundamental rights provisions are required to be interpreted and applied consistently with relevant international human rights instruments in the absence of a clear legislative intent to the contrary. This is expressly and definitively required by Article 154 of the Guyana Constitution.

The Guyana candidate, if elected, will bring to the position of judge of the ICC four decades of practice as an international lawyer, specializing in the law of treaties which is seminal for correct understanding of relevant humanitarian and human rights instruments many of which are in treaty form. The Guyana candidate's long and practical experience in the United Nations system puts the candidate in a position to appreciate the interface between the Security Council of the United Nations and the ICC which is likely to assume critical significance where relevant provisions of the Rome Statute are engaged. As a sitting judge on the CCJ in whose conceptualisation and establishment the candidate played an important part, the Guyana candidate will bring to the ICC invaluable experiences and insights of both personal and institutional independence gained from the CCJ - attributes which the ICC lacks at present, given relevant institutional arrangements expressed in Articles 16, 36 and 112 of the Rome Statute.

11. Do you have any specific legal expertise, including, but not limited to, violence against women or children?

Given the high incidence of rape, indecent assault, sodomy, abductions, child abuse and other manifestations of violence against women and children in the Caribbean, judges of all municipal courts in Caricom, including the CCJ, need to be versed in the law relating to violence against women and children. And such legal expertise is within the knowledge of the Guyana candidate.

12. Historically, many of the grave abuses suffered by women in situations of armed conflict have been marginalized or overlooked.

a) What experiences have you had dealing with crimes of sexual and/or gender based violence?

b) Are there situations or cases in the past where you believe you have applied a gender perspective, i.e. inquired into the ways in which men and women were differently impacted? If so, to what effect?

c) Are there situations where you did not analyze the different impacts of a situation on women and men but on reflection now think such an analysis would have been appropriate?

Given that Caricom is relatively a zone of peace and stability in the international Community the abuses contemplated in this context are not known to occur.

13. Victims have a recognized right to participate in ICC proceedings and to apply for reparations under Article 75. What experience relevant to these provisions do you have?

Common law systems, unlike Romano-Germanic systems, make no provision for victim participation in judicial proceedings except at the sentencing stage in some jurisdictions. The common law jurisdictions of Caricom States unlike Suriname and Haiti do not provide for victim participation in judicial proceedings. However, since reparations is a generic term for a wide variety of judicial remedies – compensation, satisfaction, rehabilitation, *restitution in integrum* - several of which are known to the common law, the Guyana candidate has experience of these forms of reparations.

14. Did you help advocate for the adoption of human rights or international humanitarian law treaties or other instruments? Please describe your experience.

As a former member and acting President of the United Nations Council for Namibia, the Guyana candidate was a vigorous advocate at the material time of the International Convention on the Suppression and Punishment of the Crime of Apartheid. As an activist against the spread of apartheid by the South African regime to Southwest Africa (Namibia), the Guyana candidate was chairman of the Travel Documents Committee of the United Nations Council for Namibia responsible for utilising passports from Scandinavian countries for Namibians. The Guyana candidate's advocacy against apartheid took him to several countries of Southern Africa with the United Nations Council for Namibia in 1968, namely Zambia, Tanzania, Kenya and Uganda. The candidate was required to prepare interventions in the Third and Fourth Committees of the General Assembly for the Guyana delegation. As a member of the Sixth Committee the Guyana candidate was also a strong advocate of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. As General Counsel of Caricom the Guyana candidate was also involved in preparing position papers for Caricom participants in the elaboration of the ICC. The Guyana candidate also participated in the elaboration of the Caricom Charter of Civil Society. Recently the Guyana candidate delivered a presentation on the ICC and the CCJ in promoting Suriname's ratification of the ICC Statute, entitled The Caribbean Court of Justice: A Learning Experience for the ICC? (*See Annex II*). The Guyana candidate also appeared on the same platform with President ANR Robinson of Trinidad and Tobago at the annual meeting of the Academic Council of the United Nations System (ACUNS), June 2009 where he strongly advocated participation by States in the ICC.

15. Have you served on the staff or board of directors of human rights or international humanitarian law organizations? Please describe your experience.

No.

16 a) Please provide us with a list of your writings and opinions relevant to evaluating your experience.

Law and Policy of Procedures Associations (Oxford University Press, 1989); The Caribbean Court of Justice: Closing the Circle of Independence, (Caribbean Law Publishing Co. Ltd., Kingston, 2004); The Caribbean Court of Justice: What it is: What it Does, (Caricom Secretariat, 2003); The Caricom System: Basic Instruments (Caribbean Law Publishing Co., Kingston, 2003); Namibia: Challenge and Response, Objective Justice (United Nations, April-June 1971); Racial Discrimination: The Guyana Response (United Nations Document 50 216/3(21) WP2); The Caribbean Court of Justice: Innovation in Functional Cooperation, edited by K. Hall and M. Chuck-A-Sang (Ian Randle Publishers Ltd., Kingston 2008); New Directions in International Arbitration, Association for International Arbitration, (Maklu Publishers 2008); International Law and the Protection of Small States, edited by K. Hall (Ian Randle Publishers Ltd. 2007); Unincorporated Treaties and Small States (Commonwealth Law Bulletin Vol. 33 No. 4, December 2007); Juridical and Constitutional Implications of Caricom Treaty Practice (Commonwealth Law Bulletin Vol. 35, No. 1, March 2000); The Caribbean Court of Justice: A Learning Experience for the ICC? (Commonwealth Law Bulletin Vol. 35, No. 3, 2009). (Note: Articles on the CCJ address its individual and institutional independence primarily; articles on small states address national security and the international legal order.)

16 b) Please provide us with an electronic copy of any writing or opinion describing your experience.

(See Annex III)

Other matters:

17. Have you ever resigned from a position as a member of the bar of any country or been disciplined or censured by any bar association of which you may have been a member? If yes, please describe the circumstances.

No.

18. Have you ever been found after an administrative or judicial hearing to have discriminated against or harassed an individual on the grounds of actual or perceived age, race, creed, color, gender, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, alienage or citizenship status? If yes, please describe the circumstances.

No.

19. It is expected that a judge shall not, by words or conduct, manifest or appear to condone bias or prejudice, including, but not limited to, bias or prejudice based upon age, race, creed, color, gender, sexual orientation, religion, national origin, disability, marital status, socioeconomic status, alienage or citizenship status and shall require staff, Court officials and others subject to his or her direction and control to refrain from such words or conduct.

a) Do you disagree or have difficulty with this expectation?

No.

b) How will you be able to meet this expectation?

By acting judicially.

20. Article 40 of the Rome Statute requires judges to be independent in the performance of their functions. Members of the CICC and governments are concerned about the difficulties judges might experience in interpreting articles of the Rome Statute where their government has already expressed an opinion.

a) Do you expect difficulties in your taking an independent position?

b) Would you be able to judge impartially whether an investigation by your government was genuine?

a) No)
b) Yes)

In confirmation of both responses consider the institutional arrangements of the CCJ in which the Guyana candidate made a critical input.

21. A judge is expected to be on the bench or otherwise handle legal matters for at least seven hours per day, five days per week, and at times a judge's responsibilities may require him or her to be on the bench or at work into the evenings and on weekends. Do you expect to be able, now and in the foreseeable future, to perform these tasks on your own or with reasonable accommodation? If no, please describe the circumstances.

My normal working day is from 7:00 a.m. to 4:00 p.m. and 3:00 a.m. to 5:00 a.m. (24 x 7).

22. Do you know of any factors that would adversely affect your ability to competently serve as a judge, to comply with a judge's ethical responsibilities, or to complete the day-to-day responsibilities that a judge is required to assume? If yes, please explain.

No.

Thank you.

Annex I

Statement Pursuant to Article 36(4) of the Rome Statute

CANDIDATE	JUDICIAL EXPEREINCE	CRIMINAL/INTERNATIONAL HUMAN RIGHTS LAW EXPERIENCE	RELEVANT INTERNATIONAL LAW EXPERIENCE
Duke Pollard, JCCJ BA (Hons) London LLB (Hons) London LLM (McGill) LLM (Supp.) New York University LEC (Norman Manley Law School)	Judge, Caribbean Court of Justice (CCJ): 2005 to present. The CCJ in its appellate jurisdiction is the highest municipal appellate court for Caribbean dualist States replacing the Judicial Committee of the Privy Council (Britain). The CCJ in its original jurisdiction is also an international tribunal with compulsory and exclusive jurisdiction to interpret and apply the Treaty Establishing the Caribbean Community (Caricom).	<u>As Judge</u>: • Adjudicates at the highest appellate level matters of criminal law and procedure; • Interprets and applies the fundamental rights provisions of Caricom national constitutions. These provisions are based on the European Convention on Human Rights and the Canadian Charter of Rights; • Required to interpret and apply fundamental rights provisions of Caricom national constitutions and legislative enactments consistently with applicable international human rights instruments. A case in point is the Constitution of Guyana, Article 154 of which expressly recognises the entitlement of persons to the rights set out in the following international instruments:	International Law Consultant to the United Nations, Commonwealth Secretariat, Caricom Secretariat, and the Caribbean Law Institute. <u>As Diplomat/International Lawyer</u>: • Guyana representative at United Nations Special Committee on Question of Defining Aggression (1968-72); • Guyana representative at Vienna Conference on the Law of Treaties 1968-69; • Chairman/Vice Chairman of Sixth Committee of the United Nations General Assembly (UNGA); • Guyana's representative on First, Third, Fourth and Sixth Committees of the United Nations General Assembly (UNGA) 1968-72; • President of the Council for Namibia; • Guyana's Envoy Extraordinary Plenipotentiary with United Nations Mission to Namibia (1968);

CANDIDATE	JUDICIAL EXPEREINCE	CRIMINAL/INTERNATIONAL HUMAN RIGHTS LAW EXPERIENCE	RELEVANT INTERNATIONAL LAW EXPERIENCE
		✓ Convention on the Rights of the Child; ✓ Convention on the Elimination of All Forms of Discrimination Against Women; ✓ Convention on the Elimination of All Forms of Racial Discrimination; ✓ Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment; ✓ Convention on Economic, Social and Cultural Rights; ✓ Convention on Civil and Political Rights; ✓ International Convention on the Prevention, Punishment and Eradication of Violence Against Women. <u>As Diplomat/International Lawyer</u>: • Represented Guyana on the United Nations Special Committee on the Question of Defining Aggression. • Advising on the application of the Geneva Conventions (1949) in relation to the South West	• Rapporteur of the United Nations Host Country Committee; • Guyana representative at United Nations Conference on Law of the Sea; • Guyana representative at United Nations Commission on International Trade Law (UNCITRAL). <u>As General Counsel, Caribbean Community</u> : • Assisted Caricom States in preparation for various human rights conferences; • Assisted Caricom States in preparation of briefs for human rights conferences like Conference on the International Criminal Court and Conference on the Rights of the Child. <u>As General Counsel/Legal Consultant of Caricom</u>: • Drafted Revised Agreement Establishing the Caribbean Community; • Drafted Agreement Establishing the Caribbean Court of Justice; • Drafted Code of Conduct of Judges of the Caribbean Court of Justice; • Drafted Agreement Establishing the Caribbean Court of Justice Trust Fund.

