I. INTRODUCTION

Treaties are undoubtedly one of the most important sources of public international law. Accordingly, the law governing their conclusion, operation and termination is, primarily, international law. Even so, international agreements bear significant implications for national law, national institutions, and the nationals of states. First, giving effect to treaty obligations often requires passage of implementing legislation; such legislation then becomes the rule of governance for individual conduct. As the sole repository of the law-making function, Parliament is necessarily involved in the enactment of legislation that implements the treaty regime. Secondly, the practical effect of international agreements is often the imposition of obligations and the conferral of rights on citizens. In this way treaties restrict or empower individuals to act in the national as well as international spheres. Thirdly, citizens may be directly affected by international agreements as, for example, where human rights are recognized together with the procedural capacity available to the individual to vindicate those rights.
environmental obligations require that a particular polluter pay for environmental harm caused by his actions. Fourthly, treaties frequently involve considerable financial, administrative and technical commitments on the part of the consenting state. Such commitments result in a drain on public resources and the public purse. Fifthly, given that treaties are the only way in which states may create internationally binding legal obligations “in a deliberate and conscious manner,” state participation in treaty making may be said to represent the reflective effort of a society at international law making.

For these reasons, the question of state allocation of the power to make treaties assumes obvious importance. International law recognizes certain persons, by virtue of their functions and without having to produce other authorization, as having full treaty making powers. Thus the Vienna Convention on the Law of Treaties 1969 identifies Heads of State, Heads of Government, and Ministers for Foreign Affairs as representing their respective states for the purpose of performing all acts relating to the conclusion of a treaty. Heads of diplomatic missions and representatives accredited by states to an international conference or to an international organization also have power to adopt the text of agreements concluded in the receiving state or at the international conference. All of the officials thus recognized by the Vienna Convention represent the executive but it is important to observe that the Convention is based upon traditional patterns of state practice. Nothing in the Convention prevents the modification or the reallocation of the treaty making power by allowing for participation by other elements of government. Indeed, elsewhere, the Convention makes clear that it is the responsibility of each state to make its own constitutional arrangements for the exercise of the treaty making power. It is expressly provided that, in certain circumstances, non-compliance with municipal law requirements regarding the competence to conclude treaties, may result in the international invalidity of the agreement.

In the vast majority of democratic countries outside the Commonwealth, express provision is made for the treaty making competence. For the most part, the power to conclude treaties is reserved to the executive but is made subject to constitutional provisions guaranteeing legislative participation. The role of the executive arises largely from its traditional function in policy making in external affairs. Here, it is essential that the state speaks with one voice. During the era of absolute monarchy, the monarch was that voice; as personification of the state, he enjoyed the so-called ius representationis omnimodae. The undermining of the monarchical system led to the emergence of the executive as the state organ charged with the exercise of the treaty making function.

Parliamentary participation, on the other hand, had to be justified on other grounds. In this regard, the adoption, in 1789, of the Constitution of the United States of America, marked an important watershed. Fear of executive autocracy impelled the founding fathers of the American constitution to provide for the first time that the head of state could not enter into treaties alone. Under Article II, section 2, the President has power "by and with the advise and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Although revolutionary, this constitutional provision was not originally intended to further the principles of representative democracy or of the sovereignty of the people. The requirement for a two-thirds Senate majority was meant as compensation for excluding the states of the Union from external affairs. Specifically, "the founders wanted to

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6 Vienna Convention 1969, supra, Art.7(2).
8 Participation by the House of Representatives was excluded precisely because the "fluctuating and.. multitudinous composition of that body" made it unsuitable for involvement in treaty making.” Treaty making was said to require, “accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views, a nice and uniform sensibility to national character, decision, secrecy, and despatch which are incompatible with the genius of a body so variable and so numerous”: Hamilton in The Federalist No. 75. Quoted in Wildhaber, ibid., at p. 10.
ensure that the claims of the Southern states for access to navigation on the Mississippi River and the claims of the New England states for access to the fisheries off the north-east coast would not readily be bartered away. By the end of the 19th century the conception of the senate as a cabinet with which the president consulted had been replaced by a senate that was popularly elected. With that development came assertion of the influence of representative democracy over treaty making. By contrast, the theorists of the French Revolution grasped the essential problem of treaty making immediately. The French Constitution provided for legislative participation because it was realized at the time of the Revolution that "a treaty obliges the nation and the citizens, those governing and those governed."

Turning to Caribbean law and practice, one finds that the importance of treaty making is belied by the treatment of the process. None of the written constitutions of the twelve independent states, ostensibly the supreme law of the land, makes provision regarding competence to create international agreements. Indeed, international law and international relations do not feature prominently in the constitutions. Article 37 of the Constitution of the Co-operative Republic of Guyana does provide that the state "will establish relations with all other states on the basis of sovereign equality, mutual respect, inviolability of frontiers, territorial integrity of states." Similarly, the preamble to the Constitution of Belize requires that state to adopt policies that promote "respect for international law and treaty obligations in dealings among nations." But it may be significant that even these rather generalized references to external relations are to be found in the constitutions of the two states that, at the time of constitution making, had unresolved territorial claims against them. These states therefore had a particular interest in placing strong emphasis on international law sources guaranteeing territorial integrity. The other constitutions, in the words of a prominent international lawyer, "pass matters of international law over in silence."

Legislative regulation is, with one exception, as unsatisfactory as the constitutional provisions. Caribbean legislation provides for the making of treaties only in certain substantive fields (the prime example being agreements in maritime law, mainly delimitation and fisheries and then does so in an ad hoc and piecemeal manner. There is no equivalent of United Kingdom legislation providing for the distribution of the treaty making power between the executive and parliament in relation to European law. The United Kingdom's European Communities Act 1972 provides for the general submission of United Kingdom law to European Community law. This statute must be read together with the European Parliamentary Elections Act 1978. The latter imposes an express prohibition against ratification by the Crown of any treaty, agreement or protocol that provides for any increase in the powers of the European Parliament, unless British Parliamentary approval has first been obtained. In Blackburn v. Attorney-General the constitutionality of the Act of 1972 was challenged on the ground that it undermined parliamentary sovereignty by authorizing European institutions to legislate for the British people. In R v. Secretary of State for Foreign And Commonwealth Affairs, Exp., Rees-Mogg, the United Kingdom's acceptance of the Maastricht Treaty and its Protocols was challenged on the ground that that acceptance violated the Act of 1978 by giving

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16 A R. Carnegie, "The Interface Between International Law and National Law. A West Indian Perspective" (Unpublished J.O.F. Haynes Memorial Lecture of the University of Guyana, delivered at Turkeyen on January 8, 1991), at p. 5. Note the preamble to the Saint Lucia Constitution in which the people of that state "pledge their support for international peace and security, for friendly relations among nations and the promotion of universal respect for human rights and freedoms; and their cooperation in solving by peaceful means international problems of an economic, social or political character." The Ratification of Treaties Act 1987 (No. 1 of 1987), Antigua and Barbuda.

17 Note for example the legislation spawned by the adoption of the 1982 Law of the Sea Convention in which specific Ministers are given power to conclude fisheries and delimitation agreement.

119711 I WLR 1037.
119941 2 WLR 115.
additional power to the European community without the prior approval of the British Parliament. On both occasions the challenge failed. It may now be taken that the relationship between the Crown and Parliament in relation to the making of European law, and the effect of European law in the United Kingdom, has been settled for the time being.'

The silence of the Caribbean constitutions and the gaps in the region’s legislation leave the matter of treaty making to be regulated by rules of common law. Given that indigenous Caribbean common law is yet to achieve maturity,’ it remains the case that English decisions predominate, a point reinforced by the retention of the Privy Council as the final court of appeal for all Caribbean countries except Guyana. United Kingdom common law and practice emphasize the exclusivity of the executive in foreign affairs. Treaty making is an exercise of the prerogative powers by the Crown through the executive branch of government. There is no legal requirement that parliament be consulted or be otherwise involved, although this position in strict law has been mollified by several constitutional conventions developed within the context of the British system. Unfortunately, Caribbean states have adopted the strict rule but not the conventions that make the rule tolerable.

The sole Caribbean example of an attempt to place the treaty making power on a clearer and more defensible footing than exists at common law is provided by the Parliament of Antigua and Barbuda in its passage of the Ratification of Treaties Act. 1987. The statute’s objective is to make provision for ratification of certain treaties by the House of Representatives before such treaties can become effective for Antigua and Barbuda. This is a laudable effort and undoubtedly assists in furtherance of the processes of public information and democratization. In many respects the Act goes beyond the British constitutional

II. PREROGATIVE POWER OF TREATY FORMATION

United Kingdom practice draws a sharp distinction between the making or the formation of treaties and their implementation or performance. The former is an executive, the latter a legislative, act. According to Lord Atkin in Attorney General for Canada v. Attorney-General for Ontario: “within the British Empire there is a well established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action.” This dualistic approach to the relationship between international and national law is rather unfortunate since the rules concerning formation of international agreements inevitably impinge upon the procedures for their implementation. The British dualism results in the conclusion of treaties which are valid and binding at the international level but which cannot be relied upon or applied in municipal law. Treaties, as such, are not a source of rights or obligations for citizens. In countries providing for legislative participation in the process of ratification of treaties, on the other hand, ratification becomes a legislative act and the treaty becomes effective in international law and municipal law simultaneously.’ For example,
under the United States Constitution, treaties concluded by the President with the concurrence of two-thirds of the senate, are automatically a part of the law of the land and are, in principle, the source of rights and obligations for individuals. Under the Dutch Constitution, all internal law, even Constitutional law, must be disregarded if incompatible with provisions of treaties to which the Netherlands has given consent. Similarly, the Russian Constitution of 1993 provides that international treaties accepted by the Russian Federation override other rules stipulated by internal law. A like position obtains in respect of France and most other democratic countries outside the Commonwealth.

As concerns the bare power of treaty formation, it is well established in United Kingdom law that the Crown, as sole repository of the prerogative power to conclude treaties, issues full powers or other authority to negotiate and sign treaties. The Crown also ratifies treaties if this is required. Customary international law as codified in the 1969 Vienna Convention provides similarly for the location of treaty making powers in the executive. By convention, the British Monarch acts in relation to treaty making only on the advice of Her Ministers. The Ministers in turn are accountable to the British Parliament for their actions in foreign affairs. Actual responsibility for treaty formation therefore rests with the Executive and more particularly, with the Secretary of State for Foreign Affairs.