CANDIDATE	JUDICIAL EXPEREINCE	CRIMINAL/INTERNATIONAL HUMAN RIGHTS LAW EXPERIENCE	RELEVANT INTERNATIONAL LAW EXPERIENCE
		Africa Peoples' Organisation (SWAPO) insurgency movement against the South African regime and the MPLA/UNITA insurgency movements against the Portuguese Government. As Legal Consultant/General Counsel of the Caribbean Community: • Advised Caricom States on the establishment and implementation of a regional Witness/Justice Protection Programme; • Assisted Caricom States in enacting national Witness/ Justice Protection Programmes; • Assisted Caricom Attorneys-General in interpreting and applying Article 4 of the American Convention on Human Rights and Article 6 of the International Covenant on Civil and Political Rights.	As Director of Caricom Legislative Drafting Facility: • Drafted Agreement Establishing the Association of Caribbean States; • Drafted various constitutional instruments of regional inter-governmental organisations. Publications Author of numerous books and articles on international law issues, including human rights law, published by: Oxford University Press, The Caribbean Law Publishing Company, The International and Comparative Law Quarterly Review, The Commonwealth Law Bulletin, The Texas Law Review, San Diego Law Review, Caribbean Law Institute; United Nations National Resources Forum; Royal University of Malta; and The Caribbean Yearbook of International Relations.

Annex II

THE CARIBBEAN COURT OF JUSTICE: A LEARNING EXPERIENCE FOR THE INTERNATIONAL CRIMINAL COURT?*

by

THE HON. MR. JUSTICE DUKE E.E. POLLARD, JCCJ

I. Historical Antecedents of the ICC

1.0 The Treaty of Westphalia (1648) did not only terminate the Thirty Years War[1] and located national combatants at the centre of the emerging European states system, but also accelerated and institutionalised the augmentation and consolidation of state power in domestic jurisdictions for centuries thereafter.[2] More importantly, and, perhaps, depressingly, it legitimised states as not merely the primary but also the only legitimate subjects of international law in the perception of authoritative publicists[3]. Sovereign

* This article is based on a Paper presented at the Paramaribo Regional Parliamentary Seminar, International Justice and Security: The Role of the International Criminal Court on 07th June, 2008 at Hotel Torarica, Paramaribo, Suriname. It was published in The Commonwealth Law Bulletin Vol. 35, No. 3, 2009. Justice Pollard is a senior judge of the CCJ and candidate for the ICC.

[1] This was one of several wars of religion which consumed Europe following the schism in the universal Roman Catholic Church and the emergence of Protestantism as a competing religious ideology. The preference of England and the Netherlands for Protestantism coupled with economic and territorial rivalries, led to much military warfare with Roman Catholic Spain and France in the 16th Century.

[2] See D. Hold et al, *Global Transformations, Politics, Economics and Cultures* (Cambridge, Polity Press, 1999) 32-49

[3] Consider in this context the writings of Vattel and Hegel who propagated an extremely individualistic concept of state sovereignty which "reached its doctrinal plenitude in the nineteenth century": See J.G. Starke, *Monism and Dualism in the Theory of International Law*, (BYIL, 1936) 69.

states as international actors, in the positivistic philosophy of Hegel, were entitled to be unrestrained in the pursuit of power, and competent decision-makers to be immunised from penalties for the dehumanising consequences of executive lawlessness associated with unrestricted and unregulated warfare. Fortunately for modern societies, however, this perception of impunity for the consequences of the callous employment of state power was firmly and resolutely rejected by the Nuremberg and Tokyo Tribunals, the first of which affirmed that international law provided the basis of interstate activities and that "(c)rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[4] In effect, individuals were being denied the indefeasible defence of act of state and were being located at the centre of international criminal activities as exemplified in the prosecutorial proceedings of the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and, more recently, the International Criminal Court (ICC).

1.1 Wars, whether "just" or "unjust"[5], were invariably perceived by the intrepid purveyors of violence in the emerging European states system of the post-Renaissance era as sorties in the discretionary exercise of royal prerogative powers resulting in the gratuitous devaluation of human life which, more often than not, accompanied the indiscriminate destruction of private and social capital of civilian populations unrelated to military necessity. Devastation issuing from internecine warfare was to be regarded as collateral damage constituting the deterministic outcome of the armed confrontation of states. Predictably, unbridled individualism in the pursuit, acquisition and deployment of state power in the post-Westphalian period set the stage for interminable wars during the 18th Century which witnessed the War of Spanish Succession (1701-14), the War of the Austrian Succession (1740-48), the War of Jenkins' Ear (1739-48), the Seven Years War (1756-63), the War of American Independence (1774-83) and the French Revolutionary and Napoleonic Wars (1789-1815). Peace in the age of mercantilism, internecine warfare

[4] See the Judgment of the International Military Tribunal (Nuremberg), October 1, 1946, (41 AJ1L 1947) 221.
[5] Ancient and medieval scholars like Plato, Aristotle, St. Augustine and St. Thomas Aquinas tended to discuss armed confrontations of political entities in moralistic terms.

and territorial expansionism appeared to be an intolerable interruption of an otherwise opportunistic continuum of military confrontations.

1.2 The Congress System which commenced with the Vienna Congress (1815) and continued intermittently during the 19th Century afforded some respite from the incessant international violence of an earlier era but did nothing to proscribe war as a solution for "domestic" dynastic rivalries nor as the preferred instrument of national foreign policy. And although the Crimean War which ended in 1856 was the only major European international conflict after 1815, the unification of Germany and Italy was accompanied by a spate of "domestic" or non-international conflicts, except for the Franco-German War of 1870.

1.3 It is a matter of historical record that the scramble for Africa towards the end of the 19th Century reaffirmed the insatiable territorial and economic cupidity of powerful international actors, spawned protracted, expansionist, exploitative wars, and pointedly exemplified the inherent vulnerability of weak political entities in the face of advanced technologies of violence callously deployed in wanton acts of aggression, genocide, crimes against humanity and war crimes. No international system aspiring to be based on the rule of law, as understood at present, was available to constrain the executive indiscretions provoked by vaunting territorial ambitions. Unqualified impunity for the legitimate perpetrators of state terrorism appeared to be a peremptory attribute of national sovereignty. The Hague Conference of 1907 was not an outstanding success in proscribing war and prescribing rules of humanitarian law. Consequently, it was not until after the First World War (1914-18) and the Second World War (1939-45) had run their courses with untold barbarities by *soit disant* advanced civilisations of Europe that any serious, determined but, nevertheless, unsustained effort was made by critical decision-makers of the victorious combatants to impose normative prescriptions on the conduct of war.[6] The Briand-Kellog Pact in (1928) had been a signal failure in attempting to proscribe war as an instrument of national policy.

[6] Article 227 of the Treaty of Versailles provided for the establishment of an international tribunal to try Kaiser Wilhelm for war crimes committed during the First World War. Article VI of the Genocide Convention (1945) provided for the establishment of a tribunal to prosecute offenders for the crime of genocide but nothing ever came

1.4 Predictably, the Briand-Kellog Pact lacked the required degree of international constitutional legitimacy accompanied by the appropriate sanctioning process of prescription to constrain the frustrated ambitions of unrepenting, politically deviant state actors, particularly Germany, aggrieved by perceived injustices inflicted on them at the Peace Versailles (1918) which terminated the first World War and made an abortive attempt in the guise of the League of Nations, at international governance based on the rule of law. In the result, the scourge of war, actively promoted by Nazi Germany, Fascist Italy and chauvinist imperialist Japan, visited on the international community widespread and indiscriminate devastation of private and social capital accompanied by heinous acts of genocide, war crimes and crimes against humanity evidenced in unimaginable acts of social deviancy and demonstrating man's inhumanity to man, much of which had been predicated on juridically impermissible and wanton crimes against the peace.

1.5 An emerging, hesitant process of international humanitarian law accelerated after the Second World War culminating in the Geneva Conventions of 1949. Predictably, however, apart from the abortive attempt to arrest Kaiser Wilhelm II of Germany and try him for war crimes and crimes against the peace during World War I, there was no determined and systematic effort by the unorganised international community prior to Nuremberg to investigate, prosecute and penalise perpetrators for various crimes associated with aggressive warfare. Indeed, many despicable activities committed during international warfare were not chararacterised as crimes during the first quarter of the 20th century and the principles of *nullum crimen sine lege* and *nulla poena sine lege* allowed many an international criminal to operate with impunity. And so the culture of impunity continued unabated to be addressed another day. The unqualified moral outrage issuing from unrestricted indiscriminate warfare during World War II resulting in genocide and other atrocities against human kind, however, prompted the initiation of institutional arrangements in the international community to investigate, prosecute, convict and punish

of it. Similarly in 1951 and 1953 the United Nations General Assembly mandated the International Law Commission (ILC) to elaborate provisions for an international criminal court but the cold war was not conducive to a successful initiative.

perpetrators of international crimes and substitute accountability for impunity for international criminal activities.

II. Small States in the International Legal Order

2.0 The calamity befalling the three little Baltic Republics during the Second World War affords depressing validation of the African aphorism that when elephants go on a wild rampage it is the grass underfoot that suffers most. And so it was when Latvia, Estonia and Lithuania were forcefully and unceremoniously incorporated into the USSR in 1940 thereby constituting an appalling but, ultimately, retrievable manifestation of executive lawlessness based on gratuitous, unqualified aggression. Although *ad hoc* attempts were made at Nuremberg and Tokyo to bring to justice the main axis perpetrators of impermissible violence and unspeakable human trauma during World War II, it is not unreasonable to conjecture that the victorious powers had among them more than their fair share of sanctimonious villains, bearing in mind the bombardment of Dresden and the nuclear atrocities at Hiroshima and Nagasaki.[7]

2.1 In the premises, history has taught mankind that what is required to avoid a recrudescence of the horrors of war accompanied by the unimaginable acts of sadism committed on civilian populations unsanctioned by military necessity is not *ad hoc* tribunals to investigate, prosecute, convict and punish perpetrators of international crimes *ex post facto*, but an international legal order which not only prosecutes, convicts and penalises convicted miscreants but also acts as a potent deterrent to would-be perpetrators of political acts of moral and social deviancy. In such an international legal order the likeliest beneficiaries must be perceived to be the small vulnerable states of the international community, like Suriname and Guyana, whose relatively vast territorial expanse endowed with abundant natural resources provide a temptation for the territorial cupidity of more powerful neighbours. The invasion of Kuwait by Iraq, involving as it

[7] See B.B. Ferencz, *International Criminal Courts: The Legacy of Nuremberg* (Pace International Law Review, Vol. 10, 1998) 217

did a crime against the peace and other international crimes, is probably an extreme case in point.

2.2 It does appear to be somewhat in the nature of a paradox, however, that although small states are likely to be the greatest beneficiaries of a credible, centralised, sustainable, organised international community based on the rule of law, the effective and successful establishment of which must be seen to involve a surrender of important attributes of sovereignty to a central collectivity, small states are, inexplicably, protective of their sovereignty and are the least likely to surrender attributes thereof for the commonweal, especially where political independence from colonial rule was recently achieved. Thus, whereas a collectivity of large older states like the European Union stands ready to surrender attributes of sovereignty to central organs by way of conferring on them legislative competence and requiring the compulsory submission of disputes of states and private entities to a regional court, the small states of the Caribbean Community (Caricom) and elsewhere resolutely resist any attempt to follow in the steps of their European counterparts and insist on establishing what is in their perception "a community or association of sovereign states".[8] But then Europe had a legacy of interminable genocidal wars which argued in favour of political integration.