III. CARIBBEAN CONSTITUTIONAL ARRANGEMENTS

Caribbean constitutions are essentially a written version of the constitutional arrangements evolved in the United Kingdom over many centuries; the main deviations from the Westminster Model include express inclusion of a bill of rights and the embodiment in written form of various conventions of United Kingdom constitutional practice. The constitution performs certain critical functions including (i) the provision of a fundamental law, (ii) the creation and establishment of state institutions and the distribution of the functions of the state, and (iii) the creation of the power to make law. For present purposes, the allocation of the executive power by the constitution is also noteworthy since the treaty making competence may be regarded as one of the subspecies of that power. The relevant constitutional arrangements are briefly sketched below.

(a) Constitutional Monarchies

Nine of the twelve independent states retain the British Monarch as Head of State. In these countries, the so-called "constitutional monarchies", location of the treaty making power could give rise to theoretical problems. In virtue of their function and by reference to international law, it may be taken that the power to conclude treaties resides in the Prime Minister (as Head of Government) and the Minister for Foreign Affairs. In addition, Heads of Diplomatic Missions and Accredited Representatives to international conferences enjoy the power, without production of documentary authority, to adopt the text of agreements concluded in the receiving state or at the international conference. No other Minister of Government, public officer or private individual may represent the state without production of full powers. In this regard, the position of the British Monarch and that of her representative, the Governor-General, are rather ambiguous.
The constitutional vesting of executive authority in the British Monarch is sufficient, under the Vienna Convention, to confirm the external competence of the Crown to make treaties. This means that Her Majesty could validly conclude international agreements for any of the nine states that repose executive authority in her. Such treaties would be entirely binding on the state in international law and would obligate the state and its citizens. Moreover, the constitutional provision that executive authority "may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him", in no way undermines the legal ability of the Crown to act at the international level.

The fact that Her Majesty is, by convention, most unlikely to attempt to exercise the treaty making power is rather beside the point. Symbolism is particularly important here since, as was suggested earlier, treaty making does more than create rights and obligations for the state and the individual. It is also the best means by which a society contributes to the establishment of international norms for the governance of all humanity. As such, the mechanism of treaty making necessarily reflects the indigenous concerns and juridical nature of the society contributing to the formation of the agreement. To devolve the society's power of treaty making upon an individual who resides outside the territorial boundaries of the state and who takes no part in the daily life of that society necessarily indicates that the society has devalued the law making power.

The legal standing of the Queen to make treaties is even less defensible when compared with that of the Governor-General. The Governor-General is appointed by Her Majesty and holds office during Her Majesty's pleasure. That person is Her Majesty's representative and exercises executive powers on her behalf. Although regarded locally as the effective head of state, it is remarkable that the Governor-General has no externally recognized power to conclude treaties on behalf of the state. There is no mention of such a person or office in the Vienna Convention on the Law of Treaties, 1969 or in rules of customary law.

Accordingly, the treaty making power of the Governor-General is dependent upon his or her production of the instrument of full powers. Admittedly, it is possible for the Governor-General to participate in treaty formation without production of full powers in rather limited circumstances. Essentially, it must appear "from the practice of the states concerned or from other circumstances that their intention was to consider that person as representing the state for such purposes and to dispense with full powers." But the mere fact that the Governor-General's standing to represent the state is dependent upon the collation and analysis of state practice when that of the Queen is a priori, suggests that he occupies an inferior and subservient position in a role that calls for true representation of the society.'

(b) Republics

There are three republics in the Caribbean and these differ from the constitutional monarchies primarily in the fact that the Queen is not their Head of State. Executive power is vested in a President who must be a citizen of the republic. The Constitutions of Trinidad and Tobago and Dominica provide for a ceremonial President who does not exercise actual executive power. Substantive executive powers, including the treaty making power, are retained by the Prime Minister and the Cabinet. On the other hand, the President, as the Head of State, does possess the treaty making powers under international law. Agreements made by him become the source of international rights and obligations

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Vienna Convention 1969, supra, Article 7 (1) (b).
In reality, Her Majesty's representative virtually never negotiates or signs treaties. In the way rare errAsions where the Governor-General has been involved in treaty making there has been no doubt that the effective contracting party remains the executive. The constitution obliges the Governor-General to act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet in the exercise of his functions. There are a limited number of exceptions when the Governor-General acts in his own discretion but these exceptions do not mention the treaty making function. In other words the Governor-General possess no independent or discretionary powers to make treaties.
Guiana, Trinidad and Tobago, Dominica.
for the state. By convention, however, the President does not usually engage in treaty making.

Guyana, unlike the other republics, has an executive president. In contrast with all other Caribbean states, the Guyanese Head of State is all powerful. The office merges that of the ceremonial head of state (Governor-General) and the effective head of government (Prime Minister). However, unlike similar constitutional arrangements in the United States and elsewhere, there are no provisions on the treaty making competence or procedure. By reference to state practice and the 1969 Vienna Convention it may be inferred that the Guyanese President has both municipal and international law competence to make treaties. In practice, the Guyanese Prime Minister and Foreign Minister also participate in treaty making.

(c) The Issue of Constitutionality

It has been seen that the location of Caribbean treaty making power derives overwhelmingly from United Kingdom practice which, in turn, is based entirely on custom and usage. In particular, it is based upon the prerogative power variously described as "discretionary" and "arbitrary". A satisfactory explanation remains to be found for the continued exercise of this power in post-independence Caribbean societies with constitutions subscribing to notions of limited government and parliamentary democracy. Two explanations seem possible. First, that the prerogative power has somehow survived the adoption of the constitution. Second, that international law gives treaty making power to specific organs of state independently of the constitutions.

(1) Survival of the constitution

The essential characteristic of the prerogative is that it is unique to and inherent in the Crown. According to Dicey, prerogative powers refer to the ancient residual powers innate in the Sovereign as Sovereign, which enable the Sovereign to take certain executive decisions particularly in the areas of foreign affairs, security and defense. These powers are "arbitrary" and arise from the common law as distinct from statute. Every act that the executive can lawfully perform without the authority of an Act of Parliament "is done in virtue of this prerogative."

The nature of the prerogative as uncontrolled power begs the question of its survival in the adoption of the Independence Caribbean constitutions. As we have seen, whilst executive authority in the constitutional monarchies is vested in Her Majesty, it is exercised by the Governor-General. The fact that the term 'executive power' is not itself defined in the constitution has allowed the view to be offered that prerogative powers are not inherent in the office of Governor-General under Caribbean constitutions merely by virtue of the Governor-General's position as the representative of the Monarch." The Governor-General enjoys only those powers given under statute or other legal instrument. Support is canvassed, by analogy, from the decision of the Court of Appeal of Trinidad and Tobago in the case of Hochoy v. V.I.G.E. An attempt was made to challenge, before the courts, the validity of the appointment of a commission of inquiry by the Governor-General. The Governor-General contended that, as the Queen's representative, he was clothed with the immunity from the process of the court which the Queen possessed. Rejecting this contention, the court made clear that the immunity of the Monarch from suit was...
personal to the Monarch and did not extend to her representative. This was especially the case where he exercised statutory power. Given that the office of Governor-General is established by the written constitutions which define the powers, duties and functions of the office, Rawlins submits that "the powers of that office can flow only from that document and from legislation made thereunder, rather than from any common law source.'"

A further consideration that could support this position is that the prerogative to make treaties is discretionary. The point is not entirely free from doubt but it may be the case that although the existence of the power may be determined by the courts, the manner of its exercise is, in practical terms, outside the courts' jurisdiction. This is despite the landmark decision of the House of Lords in Council of Civil Service Unions v. Minister for Civil Service. In this case Lords Fraser and Brightman expressed no conclusive view on whether the exercise of prerogative powers was subject to judicial review.' But dicta by Lords Diplock, Scarman and Roskill suggest that acts done directly under the royal prerogative were indeed subject to judicial supervision.' However, such review had to be confined to justiciable acts. The prime example given of a non-justiciable act was "the making of treaties". In Rees-Mogg the court recalled the decision of Lord Denning M.R. in Blackburn v. Attorney-General that power to make treaties lay with the Crown and not the courts; the exercise of the prerogative could not "be challenged or questioned in these courts." While not expressly dissenting from Blackburn, the court in Rees-Nogg did suggest that it was free to decide whether the Crown breached any procedures laid down by statutory law regarding treaty conclusion. In particular the court appears to have accepted that any statutory requirement for parliamentary approval prior to treaty conclusion would have to be observed by the Crown.

Arguments could be put in favor of the continued application of the prerogative of treaty making. In those countries retaining the British Monarch as Head of State, the Crown's common law powers are subject to no express constitutional amendment. Executive powers are expressly vested in the Crown and the Constitution provides for the manner in which it is to be exercised on her behalf. In Commonwealth and Central Wool Committee v. The Colonial Combing, Spinning and Weaving Company Limited' the High Court of Australia did not equate the two terms. However, the Court clearly suggested that the expression 'executive powers' as used in the constitution or legislation could be interpreted by reference to 'prerogative powers'. In the words of Starke J.,

'The Executive power of the Commonwealth 'is vested in the Queen and is exercisable by the Governor-General as the Queen's representative... ' But this section simply marks out the field of the executive power of the Commonwealth, and the validity of any particular act within that field must be determined by reference to the Constitution or the laws of the Commonwealth, or the prerogative or inherent powers of the King.’

Even if it could be argued that the prerogative powers survived constitution making, it remains the case that the prerogative is vulnerable to parliamentary repeal.' The prerogative is said to be a

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41 Rawlins, supra, at p. 135.
43 Lord Fraser did point out that to permit review would "run counter to the great weight of authority", ibid., at p. 398; Lord Brightman, at p. 424.
44 Ibid., at 407; per Lord Scannan; at p. 410 per Lord Diplock; at p. 417 per Lord Roskill.
45 Ibid., at p. 418 per Lord Roskill.
46 119941 2 WLR 115.
47 [1971] 1 WLR 1037 at p. 1040.

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48 (1922) 31 C.L.R. 421.
49 Ibid., at p. 461.