2.3 In this connexion, it is interesting to note the language of commitment set out in Article 240(1) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy ("The Revised Treaty") which states "(d)ecisions of competent organs taken under this Treaty shall be subject to the relevant constitutional procedures of the Member States before creating legally binding rights and obligations for nationals of such States". The effect of this provision is to endorse, without qualification, dualism as a prophylactic constitutional principle designed to deprive the determinations of central Caricom organs of direct effect. Equally important

[8] Consider in this context the juridical implications of Article 28(1) and Article 29(3) and (4) of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the Caricom Single Market and Economy signed in Nassau, The Bahamas in 2001: http//www.caricom.org/jsp/communi/revisedtreatytext.pdf.

are the provisions of Article 211 which constrains the jurisdiction of the Caribbean Court of Justice (CCJ) by the political determinations of critical decision-makers.[9]

2.4 Despite the above, small states of Caricom constrained to recognise that, in the ultimate analysis, their security depended on compliance by powerful international actors with the prescriptions of an effective international normative system[10], consistently demonstrated a keen interest in the establishment of an international legal order, based on the rule of law, including respect for the sovereignty, political independence and territorial integrity of states, especially small states. This explained their reluctance to have a permanent International Criminal Court whose jurisdiction was activated solely by the Security Council pursuant to Chapter VII provisions of the Charter, given the democratic deficit of that organ as evidenced in the political control enjoyed by the permanent members of this body.[11] The democratic deficit of the Rome Statute, as exemplified in Article 16 which accords the Security Council a power of deferral, coupled with the jurisdiction of the Court over nationals of non-states parties to the regime, has been posited, paradoxically, as justifying the United States "un-signing" the Statute.[12] Consequently, small states were not too comfortable with an unreformed Security Council whose permanent members enjoyed an institutional advantage over other states large and small and whose selectively principled policies might compromise the institutional independence of the ICC.

2.5 Despite their relative insignificance in the allocation and enjoyment of power in the international community, however, small states have contributed disproportionately to the establishment of a more equitable international legal order. Consider in this context the concept of the common heritage of mankind in relation to the seabed and subsoil beyond the limits of national jurisdiction conceptualised and promoted by Ambassador Pardo of

[9] Thus the compulsory and exclusive jurisdiction of the CCJ is expressly made subject to the Treaty. Consider in this context the provisions of Article 12(8) and 193 of the Revised Treaty.
[10] See D.E. Pollard, *International Law and the Protection of Small States*, The Caribbean Integration Process ed. by K. Hall, (Ian Randle Publishers Ltd. 2007).
[11] See B.B. Ferencz, op. cit. 226.
[12] See M. Morris, *The Democratic Dilemma of the International Criminal Court*, B. Buffalo, Criminal Law Review, (2002) 591-600; also A. Fictelberg, *Democratic Legitimacy and the International Criminal Court*, Journal of International Criminal Justice, September, 2006.

Malta and the according of legitimacy to the concept of the exclusive economic zone conceptualised and vigorously promoted and espoused by Caricom States to replace the inequitable normative arrangements of 1958 and 1960[13] for marine space. Caricom States also played an important role in ensuring the non-applicability of the principle of *rebus sic stantibus* to boundary treaties set out in Article 62(2) (a) of the Vienna Convention on the Law of Treaties. Recently, Guyana's proposal on climate change involving carbon credits for avoided deforestation is rapidly gaining general recognition and support in the international community.

2.6 Even of more considerable relevance in the present context is the invaluable contribution of Caricom States to the resuscitation of the idea of an international criminal court eloquently espoused by ANR Robinson of Trinidad and Tobago the then Prime Minister of the twin island republic on behalf of Caricom in the General Assembly of the United Nations in 1989.[14] The intervention of A.N.R Robinson was largely responsible for putting the International Criminal Court (ICC) back on the agenda of the General Assembly despite the latent opposition of states harbouring an interest in impunity for international criminal activities.[15] Consistently, with their principled support for an International Criminal Court, many Caricom States have ratified its constituent instrument. However, much more remains to be done in terms of enacting relevant implementing legislation and persuading Jamaica, Suriname[16], Grenada and St. Lucia to sign on to the ICC regime. And this desideratum is the principal focus of this seminar.

2.7 Subscribing as it does to the monist philosophy of international law, Suriname will not ratify the ICC Statute unless competent decision-makers secure prior parliamentary approval. And herein lies the importance of the parliamentarians who give tangible juridical expression to the democratic principle. In all of this it is important to bear in mind that participation in the ICC regime by states does not compromise in any

[13] See, in this context the Convention on the Territorial Sea and Contiguous Zone 1958 516, UNTS 205, the Convention on Fisheries and Conservation of the Living Resources of the High Seas 1958, 559 UNTS 255, and the Convention on the Continental Shelf 1964, 499 UNTS 311.
[14] See B.B. Ferencz, op. cit. 225.
[15] See J.K. Kleffner and G. Kor, *Complementary Views on Complementarity,* (TMC Asser Press, The Hague, 2006) 46.
[16] Suriname acceded to the ICC Statute on 15th July, 2008.

irretrievable way the important attributes of national sovereignty, predicated as the Statute is on the principle of subsidiarity/complementarity, according to which the Court's jurisdiction is activated only where states are unwilling or unable genuinely to investigate and prosecute crimes within the contemplation of the Statute and in respect of which they have jurisdiction.[17] In point of fact, states were adamant in making the jurisdiction of the Court consensual and specific rather than inherent and indeterminate.

III. Establishment and Functioning of the ICC

3.0 The idea of an international court to prosecute perpetrators of international crimes constituted one of the boldest assaults in modern times on national sovereignty. Indeed, the establishment of the ICC was inextricably linked to one of the most intractable problems of international law – the creation of an international court to prosecute and penalise international criminal conduct without unduly compromising state sovereignty.[18] The genesis of this dilemma is to be traced to the fact that the right of the state to exercise criminal jurisdiction over wrongful acts committed on its territory or by its nationals is one of the most determinative attributes of sovereignty. In the premises, states were loathe to compromise their sovereignty by according an international court jurisdiction over wrongful acts committed on their territory or by their nationals.[19] Following the assassination of the King of Yugoslavia and the French Foreign Minister in Marseilles in 1934 the League of Nations convened a Diplomatic Conference in 1934 to approve a convention on an international criminal court. No state ratified the Convention for an International Criminal Court. The idea died a natural death. However, as mentioned below[20] the principle of complementarity offered a solution to the problem.

3.1 Initiatives for the establishment of an institution like the ICC predate the Nuremberg and Tokyo trials[21] and an awareness of its historical antecedents is important for an

[17] These so-called core crimes are the crime of aggression; genocide; crimes against humanity and war crimes. See Article 5 of the ICC Statute.
[18] See B.B. Ferencz, op. cit. 208.
[19] Idem at 218.
[20] Infra 19 et seq.
[21] See B.B. Ferencz, op. cit. 225 et seq.

understanding of its defining attributes. The process which began soon after the United Nations was established took over fifty years to materialise due to the intervention of the cold war after 1945. Meanwhile, the unspeakable atrocities of the Pol Pot regime in Cambodia and that of Idi Amin in Uganda, among others, underscored the urgent need for the establishment of a permanent court as a disincentive to potential perpetrators of crimes of concern to the international community.[22] In both situations identified above national courts were unable and/or unwilling to arrest the avoidable descent into executive lawlessness. Following widespread international crimes in Yugoslavia and Rwanda during their civil wars in the early 1990's, however, the Security Council of the United Nations, pursuant to relevant provisions of the Chapter VII of the Charter, was constrained to establish the International Criminal Tribunal for Former Yugoslavia (ICTY)[23] and the International Criminal Tribunal for Rwanda (ICTR)[24] with three main objectives – to hold accountable and punish perpetrators of international crimes, to deliver justice to victims and their families and deter similar conduct by other would-be perpetrators. In effect, to ensure access to a credible, if only temporary, system of international justice.

3.2 However, *ad hoc* tribunals were not a satisfactory solution to the problem of investigating, prosecuting, penalising and deterring persistent acts of international criminality since such measures depended on the collective will of the Security Council's permanent members at the material time in accordance with the provisions of Article 27(3) of the United Nations Charter. This approach also was, unfortunately, subject to inordinate delays and unacceptable financial costs. To be truly effective, such courts must be permanent and serve as a standing and potent deterrent to potential perpetrators of acts of social and moral deviancy. And so, in 1998, frantic efforts by interested states and NGOs during the 90s culminated in the Rome Conference of 1998. Many states participated in the negotiation of the ICC Statute and in 1998, 120 states adopted it.

[22] P. Kirsch, *the International Criminal Court and the Enforcement of International Justice*, (Pace Int. L.R. Vol. 17:47) 48.
[23] UN Doc. IT/32, 1933.
[24] UN Doc. S/RES/995 (1994).

3.3 The jurisdiction of the Court was not to be open ended or indeterminate in respect of international crimes. Such jurisdiction as was to be accorded the Court was to be consensual and specified. It was not to be inherent and unspecified – hence the formulation of Article 5 of the Statute expressly limiting the Court's jurisdiction to specified crimes set out in a statute to be agreed and ratified by the states parties. The ICC was not to be accorded universal jurisdiction in respect of international crimes unlike sovereign states.

3.4 Following adoption of the Statute, after delicate touch-and-go deliberations, a Preparatory Commission was set up to prepare Rules of Procedures and Evidence and the Elements of Crime. The Preparatory Commission was able to reach determinations by consensus and worked for 3½ years to complete its work. By 2000, 139 states had expressed the desire to sign the Statute. This in itself attests to the mounting international support for the initiative. In point of fact, the ICC must be perceived as a defining and successful initiative to enlarge the scope and extend the normative frontiers of international humanitarian and international human rights law and simultaneously contracting the parameters of individual impunity. However, much more remains to be done to transform this innovative judicial institution into an independent, financially sustainable force for good in the international community.

3.5 The defining features of the ICC are its establishment on the principle of consensual or "ceded jurisdiction" in respect of specified crimes as distinct from an inherent jurisdiction in respect of indeterminate international crimes,[25] its permanence and establishment on a qualified foundation of the rule of law which, from the perspective of small states, constitutes the surest guarantee of protection from executive lawlessness especially in times of military confrontations, international or domestic. The principle of the rule of law must be seen to be qualified, given the general understanding of the relationship of the separation of powers doctrine to the viability of this principle and the management oversight role retained for the Assembly of States Parties in respect of the Presidency, the

[25] See United Nations Document A/49/10 *Report of the International Law Commission on the Work of its 46th Session,* (2 May to 22 July, 1994, GAOR 49th Session Supp. No. 10) 36.

Prosecutor and the Registry.[26] This arrangement accords the executive a considerable measure of political control over the Court. But the reverse side was to have a loose cannon for an international judicial institution accountable to no legitimate institution. But, consonant with the practice of tribunals, national and international, the issues of jurisdiction and admissibility were discrete and were to be determined by the tribunal concerned through the employment of rules agreed by competent states parties. In this context, it is important to bear in mind, that the essential rationale of ICC is the investigation, prosecution, punishment and prevention of the most heinous international crimes of concern to the international community and the relegation of the principle of impunity to the dust-bin of history. Consequently, the point of departure of this initiative was required to be the identification and definition of specific crimes, the most reprehensible and heinous of which were universally recognised to be crimes against the peace or aggression, genocide, crimes against humanity and war crimes, all of which are known to customary international law and not unfamiliar to the tribunals of Nuremberg, Tokyo, Yugoslavia and Rwanda.

3.6 In the Elements of Crimes, various crimes were identified and defined with generally acceptable comprehensiveness and specificity, but one crime of universal concern which defied definition for over a century - aggression - remains largely unresolved[27]. And although the ICC has been accorded jurisdiction over the international crime of aggression, the exercise of this jurisdiction will have to await its definitive determination which the United Nations Special Committee on the Definition of Aggression failed to accomplish. **The jurisdiction of the ICC is limited to crimes committed after entry of the ICC Statute into force on July 2002 and for states acceding after that date, from**

[26] See Article 112(2) (b) of the Statute.
[27] In 1974 the United Nations General Assembly agreed to a resolution on aggression but this has not been accorded the status of a definition, which, in the ultimate analysis, must be concerned with an enhanced awareness of words in order to sharpen the perception of phenomena. See General Assembly Resolution 3314 (XXIX) of 14 December, 1974, which addresses aggression by states not crimes by individuals and is designed as a guide for the Security Council and not as a definition for judicial purposes. See United Nations Document A/49/10 supra n. 25 at 38. But as the International Law Commission observed in its commentary on the Draft Code of Crimes Against the Peace and Security of mankind: "Aggression can be committed only by individuals who are agents of the state and who use their power to give orders and the means it makes available in order to commit this crime", Yearbook of the International Law Commission, 1996, Vol. II, Part II, 19-20.

the date of their accession to the Statute.[28] This was intended to enhance its attractiveness for some states and underscore its prospects of universality.

3.7 The jurisdiction of the ICC, in the absence of a contrary agreement, is restricted to the covered crimes specified in Article 5 of the Rome Statute. Consideration was given to according the ICC inherent jurisdiction for serious international crimes but this was rejected after considerable deliberations as indeterminate and according too much power to an international tribunal. Finally, it was agreed that the jurisdiction of the ICC would be consensual and restricted to specific crimes as exemplified in Article 5.[29] There was considerable resistance by states in recognising an inherent jurisdiction of the Court in respect of unspecified international crimes. This might have been construed as an irretrievable compromise of national sovereignty. However, according consensual jurisdiction to the Court in a treaty in respect of specified crimes set out in Article 5 sometimes referred to as "ceded jurisdiction" was itself the exercise of an act of sovereignty.[30] It was also decided not to give the ICC an advisory jurisdiction in respect of international crimes.[31] States will be recognised as having primary responsibility and jurisdiction in respect of the covered crimes and universal jurisdiction for some other international crimes like piracy and slavery! Further, the Security Council pursuant to relevant Chapter VII provisions of the Charter may refer cases to the ICC irrespective of nationality or territoriality.[32] Such referrals require the affirmative vote of nine members of the Security Council including those of the five permanent members. Further, the Security Council may defer an investigation or prosecution by the Prosecutor for one year and such deferral is renewable and may last indefinitely according to Security Council Resolution 1422 of July 2002.[33] And herein lies the problem potentially arising from selectively principled conduct. The omission of the Statute to accord jurisdiction to the

[28] See Article 11 of the Statute of the ICC.
[29] See United Nations Document A/49/10, op. cit. 38
[30] See *The Wimbleton* PCIJ Reports, Series A. No. 1, 25.
[31] See United Nations Document A/49/10, op. cit. 38
[32] See Article 13(b) of the ICC Statute.
[33] See Article 16 of the Statute.

States of custody[34] or states of the victims' nationality has been perceived to have considerably compromised the effectiveness of the ICC.

3.8 Under Article 19(1) the Court determines its jurisdiction and the admissibility of a case in proceedings before the ICC. The principle of admissibility addresses the exercise of the Court's jurisdiction and not the entitlement to such jurisdiction. Indeed, the entire jurisdiction of the Court as expressed in the Statute of the ICC is premised on the principle of complementarity,[35] which recognises states parties to have primary but not exclusive responsibility for crimes within the contemplation of Article 5 committed in their territory or by their nationals.[36] This is the concession which had to be made to national sovereignty by the international community for universality which is expected to impact positively on the Court's effectiveness. At the same time, the principle of complementarity is expected to be a catalyst for the compliance by states with their obligation to prosecute perpetrators of international crimes.[37] The coexistent but dormant jurisdiction of the ICC is activated only where the national courts of states parties with primary responsibility for the covered international crimes are unable or unwilling genuinely to investigate or to prosecute such crimes[38] or in the case of referrals to the Court by states or the Security Council.[39] In effect, an omission by states to act in good faith in discharging their international obligations is determined by the Court – in itself a significant inroad into national sovereignty.[40]

3.9 Paradoxically, however, complementarity is simultaneously an affirmation of state sovereignty and a denial or compromise of state sovereignty. Complementarity, as an international juridical principle, allows a state to avoid state responsibility for a breach of international criminal obligations but empowers the international community as exemplified in the ICC to exercise its own jurisdiction as a complement to that of the

[34] Consider in this context Article 21(1) (b) (i) of the ILC's Draft Statute for an International Criminal Court, Report of the ICC on the Work of its 46th Session (2 May to 22 July, 1994, Document A/49/10) 41.
[35] See preambular paragraph 10 and Article 1 of the Statute.
[36] See Article 17 of the Statute.
[37] See J.K. Kleffner and G. Kor, op. cit. 77 et seq.
[38] See Article 17 of the Statute.
[39] See Article 13 of the Statute.
[40] See Article 17(2) (a)-(c) and (3) of the Statute.

delinquent state. In the process, the jurisdiction of the state is not displaced nor superseded; it is only temporarily supplemented.[41] In effect, the principle of complementarity must be seen to have a significant negative impact on the traditional international law concept of sovereignty.

3.10 The principle of complementarity acknowledges the concurrent jurisdiction of the relevant state and the ICC in respect of the covered crimes. It is important to note, however, that at no time is the jurisdiction of the relevant state displaced or in abeyance on account of non-compliance with its international obligation activated by the commission of an international crime within the contemplation of Article 5. In commenting on the role of the Court in the preamble to its Draft Statute on the International Criminal Court, the International Law Commission observed that the ICC was intended to be "complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective"[42]. This role of the ICC was emphasised by the Commission in its commentary on the preamble of its Draft Statute as follows:

> "*The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdictions of national courts, or to affect the right of states to seek extradition and other forms of international judicial assistance under existing arrangements.*"[43]

3.11 Both jurisdictions of the Court and relevant state coexist at all times in respect of the covered crimes. However, the principle of complementarity was conceptualised only to supplement existing national criminal justice systems without assuming primacy over them. Consequently, establishment of compliance by states parties to the Statute in accordance with Article 17 operates to override the jurisdiction of the Court in deference to that of the state thereby confirming the state's primary jurisdiction over the case. In effect two conditions were required for States to accept the jurisdiction of the Court. Firstly, dependence of the Court on the cooperation of states; secondly, the need to limit

[41] See Document A/49/10, op. cit. para. 50, 21
[42] Ibid at 29.
[43] See United Nations Document A/49/10, op. cit. 29.

the jurisdiction of the Court to situations where national courts were unable or unwilling to exercise jurisdiction.[44]

3.12 Consistently with the principle of complementarity, admissibility of a case as mentioned above is concerned with the exercise of jurisdiction rather than the existence of jurisdiction.[45] A covered case will be inadmissible where it is being investigated or prosecuted by a state party with jurisdiction over the crime in good faith. Again, a case is inadmissible if it has been investigated in good faith by the state with jurisdiction over the covered crimes and that state has decided not to prosecute. In both cases the relevant state must establish that it was acting in good faith in being genuinely unable or unwilling to investigate or prosecute the covered crime. Or the person concerned has been tried for the proscribed conduct and the Court is precluded by Article 20(3) from prosecuting. Furthermore, the ICC's jurisdiction comprehends only the most serious of offences so that a case will not be admissible if it is found to be lacking in sufficient gravity.[46] But cases may come before ICC if referred to the Prosecutor by a State party or the Security Council[47] or by the Prosecutor acting *proprio motu* subject to the agreement of the Pre-Trial Chamber.[48] Indeed, the Pre-Trial Chamber must authorise the investigation. The Prosecutor, the relevant state or the accused may challenge the jurisdiction of the ICC or the admissibility of a case.[49] Any party to a case may appeal to the Appeals Chamber on the ground of lack of jurisdiction or inadmissibility! Under Article 81 a convicted person or the Prosecutor may appeal on the ground of procedural error, error of fact or error of law. Both may also appeal on the ground of the sentence being disproportionate to the crime.

[44] Ibid, 23
[45] Supra 16.
[46] See Article 17(1) (d).
[47] See Article 13 and 14 of the Rome Statute.
[48] See Article 15 of the ICC.
[49] See Article 19 of the Statute.

IV. Due Process

4.0 Paramount concerns of states parties to the ICC include its institutional independence, the integrity, personal independence and impartiality of its judges[50] and respect for the generally accepted principles of a fair trial. Such principles have been addressed in many cases by the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), as well as the UN Committee on Human Rights and adumbrated by the Caribbean Court of Justice (CCJ)[51]. As concerns the qualifications of the judiciary, judges are required to possess excellent professional qualifications suitable for holding the highest judicial offices in their countries and specific relevant experience.[52] Where bias is perceived to exist, the judge must recuse himself from the relevant case. As concerns the accused, generally acceptable judicial safeguards are required to exist such as the presumption of innocence, the right to counsel, the right to examine witnesses and the prohibition of trials in absentia as well as the right to appeal a conviction are all principles on which he may rely.[53] During investigations carried out by the Prosecutor, there must be freedom from arbitrary arrest/detention, the right of the accused to remain silent, the right of the accused to counsel and to be notified of his/her rights before questioning. There is also provision in the ICC Statute for the protection of victims and witnesses in their own right.[54] In this connection, the role of the Pre-trial Chamber is very important. This Chamber determines issues of jurisdiction and admissibility prior to the trial. It also acts as a check on the enthusiasm of the Prosecutor and must authorise any *proprio motu* investigation to be undertaken by the Prosecutor[55] who must not be subject to political control or direction by states parties to the Statute or any other state or authority external to the ICC. This was a compromise issuing from the Rome Conference and which was necessary to underscore the credibility, independence and effectiveness of the ICC. The Statute also protects the rights of suspects, witnesses

[50] See Article 40 of the Statute.
[51] See the Judgment of Justice Pollard in The Queen v Mitchell Ken O'Neal Lewis [2007] CCJ 3 (AJ).
[52] See Article 36(3) of the Statute.
[53] See Articles 66 and 67 of the ICC Statute.
[54] See Article 68 of the ICC Statute.
[55] See Article 54 for the duties and powers of the Prosecutor.

and victims.[56] Relevant activities of the Pre-trial Chamber allow the Trial Chambers to focus on issues of substance necessary for the determination of an issue.

4.1 One unfortunate omission from the Rome Statute is remedies for the victims whose human rights have been violated by the Prosecutor or the Court. Indeed, it is somewhat of a paradox that the United Nations which vigorously promotes and defends human rights does not incorporate in relevant instruments provisions addressing remedies for victims of human rights violations by its organs or like agencies.

V. Administration of the ICC

5.0 The composition and administration of the Court is addressed in Part IV (Arts. 34-52) of the Statute. The ICC consists of the Presidency,[57] the Appeals Chamber, Trial Chambers and a Pre-trial Chamber[58], Office of the Prosecutor[59], and the Registry[60]. Judges are required to be persons of high moral character, impartiality and integrity possessing qualifications for appointment to the highest judicial offices in participating states.[61] They must have competence in criminal law and procedure and relevant experience in criminal proceedings or competence in relevant areas of international law – international humanitarian law or international human rights law. Fluency in English or French, the working languages of the Court, is required. An independent Prosecutor free from political direction from any source is essential for the effectiveness of the ICC. The Prosecutor and Deputies are also required to be persons of high moral character with experience in the prosecution and trial of criminal cases[62]. Trials *in absentia* are prohibited[63] and the accused is required to be present at the trial. The maximum penalty is imprisonment for 30 years but imprisonment for life may be imposed when the gravity of the crime and individual circumstances of the convicted person justify it.