Where an Act of Parliament covers the same ground as the prerogative, the prerogative is, to that extent, abrogated. What remains unclear is whether the prerogative revives if the Act is subsequently repealed. In Attorney-General v. De Keyser's Royal Hotel Ltd. 119201 A.C. 508; Lord Paimoor was of opinion that the statute abolishes the prerogative whereas Lord Atkinson was of the view that the prerogative was merely in abeyance as long as the statute remains in force. In Laker Airways Ltd. v. Department of Trade, 11977QB 643 the Civil Aviation Act 1946 was held to limit the prerogative of the Crown to revoke the license given to Laker Airways to provide "Skytrain" services under the Bermuda Agreement 1946 between the United Kingdom and the United States. As a practical matter, a great deal depends upon whether government could function smoothly and effectively without recourse to such "residual" power.
residual power precisely because parliament may legislate it away. A good example of this was the passage of the Crown Proceedings Act 1947 that abolished aspects of Crown immunity in respect of actions in contract and tort against the Crown. More apposite is the European Parliamentary Elections Act 1978. Section 6 restricts the royal prerogative in treaty making by requiring the prior approval by the British Parliament of all international agreements which increase the power of the European Parliament. Similarly, in the Caribbean, the Ratification of Treaties Act 1987 of Antigua and Barbuda fetters the use of the prerogative in treaty making by subjecting the treaty making power of the executive to parliamentary approval.

(ii) Mandate from international law

It has been argued that international law, independent of the constitutional law of the state, confers treaty making powers directly on specific state organs. It is true that international law does regulate agreement making in ways that approximate to treaty making. Military commanders may, in time of war, enter into agreements concerning the waging of war regardless of any competence in national law. Such agreements are binding upon the states represented by the commanders. Again, the treaty making power of governments in exile depends on the extent of recognition and support by the international community rather than on constitutional competence. But it may be an oversimplification to source the treaty making authority exclusively in international law. In fact international law refers "to the constitutional law and practices of states for the purpose of deducing from them general rules of international law as to the organs competent to declare the consent of states to treaties." On this basis, Article 7 of the Vienna Convention of 1969 identified heads of state, heads of government and foreign ministers as having the authority to perform "all acts" relating to the conclusion of treaties on behalf of their respective states. However, these persons are identified as having the treaty making power only because the practice of states empowers them in this way. Even then, the Convention subjects their competence to any restriction imposed by national law. Under Article 46, a treaty may be invalid if concluded in violation of the internal law of a state where the violation was "manifest" and concerned a rule of internal law "of fundamental importance."

Accordingly, a state may modify the procedures for international competence provided it does so in clear terms. It is only where municipal law is silent that the matter is governed exclusively by international law. International law contains the basic rules on competence, as Wildhaber suggests, in order to safeguard the security of international transactions. Those basic rules in no way usurp the sovereign competence of the state to decide on the treaty making power.

IV. PARLIAMENTARY INVOLVEMENT

The discussion of parliamentary involvement in treaty making in Britain is closely bound up with notions of the role parliament, parliamentary sovereignty, and the separation of powers doctrine. By the 19th century it had become accepted that Parliament was omnipotent to change the British Constitution of which it formed a part. The only limitation to parliamentary sovereignty was that it could not bind its successors. Aghast at the prospect of an all-powerful parliament at a time when that body was increasingly composed of the sons of nonconformist manufacturers and Irish peasants, Sir William Anson suggested recourse to the royal prerogative precisely as a counterweight to parliamentary sovereignty. In a letter to The Times Anson argued that the "only safeguard against such a disaster is to be found in the exercise of the prerogatives of Crown.""
On the hand, the importance and increasing frequency of treaty conclusion led to the view that parliamentary discharge of its law-making role was rendered impracticable without the legislature's involvement in the process. While not adequately informed of the nature and content of the treaty, Parliament was often faced by the 
\textit{faits accomplis} of a concluded agreement. In such circumstances, under the strict rules of the separation of powers doctrine, that body could refuse to pass any implementing legislation or to vote monies from the public purse. But in practice, Parliament, even if unconvinced of the suitability of the convention, was forced to back up the government by enacting enabling legislation in order to avoid default by the state of its international treaty commitments. British practice therefore developed a number of specific legislative checks upon treaty formation. These measures are in the nature of constitutional conventions and do not carry the weight of law. However, they are observed for the most part. These conventions render viable the seemingly undemocratic retention of treaty making within the exclusive domain of the executive.

\textbf{(a) Treaties Subject to Parliamentary Approval}

Certain classes of treaties are made expressly subject to the approval of Parliament. Such treaties will not come into force until Parliament gives its approval. The approval is normally in the form of a statute but may be by way of resolution. In British practice, treaties involving cession of British territory have, since 1890, received parliamentary approval by statute. For McNair, this is now a well established practice "amounting probably to a binding constitutional convention." Another technique relies upon legislation to specify a class of treaties that cannot be ratified by the Crown without parliamentary approval. The European Parliamentary Elections Act 1978, met above, represents the classical restriction by Parliament of the prerogative power of the Crown. Under that Act, the Crown cannot transfer to the European Union any part of the royal prerogative to enter into treaties unless Parliament first agrees to the transfer. In \textit{Rees-Moge} the court confirmed its willingness to review the exercise of the prerogative to ensure compliance with the provisions of the 1978 Act.