[56] Article 68 of the Statute.
[57] Article 38 of the Statute.
[58] Article 39 of the Statute.
[59] Article 32 of the Statute.
[60] Article 43 of the Statute.
[61] See footnote 61 supra.
[62] Article 42(3) of the Statute.
[63] Article 63(1) of the Statute.

5.1 The ICC, may invite non-parties to provide assistance[64] in accordance with an *ad hoc* agreement or on any other agreed basis. The Security Council of the United Nations may be informed of any failure to cooperate. This development appears to be a new dimension in international law, given that non-parties may rely on the principle of *res inter alios acta* in customary international law to justify non-cooperation. Article 82 allows the surrender, as distinct from extradition, of persons to the Court, despite national constitutional provisions prohibiting extradition of nationals.[65] This is consistent with Article 27 of the Vienna Convention on the Law of Treaties (VCLT) which precludes a state from invoking its municipal law as a bar to the performance of an international obligation subject to the provisions of Article 46. It is not known whether these provisions encapsulate customary international law or only bind states parties to the Convention. The principle of complementarity which provides the essential basis of the ICC Statute implies that perpetrators of international crimes may be subjected, simultaneously, to two regimes, the regime under the Geneva Conventions of 1949 and their Protocols and the Statute of the ICC. But, the principle of *ne bis in idem* appears to be adequate to protect persons against double jeopardy.[66]

VI. Effectiveness of the ICC

6.0 Uganda, Democratic Republic of Congo and the Central African Republic have referred alleged crimes committed on their territories to the ICC. Preliminary investigations are being conducted by the Pre-trial Chamber. One grave weakness of the ICC is the absence of jurisdiction for custodial states or states of victims of covered crimes. But the Statute may yet be amended to accord jurisdiction to the States of custody and victims of the covered crimes. Furthermore, when the ICC acts, its effectiveness is dependent, in the ultimate analysis, on the cooperation of states in terms of executing arrest warrants, providing evidence and enforcing sentences. The ICC also needs the cooperation of relevant international organisations, particularly the United Nations and interested NGOs

[64] Article 87(5) of the Statute.
[65] The device of "surrender" of persons is intended to circumvent the restrictions accompanying extradition which normally requires the existence of a valid extradition treaty and/or relevant national legislation before a party may be extradited by a state.
[66] Article 20 of the Statute.

for its effectiveness. The role of NGOs is also critically important in spreading popular awareness of the ICC and in promoting the ratification of the Statute.[67] This Seminar provides an excellent case in point! The ICC is designed to end executive lawlessness, official excesses and administrative improprieties in national governance and to promote an international culture of transparency, good governance and public accountability! Its international credibility and effectiveness may be considerably enhanced by reducing the political and management oversight enjoyed by the Assembly of States Parties[68] regarding the administration of the ICC and adopting a more hands-off approach to the selection of judges and the financing of the Court. The Caribbean Court of Justice offers some valuable lessons in this context.

6.1 The credibility and effectiveness of the ICC is also compromised by the provision which empowers the Security Council to defer proceedings.[69] Commenting on the implications of this Article it was submitted:

> "*The purpose of the deferral is to permit the Security Council to pursue its own negotiations for peace in a given situation without the possible infringement of an on-going investigation or prosecution. The requested deferral may not only delay, but may ultimately stifle the Prosecutor's investigation. Such interference by the Security Council may result in weakening the potency of the role of the Prosecutor. Article 16 may be used as "a bargaining chip". "In-house" diplomatic deals may be negotiated between various Permanent Members of the Security Council which, in exchange for halting an existing investigation, may result in a particular offender not being tried, let alone investigated. This may result in the individual concerned having the time to make investigations himself and to destroy or "bury" incriminating evidence, or "persuade" potential witnesses not to testify and so forth. The net result would be that such a permissible interference would defeat the whole principle and purpose of an independent, impartial and non-political process. The saving grace of this particular Article is that any deferral is subject under Chapter VII to a veto. Moreover, the Security Council is not given unlimited powers over referrals. This exercise is restricted to Chapter VII, i.e. such as threat to the peace, breach of the peace or acts of aggression. Article 16 appears to have been side-stepped to some degree by Resolution 1422 adopted by the Security Council in July 2002, which states in para. 1 that:*

[67] In point of fact NGOs are credited with determinative influence in establishing the ICC and relegating impunity to the dustbin of history.
[68] Article 112 of the Statute.
[69] Article 16 of the Statute.

> "*…if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise*".
>
> *This could result in Non-Party State officials, such as US military personnel and civilians on United Nations business, being deferred from investigation or prosecution before the ICC for any violations of the crimes stated in Article 5. Paragraph 2 of the Resolution reiterates the "renewal" request in Art. 16 but adding that such a request, although initially lasting for 12 months, may continue for as long as may be necessary. In practice such a deferral may last indefinitely. Since Russia, China and the United States are not Parties to the ICC Statute, this Resolution may prove to be of special benefit to those and other Non-Party States whose nationals could, in theory, be free from any prosecution for an indeterminate period.*"[70]

6.2 Thus the power of the Security Council acting under Chapter VII of the Charter to request deferral of an investigation not only compromises the independence of the Prosecutor but also that of the Court. And although it has been submitted that the Court may refuse such a request in the interest of justice, such a refusal could cause conflict with the Security Council. One important article's provisions reflect the inordinate influence of a super power.[71] Article 88 requires states to put in place legislation to facilitate cooperation with the ICC and Article 102 obliges states to surrender persons pursuant to the Statute. Non-compliance may result in the delinquent state being referred to the Assembly of States Parties[72] and ultimately to the Security Council. Article 98 allows non-parties to conclude bilateral agreements preventing states surrendering or handing over their nationals to the Court. The United States has concluded such bilaterals with many states, including most states of Caricom which were allegedly threatened with economic sanctions for non-cooperation.

[70] See C. de Than and E. Shorts, op. cit. 326-7.
[71] Article 98 of the Statute.
[72] Article 87(7) of the Statute.

6.3 Article 27(2) of the Statute prohibits immunity for international crimes within the contemplation of Article 5. But Article 98(2) prevents the Court from proceeding with a surrender of a suspect where a request for such surrender conflicts with an international obligation of the requested state. The question is whether Article 98(2) refers to obligations under existing treaties or treaties concluded to frustrate the operation of the Statute. However, it has been submitted that the obligations arising under such treaties do not supercede obligations assumed under the Rome Statute.[73]

VII. The CCJ as Institutional Template for the ICC

7.0 The potential impact of an ICC that is designed to be universal, effective and fair is likely to be tremendous. To achieve the objective of universality every state in the international community must be given the opportunity to sign on to the Court. As of today, however, it is clear that the Court may never achieve universality because states like the United States, the Peoples Republic of China, Russia, India and Israel have indicated their unwillingness to participate in the Statute of Court as currently conceptualised and approved. In the ultimate analysis, the effectiveness of the Court will depend on its institutional configuration and jurisdictional reach, *to wit*, its individual and institutional independence from political surrogates, its autonomy of decision in financial and administrative matters and its jurisdiction over non-parties. Whether the procedures of the Court are fair will depend on the procedural safeguards adopted by the Court to ensure that investigations are carried out in a fair, fearless and dispassionate manner and that substantive and procedural due process are observed in the trials of the accused. In this context consideration may be given to providing in the Statute for remedies for human rights violations by the Prosecutor and the Court.

7.1 Based on the foregoing, what lessons can the ICC learn from the structure and operations of institutions like the CCJ which is one of the most innovative international judicial institutions to emerge in recent times? Firstly, in terms of jurisdictional reach, these judicial institutions are qualitatively different. The ICC aspires to universality for

[73] See C. de Than and E. Shorts, op. cit. 236.

effectiveness while the CCJ is destined to remain a plurilateral judicial institution with a unique hybrid jurisdiction in the areas of both municipal and international law. In the exercise of its municipal jurisdiction the CCJ is designed to be a court of last resort for approximately twelve independent dualist political entities of the Caribbean Community (Caricom) in substitution for the Judicial Committee of the Privy Council (JCPC) an anachronistic outgrowth of an earlier colonial era. At present, only Guyana and Barbados utilise the municipal appellate jurisdiction of the CCJ, but drawing on the experience of the Canadian Supreme Court it is not impossible for the CCJ to be reconfigured so as to accommodate appeals from both Haiti and Suriname which are civil law monist jurisdictions. In the exercise of its original jurisdiction, however, the CCJ is a court of first and last instance for all fifteen states of Caricom and is required to apply such rules of international law as may be applicable[74].

7.2 In this context, the ICC may care to take a page form the CCJ's book in providing that determinations of the Court constitute legally binding precedents for parties in proceedings before the Court.[75] This would constitute a departure from the traditional international law position establishing that a cluster of decisions trending in the same direction and based on similar reasoning is required to constitute *jurisprudence constante* which could be varied depending on the circumstances of the case. Such a position is unlikely to inject in the applicable law of the Court the measure of certainty in the law required for predictability and the dispensing of justice in an impartial and dispassionate manner. Consider in this context the doctrine of precedent currently being developed and applied by the European Court of Justice enunciated in **Da Costa en Schaake[76]** and **Sri CILFIT[77]**.

7.3 As an international judicial institution the CCJ has also proven to be extremely innovative in terms of providing an enviable basis for personal and institutional

[74] See Article 217(1) of the Revised Treaty of Chaguaramas establishing the Caribbean Community including the Caricom Single Market and Economy (CSME), signed in Nassau, The Bahamas in 2001 ("The Revised Treaty") http://www.caricom.org/jsp/community/revised_treaty-text.pdf.
[75] See Article 24 of the Revised Treaty.
[76] NY 28-30/62.
[77] ECJ 283/81.

independence – a feature which the ICC would require as an axiomatic attribute if it is to establish its credibility, internationally, as an institution not subject to political direction or control by major international actors and in particular, the permanent members of the Security Council. The perception and reality of personal independence enjoyed by the CCJ is based on its unique system of appointing judges to the Bench of the Court and which peculiar conditions in Caricom make eminently feasible. This system is based on open competition where candidates for the Bench of the Court and who are professionally qualified would need to have at least fifteen years experience as a legal practitioner or teacher of the law. Selection for the position of judge is made by an apolitical Regional Judicial and Legal Services Commission (RJLSC) drawn from non-governmental institutions the largest number of which belongs to the private Bar.[78] In point of fact, except for the President whose appointment is made by a qualified majority of the Contracting Parties to the Agreement Establishing the CCJ[79] only on the affirmative recommendation of the RJLSC, there is no political input in the appointment or removal of judges of the CCJ.