Practice in some other Commonwealth countries applies the constitutional convention to a wide category of treaties. In 1928, Prime Minister King of Canada said that parliamentary approval would be sought for "all treaties irrespective of their particular character wherever they involve large national obligations." The Prime Minister added:

\begin{quote}
\textit{"I submit that the day has passed when any government or executive should feel that they should take it upon themselves without the approval of parliament, to commit a country to obligations involving any considerable financial outlays or active undertakings. In all cases where obligations of such a character are being assumed internationally, parliament itself should be assured of having the full right of approving what is done before binding commitments are made. I would not confine parliamentary approval only to those matters which involve military sanction and the like. I feel parliamentary approval should apply where there are involved matters of large expenditure or political considerations of a far-reaching character."}\end{quote}

Antigua and Barbuda apart, subjecting treaty conclusion to approval by parliament is extremely rare in the Caribbean. The Constitution of the Federation of Saint Christopher and Nevis contains clear provisions requiring parliamentary approval in case of secession of the island of Nevis from the Federation. 'Secession would, of course, carry important implications for international law,' however the concern for international relations was obviously not the chief preoccupation of the

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\footnote{[19941 2 WLR 115.} \\
\footnote{House of Commons, Deb. 1928, 11.1974.} \\
\footnote{\textit{Ibid.}} \\
\footnote{Section 113.} \\
\footnote{Issues involving definition of state territory, recognition, nationality, expropriation, succession to treaties, for example, are likely to arise in the context of secession.}
\end{footnotes}
framers of these provisions. Parliamentary approval was not required in relation to the infamous shiprider agreements between Caribbean governments and the United States, although these pacts involved considerable public debate and controversy. Numerous trade, human rights, environmental, extradition, investment, and security agreements have been concluded without any involvement by parliament. In short, parliamentary sanction of treaties is not required regardless of the political, social, environmental, or economic implications of the treaty for the state.

(b) Anticipatory Legislation

In the case of multilateral treaties entailing enactment of enabling legislation, it has become customary for the Crown to ratify the agreements only after obtaining the enabling legislation from parliament. Sir Herch Lauterpacht suggests that the "practice of passing the enabling Act prior to the ratification of the treaty has now become the normal procedure." This procedure is designed to allow for parliamentary debate of the proposed acceptance of international treaty commitments. Any reservations expressed by Parliament can be taken into account by government when ratifying the convention. If needs be, the government may enter formal reservations to the treaty regime which modify or exclude operations of specific provisions of the treaty in relation to the state. Failure by government to accommodate parliamentary concern runs the risk that the government, having accepted the treaty in its entirety, may not be able to get the enabling legislation through the House.

The practice of obtaining anticipatory legislation is also widespread in the Caribbean. Indeed, delays in state ratification of treaties has often been blamed on the need to secure the prior passage of implementing legislation so as to ensure that the country is not in breach of its treaty commitments. An extreme example of this phenomenon was the adjustment of national maritime legislation to incorporate jurisdictional provisions in the 1982 Montego Bay Convention on the Law of the Sea, even before the Convention entered into force. The recent flurry of legislative activity in relation to the ratification of, and accession to, MARPOL 73/78 is also indicative of this approach.

However, the Caribbean practice of securing the passage of legislation that anticipates acceptance of the treaty has not yet ripened into a constitutional convention. For one thing the practice is not uniform. For another, there is no evidence that the practice, even when adhered to, is regarded as having risen to the dignity of a constitutional norm. Finally, the view is gaining ground that the practice of engaging in pre-emptive legislation making carries certain negative consequences. Delay in the legislative process frustrates the whole treaty formation effort. Years have passed while the draft legislation lingered in the draftsman's office, the very absence of an international obligation to legislate serving as a disincentive to speedy enactment. On the other side, enactment of legislation is sometimes not accompanied by acceptance of the relevant treaty. There are numerous instances where legislation exists on the statute books, ostensibly in full compliance with treaties, but where the state has not gone on to adopt the treaty. In the latter circumstances the state is unable to obtain the benefits of the treaty regime. These benefits could include technical and financial assistance as well as the opportunity to participate in international decision making at the international organizational level.

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67 Note e.g., that Jamaica has accepted the MARPOL 73/78 Convention but that implementing legislation is difficult to locate.
(c) the Ponsonby Rule

In 1924 Mr. Ponsonby, British Under-Secretary of State for Foreign Affairs, announced a new constitutional practice to the House of Commons. It was the intention of Her Majesty's Government to lay on the Table of both Houses of Parliament all politically important treaties for 21 days before ratification. The practice, known as the "Ponsonby Rule", was intended to secure publicity and parliamentary discussion prior to governmental acceptance of treaties. It does not apply to agreements not subject to ratification or where ratification is urgent and Parliament is not sitting. The Ponsonby rule is probably now to be regarded as a constitutional convention.

One version or another of the Ponsonby rule exists in the United Kingdom, Canada and Australia. So, in 1961, Prime Minister Menzies of Australia expressed his government's policy in the following terms:

"Except in cases where a treaty will otherwise be brought to the attention of Parliament, for example, where a bill or motion relating to the treaty is to be introduced, the Government as from the next parliamentary session proposes as a general rule to lay on the Table of both Houses, for the information of honourable members and senators, the text of treaties signed for Australia, whether or not ratification is required, as well as the texts of treaties to which the Government is contemplating accession. Unless there be particular circumstances which in the Government's opinion require that urgent attention be given to the matter — for example, at a time when Parliament is not in session — the Government will moreover as a general rule not proceed to ratify or accede to a treaty until it has lain on the Table of both Houses for at least twelve sitting days."