7.4 In the premises, the CCJ is a unique international judicial institution in terms of its apolitical procedures for the appointment of its judges. All other recognized international judicial institutions[80] consist of judges who are selected either directly or indirectly by political surrogates[81]. In the case of the ICC its judges are elected by the Assembly of States Parties from nominees of states parties to the Statute selected by a procedure for

[78] See Article V of the Agreement Establishing the Caribbean Court of Justice, *www.caricom.org/jsp/secretariat/legal... /**agreement**_ccj.pdf*
[79] See Article IV of the Agreement Establishing the Caribbean Court of Justice, *www.caricom.org/jsp/secretariat/legal.../**agreement**_ccj.pdf*
[80] See for example the International Court of Justice (ICJ) (Statute of the International Court of Justice UKTS 67(1946) or (Charter of the United Nations 1 UNTS XVI); the European Court of Justice (ECJ) (Treaty of the European Union 1757 UNTS 3); the European Court of First Instance (CFI) (Treaty on the European Union 1757 UNTS 3); the Court of Justice of the European Free Trade Area (EFTA) 1795 UNTS 3; the International Criminal Court 2187 UNT 590; the Central American Court of Justice (CACJ) (Convention on the Statute of the Central American Court of Justice, 1821 UNTS 292); the Inter-American Court of Human Rights (IAHR) (American Convention on Human Rights 1144 UNTS 144); the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA) (COMESA Treaty 2314 UNTS 265); the Economic Community of West African States (ECOWAS) Court of Justice (Revised Treaty of ECOWAS 2373 UNTS); the International Criminal Tribunal of the Former Yugoslavia (ICTY) (UN Doc IT/32 1933); the International Criminal Tribunal for Rwanda (ICTR) (UN Doc S/RES/955 (1994).
[81] See R. McKenzie and P. Sands, *International Courts and Tribunals and the Independence of the International Judge*, (44 Harvard International Law Journal 217, Winter 2003) 4.

appointment to the highest national judicial offices or by a procedure for the nomination of candidates for the ICJ.[82] Both of these procedures, however, engage the intervention of the political directorate. Further, in the selection of judges of the ICC, account must be taken of the principles of representation of the principal legal systems of the world, equitable geographical representation and fair gender representation. Additionally, no two judges may come from the same state[83].

7.5 In the CCJ, there are no such strictures. The determinative criteria are personal integrity, professional qualifications and personal independence. However, the competent decision-makers of the CCJ were not similarly constrained like their political counterparts in establishing other similar international judicial institutions. For, with the exception of the civil law jurisdictions of Haiti and Suriname, all the States parties of the Agreement Establishing the CCJ boasted common law jurisdictions, shared a common cultural experience, perspectives of identification and social ethos, and even shared for a considerable period of time the same municipal court of last resort, *to wit*, the Judicial Committee of the Privy Council (JCPC). As such, many of the concerns about normative dissonance which must have agitated the founders of other international judicial institutions did not arise in relation to competent decision-makers who were called upon to establish the CCJ.

7.6 In terms of institutional independence based on the autonomy of administrative and financing determinations, the CCJ also enjoys an enviable and unique position vis-à-vis other international judicial institutions. In this context administrative and financing decisions of the CCJ are open to scrutiny, endorsement or rejection by the Regional Judicial and Legal Services Commission (RJLSC) and the CCJ Trust Fund as appropriate[84]. None of these determinations is subject to political control or direction.[85] States parties to the Agreement Establishing the CCJ have opted to establish a Trust Fund

[82] Article 36(4) of the Statute.
[83] Article 36(7) & (8) of the Statute.
[84] A committee consisting of representatives of the RJLSC, the CCJ Trust Fund under the chairmanship of the Secretary-General of Caricom was established to consider and resolve intractable financial issues: http://www.caricomlaw.org.
[85] Article 112(2) (b) of the ICC Statute accords the Assembly of States Parties "management oversight of the Presidency, the Prosecutor and the Registrar regarding the administration of the Court".

based on a CCJ Trust Fund Agreement. The proceeds of the Trust Fund with initial capitalisation of US $100,000,000, and which is administered by independent trustees drawn entirely from civil society and the private sector, as identified by the Caricom Secretariat, are employed for financing the operations of the CCJ including the payment of salaries and allowances of judges. The CCJ may also accept voluntary contributions from approved sources.[86]

7.7 In other international judicial institutions like the ICC, financing of their operations comes from assessed contributions made by states parties to the relevant regime in accordance with the agreed scale of assessment used by the United Nations for its regular budget.[87] Voluntary contributions may also be received and utilised as additional funds of the ICC.[88] However, based on the past experience of the United Nations, this system of funding the operations of the ICC does not hold out any plausible assurances in terms of freeing the institution from indirect political influence of the more economically powerful states parties to the Statute through employment of the power of the purse. In point of fact, the political profile of the states parties, as represented in the Assembly, is quite prominent in the management and administration of the operations of the ICC.

7.8 Given the management oversight functions enjoyed by the Assembly of State Parties, the ICC appears to function in the dark shadow of political operatives thereby creating the unfortunate perception of political bias in relevant determinations, despite the commendable procedural safeguards agreed for the fairness of trials and substantive provisions designed to ensure the integrity and independence of judicial determinations. However, bearing in mind the scale and diversity of the international community, the nature of its actors and the novelty of the regime sought to be established in the context of the prevailing international ethos, the ICC must be perceived as constituting a worthy and remarkable achievement whose configuration and operating procedures may still be enhanced over time.

[86] See Article IV(1) (c) of the CCJ Trust Fund Agreement.
[87] Article 115 of the Statute of the ICC.
[88] Article 116 of the Statute of the ICC.

7.9 In terms of Suriname's position in relation to the ICC, it is up to that country, as an indispensable attribute of sovereignty, to make the relevant determination to participate or not in the relevant regime. However, some pertinent observations may be proffered. In the ultimate analysis, the security of small states must be seen to depend on the establishment of and compliance with an effective international legal order in which the political independence, territorial integrity, cultural and moral autonomy of states, large and small will be respected. The successful creation of the ICC is an important step in the establishment of such an order. All of the heinous international criminal acts over which the ICC will exercise jurisdiction, to wit, genocide, war crimes, crimes against humanity and aggression,[89] involve socially deviant conduct in respect of which small states are extremely vulnerable.

7.10 Despite the establishment of the United Nations System, the international community remains largely unorganised by reference to an effete international legal order whose determinations are, more often than not, honoured in the breach than in the observance. The current war in Iraq, for example, constitutes incontrovertible, persuasive evidence that the Security Council as an executive organ is incapable of constraining the determined actions of "coalitions of the willing" comprising economically, politically and technologically powerful actors in the international community whose determinations are not necessarily buttressed by the employment of permissible coercive violence. Similarly, the jurisdiction of the International Court of Justice is far from universal and compulsory. Consider in this context the provisions of Article 36(2) of the ICJ's Statute. In the premises, international legislation unavoidably assumes the form of treaties whose enforcement, in the ultimate analysis, is decentralised and dependent on the exercise of state authority. In the meantime, state interaction in the international community has become extremely complex and is likely to intensify in complexity and exploitativeness thereby increasing the vulnerability of small states to the avarice and deviant conduct of more powerful international actors.

[89] See Article 5 of the Rome Statute.

7.11 And this is the context in which Suriname, as a sovereign state, is called upon to reach a determination in respect of participation in the International Criminal Court.

Hon. Mr. Justice Duke E.E. Pollard
Date: 5th August, 2009.

[2007] CCJ 3 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CR. 1 of 2006
BB Criminal Appeal No. 2 of 2005

BETWEEN

THE QUEEN **APPELLANT**

AND

MITCHELL KEN O'NEAL LEWIS **RESPONDENT**

Before The Right Honourable and the Honourables:	**Mr Justice Michael de la Bastide, President**
	Mr Justice Nelson
	Mr Justice Pollard
	Mr Justice Saunders
	Madame Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton

Appearances

Mr Charles Leacock QC and Mr Elwood Watts for the Appellant

Mr Erskine L Hinds and Mr Olson De C Alleyne for the Respondent

JUDGMENT
Of the President and Justices Nelson, Saunders, Bernard, Wit and Hayton
Delivered by the President
The Right Honourable Mr Justice Michael de la Bastide
On the 4th day of June, 2007
and
JUDGMENT
Of the Honourable Mr Justice Pollard

JUDGMENT OF THE HONOURABLE MR. JUSTICE POLLARD, JCCJ:

Introduction

[57] This is an appeal by the Director of Public Prosecutions from the decision of the Barbadian Court of Appeal delivered on 05th January, 2006 quashing the conviction, setting aside the sentence of the Respondent and ordering a new trial. Although the Appellant filed seven grounds of appeal the determinative issue in the judgment of the Court of Appeal was *"whether he was afforded a fair hearing of his case in accordance with his constitutional rights."* The Court of Appeal in its determination concluded *"that the cumulative effect of the matters raised in the appeal taken as a whole was to deprive the appellant of a fair hearing* ***interpreted in accordance with the Constitution*** *such as to render the verdict unsafe or unsatisfactory."* In the determination of the Court of Appeal the conviction of the Respondent could only be upheld as safe or satisfactory if it resulted from a trial in compliance with the rules of good practice and the high professional standards established for criminal trials.

[58] In this appeal the gravamen of the Respondent's contention in the court below was that the verdict of the jury at the trial was heavily influenced by the discussion of

prejudicial matters by counsel of both parties in open court relating to an application for the recusal of the trial judge in the hearing of potential jurors and by the omission of the trial judge to direct the jury to disregard in their deliberations such prejudicial matters which they heard prior to being empanelled as a jury. Furthermore, the trial judge did not allow counsel for the defence to make his application for the recusal of the trial judge in chambers, nor to complete his submissions in open court on the same application. The trial judge also declined to give reasons for refusing to recuse himself.

[59] The Court of Appeal determined, further, that since this was a capital case the term "fair hearing" must be interpreted in its widest sense. In the result, the appeal was allowed, the conviction quashed, the sentence set aside and a retrial ordered. The Appellant is now appealing as of right within the meaning of Section 6(c) of the Caribbean Court of Justice (CCJ) Act Cap. 117 (2003) from the decision of the Court of Appeal to this Court, or in the alternative, with special leave of this Court. Counsel for the Appellant later withdrew the application for special leave. The Respondent's counsel also cross-appealed against the order for retrial.

[60] The two preliminary points which counsel for the litigants agreed at the case management conference that the CCJ should consider and determine are as follows:

(a) whether by virtue of Section 6(c) of the Caribbean Court of Justice Act Cap. 117 of Barbados, the Crown has an appeal as of right to the Caribbean Court of Justice in this case;

(b) whether, if such a right of appeal exists, the Crown can, as part of any relief it obtains, secure the reinstatement of the conviction of the Respondent.

Entitlement of the prosecution to an appeal as of right

[61] Of the two agreed preliminary points identified in the immediately foregoing paragraph the first addressed the substantive issue relating to the legal incidence of section 6 of the Caribbean Court of Justice Act Cap. 117 (CCJ Act) which provides:

> "6. An appeal shall lie to the Court from decisions of the Court of Appeal as of right
>
> (a) …
>
> (b) …
>
> (c) in any civil or criminal proceedings which involve a question as to the interpretation of the Constitution"

[62] On an ordinary reading of the terms "appeal", "Appellant" and "party" of Section 2 of the aforementioned Act, it does appear, *ex facie*, that the Crown, as a party to proceedings before the Court of Appeal, does have an appeal as of right within the meaning of Section 6(c) of the CCJ Act, Cap. 117 (2003) like the defendant. Section 2 of the Act defines "appeal" as an "appeal to the Court", which is a reference to "the Caribbean Court of Justice established by the Agreement." Section 2 also defines the cognate expression "Appellant" as "the party appealing from a judgment" and goes on to define a party "as **any** party to proceedings before the Court."

[63] In light of the foregoing, it is extremely difficult to avoid the inference that the Crown, like the defendant, has been accorded an appeal as of right in criminal proceedings. In my view, however, this inference is sustainable only if it can be established, *in limine,* that the Crown is entitled, to an appeal in criminal proceedings and, provided further, that such an appeal relates to "any … criminal proceedings which involve a question as to the interpretation of the Constitution." In his written submissions Counsel for the Appellant contended, *inter alia*, that the Caribbean Court of Justice Act, Cap. 117 (2003) cannot be so narrowly construed as to restrict an appeal as of right in criminal proceedings to a convicted person.