The Ponsonby rule is not accepted in the Caribbean. A treaty is perfectly valid and binding on Caribbean states in both international and municipal law if it is duly signed and ratified. It is entirely irrelevant that parliamentary approval or consultation was not sought or that parliament was not informed. Indeed, the practice in these parts is not to inform parliament beforehand. In this regard, the Caribbean position appears to be identical to that of India. In Union of India v. Jain, the Calcutta High Court rejected the argument that a 1951 Treaty between France and India was invalid because it had not been submitted to Parliament. The Court said:

"Making a treaty is an executive act and not a legislative act. Legislation may be and is often required to give effect to the terms of a treaty. Thus if a treaty, say, provides for payment of a sum of money to a foreign power, legislation may be necessary before the money can be spent; but the treaty is complete without the legislation... I can see no justification in principle or authority for the view that making a treaty requires legislation for its validity. The President makes a treaty in exercise of his executive power and no court of law in India can question its validity."

V. THE RATIFICATION OF TREATIES ACT

The Ratification of Treaties Act (ROTA) of Antigua and Barbuda was enacted on 25th February, 1987. It entered into force on 6th February, 1989. The clear intent of the statute is to remedy a fundamental defect in Caribbean law and practice by legislating a role for Parliament in treaty conclusion. Specifically, the Act provides that certain treaties cannot be accepted by the state unless the approval of Parliament is first obtained. Accordingly, the Act furthers the objectives of participatory democracy by giving parliament, parliamentarians, and by extension, the populace, a voice in the treaty conclusion process. From all reports the

Act has been the catalyst for a significant increase in public appreciation of, and sensitivity to, international treaties.

The preamble to the ROTA states that it is an Act "to provide for the ratification of certain treaties". The actual instrument of ratification is issued under the signature of the Minister responsible for external affairs." But the central role played by Parliament in the ratification process is underscored by section 3, paragraph 1. This provides that:

"Where a treaty to which Antigua and Barbuda becomes party after the coming into force of this Act is one which affects or concerns -

(a) the status of Antigua and Barbuda under international law or the maintenance or support of such status, or
(b) the security of Antigua and Barbuda, its sovereignty, independence, unity or territorial integrity, or
(c) the relationship of Antigua and Barbuda with any international organisation, agency, association or similar body,

such treaty shall not enter into force with respect to Antigua and Barbuda unless it has been ratified or its ratification has been authorised or approved in accordance with the provisions of this Act."

As the first, and to date, the only attempt in the Caribbean to provide for participation by the legislature in treaty making, the ROTA deserves close attention. Scrutiny invites a number of comments.

(a) Definition of 'Treaties'

The ROTA is unique among Caribbean statutes in providing a broad definition for the term 'treaties'. Section 2 provides that for the purposes of the Act, 'treaty' means:

(an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation..."

This definition reflects, word for word, the definition found in the landmark 1969 Vienna Convention? It thus enjoys legal continuity between municipal and international law. Also, the statute confirms the generic nature of the term 'treaty'. There is no set nomenclature. A state may be party to the Charter of the United Nations 1945, the Statute of the International Court of Justice 1946, the Agreement Establishing the Caribbean Development Bank 1969, the Treaty Establishing the Caribbean Community 1973, the United Nations Law of the Sea Convention 1982, the Memorandum of Understanding Relating to Security and Military Co-operation in the Eastern Caribbean 1982, and the Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region 1990. These are all treaties under the terms of the Act of 1987.

On the other hand, the definition is defective in several important regards. First, section 2 does not include all acts and agreements that impact national law processes and resources. Unilateral declarations as to treaty succession made by Caribbean states upon gaining independence are not included given that they are not "agreements". Agreements between states and international persons other than states, and between those other persons alone, are excluded. This exclusion is very significant because Caribbean states have entered into numerous agreements with international and regional organizations that obligate both the state and the citizens. This is the case whether the agreements relate to the privileges and immunities of an organization physically located within the territorial jurisdiction, or to loans and other financial or developmental matters. Furthermore, important regional agreements appear, prima facie, to be omitted because of the inclusion of non-independent territorial entities that therefore do not qualify as "states".  

{Supra, Article 2 (1) (a).}
A good example is the Treaty Establishing the Organization of Eastern Caribbean States 1981 that includes Montserrat as a contracting party. Similarly, important ‘developmental’ agreements with foreign corporations are not covered.

A second significant limitation arises from the fact that only agreements ‘governed by international law’ are included. It is impossible to be sanguine about whether a particular transnational agreement, ostensibly governed by principles of international law, is not, nonetheless, in most of its aspects, subject to national law. A good example of this is provided by *Revere Copper Inc. v. °PIC.* The Jamaican Parliament enacted the Bauxite (Production Levy) Act in 1974. This statute substantially increased the levies payable by the plaintiff, a bauxite corporation. The corporation contended that the levies were contrary to certain tax stabilization guarantees reached in a 1967 agreement with the previous JLP government and therefore amounted to illegal expropriation. The PNP government, elected in 1972, maintained that it could ignore the stabilization clause on the basis of the principle of permanent sovereignty over natural resources. The company’s argument was rejected by the Supreme Court of Jamaica as tending to fetter the constitutional power of Parliament to make laws for peace, order and good government. The argument was, however, accepted by the international Tribunal to whom the dispute had been referred on a claim by the company for compensation for losses incurred as a result of the disruption of its enterprise in wake of the imposition of the levy. The Tribunal accepted that Jamaican law was the governing law “for all ordinary purposes of the agreement.” But it refused to consider that the application of that law precluded “the application of principles of public international law which govern the responsibility of states for injuries to aliens.”