He submitted, further, that *"(t)he Crown has always enjoyed an appeal as of right from decisions of the Court of Appeal on matters relating to interpretation of the Constitution. The fact that this has been seldom or never exercised is no basis for saying that it does not exist."* This submission must be presumed to incorporate a reference to criminal proceedings. He submitted that Section 6(c) of the Caribbean Court of Justice Act "merely repealed and replaced the jurisdiction of the Judicial Committee of the Privy Council making the Caribbean Court of Justice the final Court of Barbados. Accordingly, it is imperative that the Crown should continue to enjoy the same right and jurisdiction that it was always accorded in the Supreme Court of Judicature Act Cap. 117 as is intended."

[64] The learned President in his judgment has adduced compelling and persuasive reasons to support the view that the term "appeal" as employed in related antecedent legislation, namely, section 37 of the Criminal Appeal Act, Cap. 113A and section 64 of the Supreme Court of Judicature Act, Cap. 117A is not restricted to a person convicted on indictment. Further, he maintained that the CCJ Act 117 (2003) which superseded the Supreme Court of Judicature Act, Cap. 117A defined appeal in a manner which clearly contemplated according the prosecution an appeal as of right within the meaning of section 6(c).

[65] I agree with the learned President that section 6(c) of the Caribbean Court of Justice Act, Cap. 117 (2003) accorded the prosecution an appeal as of right in criminal proceedings which involved a question as to the interpretation of the Constitution. I also agree with the learned President, but for different reasons set out below, that the Court of Appeal in reaching its determination was not engaged in the interpretation of the Constitution.

Importance of a fair hearing guaranteed by the Constitution

[66] In paragraph 2 of its judgment the Court of Appeal maintained that although the Appellant had filed seven grounds of appeal, "the important issue for us to decide

is whether he was afforded a fair hearing of his case in accordance with his constitutional rights". I am inclined to concur in the opinion of the Court of Appeal that the determinative issue falling to be decided was whether the Respondent was accorded a fair hearing consistently with his constitutional rights. Consequently, I propose to examine various relevant judicial determinations on the interpretation and application of the term "fair hearing" given its seminal importance for human rights generally[18] and, in particular, for the liberty and life of the individual, especially in the retentionist jurisdiction of Barbados.

[67] Section 18(1) of the Constitution of Barbados provides as follows:

> "If any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The Respondent's main ground of appeal in the court below was that he did not enjoy the benefit of a fair hearing within the meaning of Section 18(1) of the Constitution. The Court of Appeal in allowing the appeal of the Respondent determined, *inter alia*:

> "A great deal of prejudicial matter was raised in the hearing of potential jurors; the objections (of the accused) struck at the fairness and impartiality of the trial judge … We conclude that there was a material irregularity in the course of the trial process, which rendered the trial unfair and therefore the conviction unsafe … We conclude that the cumulative effect of the matters raised in the appeal taken together as a whole was to deprive the appellant of a fair hearing**, interpreted in accordance with the Constitution**, such as to render the verdict unsafe or unsatisfactory."

[68] In effect, as indicated above, the gravamen of the issue to be determined here is whether the accused was granted a fair hearing in accordance with his constitutional rights. This brings me to the second aspect of the first preliminary issue, namely, whether the appeal accorded the Appellant by the Caribbean Court of Justice Act, Cap. 117 (2003) was an appeal as of right in a criminal proceeding

[18] See, for example, Morel v France – 34130/96 [2000] ECHR 218 (6 June 2000)

involving "a question as to the interpretation of the Constitution". The Court of Appeal had no hesitation in determining that the Appellant was deprived of a "fair hearing, interpreted in accordance with the Constitution." And it is common ground that the right to a fair trial is absolute! In the opinion of Lord Bingham:

> "If the trial as a whole is judged to be unfair, a conviction cannot stand. What a fair trial requires cannot, however, be the subject of a single unvarying rule. It is proper to take account of the facts and circumstances of particular cases, as the European Court has consistently done."[19]

[69] In determining whether a party was accorded a fair hearing in accordance with Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, the European Court of Human Rights has developed a body of interpretative principles for employment as the facts determined in any given case may prescribe. In extending support to the *dictum* of Lord Bingham mentioned above, Lord Steyn in the same case asserted:

> "Once it has been determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or any other ground. This is to be contrasted with cases where a trial has been affected by irregularities not amounting to denial of a fair trial."[20]

[70] In light of its determination on this issue, the Court of Appeal was right to quash the conviction and sentence and order a retrial, especially since the trial judge omitted to warn the jury to disregard in their deliberations the prejudicial information which was disclosed in their presence and hearing prior to being empanelled. In this connexion it is important to bear in mind that:

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[19] Glyne Hamilton Cumberbatch v The Queen, (2004) 67 WIR 48 at p. 53; also Brown v Stott [2001] 2 WLR 817 at 693; Wilberforce Bernard v The State [2007] UK PC 34 at p. 12

[20] Idem at 708

> "(i)n a criminal trial, it is the court acting collectively that has the shared responsibility of ensuring a fair trial. The judge and the jury are, by the system employed, given distinct functions to perform which will collectively protect the rights of the person standing trial. In fulfilling their distinct functions, both the judge and the jury must recognize the need to ensure that the accused receives a fair trial but that does not require the jury to take upon themselves functions that the law properly entrusts to the judge. Provided each fulfils its role the accused will receive a fair trial."[21]

[71] Since the right to a fair hearing or fair trial is absolute, the overall fairness of a criminal trial cannot be compromised.[22] "The rights specified in paragraphs (a) to (f) of Section 18(2) are guaranteed by the Constitution as practical and effective rights. In the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) the rights similar to those listed in Section 18(2) of the Constitution are described as "minimum rights" – see Article 6. They are not and are not meant to be theoretical or illusory. They are of value in a democracy governed by the rule of law. If it can be established that a hearing has not been fair, a conviction will be quashed."[23]

Is the concept "fair hearing" amenable to judicial interpretation?

[72] Despite the seminal importance of a fair hearing in retentionist jurisdictions to the safety of a conviction and the necessity to ensure in every case judicial respect for this constitutional right, the Judicial Committee of the Privy Council (JCPC) in *Joseph v State of Dominica* determined that "(t)he question whether the case has received a "fair hearing" within the meaning of Section 8(1) of the constitution is not a question of interpretation of that enactment. It is a question of the application of these words to the facts of the particular case."[24]

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[21] Per Lord Hutton in Regina v Mushtag [2005] UKHL25; also per Bingham CJ in Randall v R (2002) 60 WIR 103 at 120

[22] Brown v Stott [2001] 2 All ER 97; See also the dictum of Lord Bingham CJ in Randall v R (2002) 60 WIR at 120

[23] Per Sir David Simmons, CJ in Glyne Hamilton Cumberbatch v The Queen (2004) 67 WIR 48 pp. 53-54

[24] Joseph v State of Dominica (1988) 36 WIR 216 at p. 218

[73] In my respectful opinion this *dictum* betrays symptoms of a juridical oxymoron and evokes disconcerting queries about its legitimacy. Compare this *dictum* with the opinion of President Aharon Barak of the Supreme Court of Israel who pertinently observed:

> "The judge has an important role in the legislative project: The judge interprets statutes. **Statutes cannot be applied unless they are interpreted**. The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes because the court has given it a new meaning that suits new social needs."[25]

[74] The foregoing statement of the role of the judge applies, *a fortiori*, in relation to the constitution of Barbados which is an instrument of a peculiar and superior class constituting as it does the supreme law of the State. Since this instrument is seen to be a living instrument and always speaking the words contained therein must be viewed as eminently susceptible to interpretation in order to accommodate ever-changing social realities. In light of evolving international human rights standards what might have constituted a fair hearing in 1988 may not be seen to satisfy required conditions in 2006. In the characterization of Sir David Simmons CJ *"…the Constitution must be interpreted as a living instrument adapting itself to take account of the contemporary standards and values of a democratic society."*[26] This judicial insight must be considered as lying at the heart of a determination concerning the constitutional right to a fair trial.[27]

[75] There can be no doubt in my view that the provisions of the Barbados Constitution, like those of any other legal instrument, cannot be meaningfully applied unless they are interpreted, if only for the very simple reason that written

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[25] Aharon Barak, The Judge in a Democracy (Princeton University Press 2006) at pp. 4-5
[26] Clyde Grazette v Attorney General and Director of Public Prosecutions No 16 of 2006
[27] Brown v Stott op. cit. at p. 106

words in such an instrument are mere visible symbols expressive of human intentions or motivations continuously vulnerable to change, consistently with the dynamism of their operational environment. The sociological significance of such symbols is necessarily a function of determination and evaluation in the light of contemporary social realities. Sometimes the language of commitment employed in a legislative enactment or constitution is self-explanatory as in *Frater v R,*[28] such that the court of competent jurisdiction adopts the interpretation which is self-evident. But what may be self-evident in one generation may not be so regarded in the next! Semantically, it does appear from relevant case law that the term "fair hearing" does not fall into this unique class of eternally self-explanatory verities. As Lord Bingham pertinently observed:

> *"The requirements of fairness in any given case are not however an abstract or absolute standard. They depend on the context and all the facts."*[29]

[76] Understandably, the JCPC in its relevant determinations were apparently anxious to avoid opening the flood gates for appeals on constitutional grounds. However, the courts appear to be very well placed to preempt such an eventuality by defining and delimiting the juridical parameters of a "fair hearing" on the basis of judicially determined and agreed principles and by adjudging in every case whether the constitutionally guaranteed right to a fair hearing genuinely addressing the interpretation of the constitution is engaged;[30] or whether, in the final analysis, a litigant is indulging a frivolous or vexatious suit or is otherwise abusing the process of the court.

[77] Relevant judicial determinations have so far confirmed that the concept "fair hearing" eludes definitional specificity and exhaustiveness. However, this circumstance must not be considered as precluding an inclusive/exemplary

[28] Frater v R (1981) 1 WIR 1468
[29] R v Criminal Cases Review Commission ex parte Pearson [2000] IG App R 141 p.171
[30] Harrikissoon v Attorney General for Trinidad and Tobago (1980) AC 265

interpretation of it. The requirement of legal certainty, especially in matters relating to human rights and, more particularly, to matters affecting the life and liberty of the subject, demands that the term "fair hearing" must not remain untrammelled by judicially agreed juridical parameters, leaving the concept completely at large and vulnerable to the whims and fancies of subjectivist judicial activism.

[78] In my opinion, the important issue falling to be determined by our Court is whether the Court of Appeal in reaching its judgment, did in effect *interpret* the term "fair hearing" set out in Article 18(1) of the Constitution before concluding that the conviction was unsafe or unsatisfactory, or whether the Court of Appeal merely applied to the facts found judicially predetermined principles encapsulated in the term "fair hearing". If the latter, then the expression "*interpreted in accordance with the Constitution"* employed by the Court of Appeal in its final determination must be regarded as otiose and lacking in juridical significance for the outcome of the appeal. I have no doubt that the latter was the case.

[79] In support of his position, reliance was placed by counsel for the Respondent on the decision of the JCPC in *Joseph v The State of Dominica.*[31] Section 8(1) of the Constitution of Dominica which guaranteed the constitutional right to a "fair hearing" was expressed in terms similar to Section 18(1) of the Barbados Constitution. This decision of the Board, however, must be distinguished from a similar determination by their Lordships in *Frater v R* where an appeal, purporting to be made as of right under Section 110(1) of the Constitution of Jamaica, was dismissed on the ground that while the application of the particular constitutional provision might have been in issue no question of its interpretation properly arose. The relevant language of commitment, which is clear, unambiguous and invokes no intractable problems of interpretation was as follows:

> "(6) Every person who is charged with a criminal offence-

[31] (1988) 36 WIR 216

(a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged…"

[80] The relevant determinations of their Lordships mentioned above were undoubtedly informed by considerations of legal policy and, in particular, "the need for vigilance on the part of the Courts of Appeal in dealing with claims to be entitled under similar constitutional provisions to appeals as of right to this Board or to Her Majesty in Council"[32]**.** Lack of vigilance in this regard by judges competent to make a determination could trigger such a rash of appeals on constitutional grounds as to inundate, prejudicially, the criminal justice system in Barbados.

[81] Granting the generally acknowledged difficulty of arriving at a precise and exhaustive definition of the term "fair hearing", the anxiety of the Board to preempt frivolous or vexatious constitutional appeals as of right, thereby overburdening the administration of criminal justice and devaluing the important constitutional right to a fair hearing, is to be commended and endorsed. Judiciously, the European Court of Human Rights has determined that the concept of a "fair hearing" defies precise and exhaustive definition.[33] There is no definition of the term "fairness" for the purposes of the Convention (on which the provisions on fundamental rights and freedoms of many Caricom States are based). It has been judicially characterized not as a term of art and does not have to be given any strict or technical meaning.[34]

[82] The foregoing notwithstanding, strict compliance with the rule of law in modern democracies does appear to prescribe the need for a more compelling and persuasive basis than definitional intractability as a ground for disentitling an accused person convicted on indictment to an appeal as of right in proceedings before a court of last resort, especially in capital cases. More importantly, as

[32] Joseph v The State of Dominica op. cit. at p. 219
[33] CG v The United Kingdom (2001) ECHR 870 at p. 28
[34] See Judge Bratza, CG v united Kingdom [2001] ECHR 43373/98, p. 13

pointed out by the European Court of Human Rights, the "right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively."[35] Article 6(1) of the Convention speaks, *inter alia*, of a "fair hearing".

[83] It does appear to be the subject of a reasonable inference from relevant case law, however, that although the European Court of Human Rights has had to come to terms with the reality that the Convention omitted to define the term "fair", this did not preclude an "interpretation" of the term "fair hearing". Thus, the European Court of Human Rights recognized that *"principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify"*[36]. It is clear from this *dictum* that the term "fair trial" from the perspective of the European Court of Human Rights, is amenable to the elaboration and extrapolation of interpretative principles for application in appropriate circumstances. In my view the definitional and interpretative processes are closely allied being both concerned with discerning meaning from verbal expressions of human intentions. Whereas the interpretative function is concerned with the ascertainment of the meaning to be assigned to written words or other verbal manifestations of human intention, the definitional function is essentially concerned with an enhanced awareness of the meaning of words for the purpose of sharpening the perception of phenomena[37].

[84] In effect, in defining a legal concept set out in a constitution or enactment the legislative draftsperson is not merely concerned with the correct choice of words to communicate meaning but, even more importantly, with the sociological phenomena which words are employed to portray. In short, legal language which critically determines the cut and thrust of social interaction must be concerned with identifying and clarifying the sociological phenomena which verbal

[35] Per Judge Bratza, CG v United Kingdom[2001] ECJR 43373/98, p. 14
[36] Dourson v The Netherlands (1996) 22 EHRR, 330, 358 para. 70
[37] See HLA Hart, The Concept of Law, (2nd ed) 1994, p. 14

expressions are employed to signify. In light of the foregoing, I apprehend that every term or concept employed in legal discourse must be seen as amenable to interpretation if not precise definition, including the intractable concepts "fair trial" or "fair hearing" or "due process" and such like.

[85] In point of fact the Human Rights Committee of the United Nations has interpreted the term "fair hearing" despite the general awareness that "fair trial" and "fair hearing" are semantically elusive concepts "characterized by considerable vagueness"[38] tending to an open-ended residual quality not unlike the concepts of "proportionality", "due process of law" and "safety of a conviction".[39] Consider in this context the *dictum* of Lord Bingham CJ:

> "The expression unsafe in Section 2(i)(a) Criminal Appeal Act (1968) does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, … Cases, however, arise in which unsafety is much less obvious: Cases in which the Court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done … If on consideration of all facts and circumstances of the case before it, the Court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the Court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances.[40]

[86] In the characterization of Lord Clyde:

> "But while there can be no doubt that the right to a fair trial is an absolute right, precisely what is comprised in the concept of fairness may be open to a varied analysis. It is not to be supposed that the content of the right is necessarily composed of rigid rules which provide an absolute protection for an accused person under every circumstance.[41]

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[38] See Stefan Trechsal, Human Rights in Criminal Proceedings, Oxford University Press (2005) p. 54
[39] R v Michael George Davis et al [2001] 1 Cr App R 8 at p. 131
[40] R v Criminal Cases Review Commission, ex p. Pearson [2000] 1 Cr Appl R 141 at pp. 146-7
[41] Brown v Stott, op. cit. at 727

[87] In *Morael v France,* the United Nations Human Rights Committee determined that "(a)lthough Article 14 (of the International Covenant of Civil and Political Rights (ICCPR)) does not explain what is meant by a "fair hearing" in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of Article 14(1) *should be interpreted as requiring a number of conditions*, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*, and expeditious procedure.[42] The facts of the case should accordingly be tested against those criteria."[43] It is also common ground that the right to a reasoned decision is an indispensable attribute of a fair trial[44].

[88] In a similar vein the European Court of Human Rights perceptively determined:

> "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party..."[45]

Did the Court of Appeal interpret the Constitution?

[89] In my opinion, a judicial determination whether, on the basis of the facts established in any given case, the constitutional right of an accused to a fair trial guaranteed by Section 18(1) has been breached, unavoidably engages an interpretation of the Constitution. Nevertheless, in any particular case it is for the courts to determine if, on the facts found, a judicial interpretation of a fair trial in accordance with the Constitution has already been made by a court of competent

[42] See Herbert Bell v Director of Public Prosecutions and Another [1985] 3 WLR 73
[43] CCPR/C/36/D/207/1986 [1989] UNHRC 16 (28 July 1989).
[44] Clyde Hamilton Cumberbatch v The Queen, op. cit.
[45] Per Lord Bingham of Cornhill in Brown v Stott [2000] 2 WLR 817 at p. 695

jurisdiction and all that remains to be done is to apply the relevant principles to the instant case.

[90] In some cases, however, it may very well be determined that the language of commitment is self-explanatory, that is to say, it is so clear and devoid of doubt or ambiguity that the relevant provisions of an enactment may be applied without the need for discerning its meaning which is self-evident:

> "Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. 'The decision on this case', said Lord Morris of Borth-y-Gest in a revenue case 'calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish and guide in reaching a decision.' Where, by the use of clear and unequivocal language capable of only one meaning anything is enacted in the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be."[46]

But although in this situation the burden of interpretation falling on the judge is considerably reduced, it is not entirely dispensed with. This appears to have been the case in *Frater v R*[47] mentioned above where the language of commitment was self-explanatory. Given, however, that the concept "fair" invokes the aphorism *quot hominess tot sententiae* (open to as many interpretations as there are judges competent to make a determination) and is liable to be defined by the many different circumstances establishing the context of its interpretation, I would hesitate to presume that it may be applied in the absence of interpretation.

[91] Where, however, a prior judicial determination on the same or similar facts has not been made and the language of commitment is not self-explanatory, an examination of relevant agreed principles by a court of competent jurisdiction is required in order to establish whether an accused was accorded a fair trial to which he was constitutionally entitled thereby engaging an interpretation of the constitution. Contrary to authoritative *dicta* on the issue, and consistently with the

[46] Maxwell on the Interpretation of Statutes (12 ed) by P St J Langan (Butterworths, 2006) at p. 29
[47] Supra, Note 11

insightful observations of Aharon Barak mentioned above, it is my respectful opinion that it would not normally be possible to apply the provisions of any legal enactment, be it a constitution or other legal instrument, in the absence of interpreting them or discerning their meaning.

[92] It has been pertinently observed that every word in a legislative text must be given its own meaning. This was expressed to follow from the assumption that the legislature avoids tautology and that every word of legislation has a sensible reason for being there. The legislature does not make mistakes or waste words.[48] In *R v Kelly* Cory J, in support of this position, said, *"(i)t is a trite rule of statutory interpretation that every word in a statute must be given a meaning."*[49]

[93] Section 18(1) of the Constitution of Barbados guarantees the individual charged with a criminal offence the right to a "fair hearing". This right, as mentioned above, has been determined by the weight of judicial authority to be absolute.[50] Like *habeas corpus* the right to a fair hearing is a peremptory attribute of a democracy based on the rule of law from which no derogation is to be entertained. Given the fundamental importance of this right, as expressed in the language of the Constitution, I find it difficult to accept that the term "fair hearing" is not susceptible to interpretation, since in the absence of attributing meaning to the term in light of contemporary social realities, its correct application to the facts established in any given case would, to my mind, be infeasible. On a careful examination of cases involving the right to a fair hearing it appears to me that the courts of competent jurisdiction in making a determination, apply, either consciously or unconsciously, but more often than not, inarticulately, judicially predetermined principles to the facts found.

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[48] Ruth Sullivan, Statutory Interpretation, Irwin Law (1997)
[49] [1992]25 CR 170 at p. 31
[50] Fitt v United Kingdom (2000) 30 EHRR 450, 510; Brown v Stott [2001] 2 All ER 99; Glyne Hamilton Cumberbatch v The Queen – Criminal appeal No 52 of 2002 (Barbados) p. 9; A Mohammed & R Harripersad v The State (2000) 58 WIR 391 at 408; R v A (No 2) [2000] 2 WLR 1546; Ramdatt v R (2002) 60 WIR 103 at 28; Clyde Grazette v Attorney General and Director of Public Prosecutions No 2016 of 2006 at p. 15; R v Michael George Davis et al [2001] 1 Cr App R 8; Wilberforce v Bernard op.cit.

[94] Indeed, the instant appeal appears to be an excellent case in point of this practice. For example, the Court of Appeal must be seen to have applied the generally accepted right to adversarial proceedings based on the principle of equality of arms at paragraphs 14, 15 and 24 of its judgment and the equally important right to a reasoned decision at paragraph 12 of its determination, even though no explicit reference was made to these principles. In *Clyde Grazette v Attorney General and Director of Public Prosecutions*[51], however, the Court of Appeal expressly made reference to the right to adversarial proceedings based on the principle of equality of arms.

[95] In conclusion, I am of the view that Section 6(c) of the Caribbean Court of Justice Act, Cap. 117 (2003) accorded the prosecution an appeal as of right in criminal proceedings involving a question as to the interpretation of the Constitution. The Court of Appeal held that the Respondent was deprived of a fair hearing to which he was constitutionally entitled such as to render the verdict of the trial judge unsafe or unsatisfactory. However, although the term "fair hearing" must be seen to be normally susceptible to judicial interpretation, an interpretation of the Constitution by the Court of Appeal does not appear to have been engaged in this case. The Court of Appeal must be seen, on an examination of the reasoning employed, to have simply applied judicially predetermined principles of a fair hearing to the facts found. Consequently, the determinative ground of appeal adduced by the Appellant must fail.

[96] I concurred in the decision of my learned brothers and sister to dismiss this appeal. I also concurred in the dismissal of the cross-appeal for the reasons adduced by the learned President.

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[51] No 2016 of 2006 at pp. 6 ff