It is significant that the Tribunal based this decision on the nature of the developmental contract. According to it, while economic developmental contracts were not usually made between governments only, they were nonetheless entered into as part of the contemporary international process of economic development. The foreign corporations committed large amounts of capital over a long period to the development of the host country and could, therefore, reasonably require contractual guarantees as to the security of their investments. Such guarantees could legitimately include promises of immunity from subsequent parliamentary override of the terms of the contract. While development contracts are not “treaties”,” the pride of place given to them, and their impact on the national economy, suggest that their conclusion should be subject to parliamentary participation.

Thirdly, oral treaties are excluded from the scope of section 2. Oral agreements are by no means commonplace but are nonetheless well known in the international arena. The *Eastern Greenland* case is the most famous of such agreements. Here, the Danish Government, in its desire to obtain universal recognition of its sovereignty over Greenland, had instructed its diplomatic agents to approach other sovereign governments for support. In 1919, the Danish Minister at Oslo called on the Norwegian Foreign Minister, Mr. Ihlen, and assured him that at a forthcoming international conference Denmark would raise no objections to the Norwegian claims to sovereignty over Spitzbergen. At the same time he expressed the hope that Norway would not raise objections to Danish claim to Eastern Greenland. At the time Mr. Ihlen confined himself to stating that the matter would be considered. Ten days later, after informing his colleagues in the Norwegian Cabinet of his conversations, he told the Danish Minister that “the Norwegian Government would not make any difficulties in the settlement of this question.” Conflict ensued, however, and the Norwegian government proclaimed the occupation of Eastern Greenland in 1931. Denmark then brought an action before the Permanent Court of International Justice. For its part Norway argued that the declaration made by Mr. Ihlen was not binding because it related to a matter of “special importance”; the commitment given by the Foreign Minister could only be consistent with the Norwegian constitution if it had been previously

17 ELM 1321.
(1977)26 WIR 486.
56 LLR 258 at p. 271.

(1933) PCIJ Ser AM No. 53.
deliberated by the Council of Ministers. Denmark contented that Mr. Ihlen had been invested with the necessary authority to make the declaration. Even without such authorization, it argued, the Foreign Minister had the necessary competence under international law to bind the state. The court decided for Denmark. It said:

"The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs."

On this point Judge Anzilotti, dissenting, agreed with the majority. He said:

"No arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the Court; ... In my opinion, it must be recognised that the constant and general practice of States has been to invest the Minister of Foreign Affairs — the direct agent of the chief of State — with authority to make statements on foreign affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question. Declarations of this kind are binding on the State.

As regards the question whether Norwegian constitutional law authorised the Minister for Foreign Affairs to make the declaration, that is a point which, in my opinion, does not concern the Danish Government: it was M. Ihlen's duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws.""

While the inclusion of oral treaties would cause obvious problems, the exclusion of development contracts, agreements with international organizations, and agreements involving non-independent territories, cannot be easily explained. The treatment of agreements with international organizations is especially baffling because section 3 (1) specifically provides for the procedure for the ratification of treaties that affect or concern "the relationship of Antigua and Barbuda with any international organisation, agency, association or similar body." The most that can be said is that the Antiguan definition was based upon the precedent of the leading legal instrument in the field, the 1969 Vienna Convention. At the same time, it should also be pointed out that these weaknesses have been cured at the international level. A separate convention has been concluded to fill particular gaps left by the 1969 Convention,' and states have been mandated to have recourse to relevant principles of customary international law in relation to others.' Any amendment of the ROTA must take these developments into account.

(b) Scope

The ROTA anticipates that there are some treaties that will be excluded from the scope of the legislation. This follows from the preambular objective of making provision for the ratification of certain treaties. It follows, more particularly, from the description in section 3 of the categories of treaties that must be submitted to Parliament for ratification. Furthermore, section 5 reaffirms that there are "treaties to which subsection (1) of section 3 does not apply." In respect of such treaties, the exclusivity of the Executive's treaty making powers remains unaffected.

It is not immediately clear, for example, whether such treaties could be "laid" in Parliament.

" Vienna Convention 1969, Arts. 2,3. Note, also, that the ICJ is mandated by Article 38 of its Statute to have regard to customary law in adjudicating upon international disputes submitted to it.
The identification of the treaties excluded from the requirement of parliamentary ratification is, of course, a matter of statutory interpretation. The difficulty here is threefold. First, the wording of the categories of treaties that must be subjected to parliamentary approval is broad enough to be inclusive of virtually all treaties. Few treaties neither affect nor concern national status, security, sovereignty, independence or relationship with any international organization. Indeed, the treaties deemed subject to the ratification process reveal the extreme width of the provisions.

Secondly, the ROTA clearly includes agreements affecting national security and defense; a prime category for exclusion from parliamentary purview. In fact, the Act makes special provision for parliamentary discussion of these agreements. Under section 3, paragraph 5, any act of a foreign state relating to treaties affecting security must be laid on the Table of the House as soon as practicable by the Minister responsible for foreign affairs. Moreover, the Minister is required to move a motion giving an opportunity to the House to express itself on such act. However, the Antiguan position is rather generous to Parliament. The Ponsonby rule does not, apparently, apply to agreements that touch and concern security matters. Thus the Canadian Prime Minister refused in 1963 to submit to Parliament the agreement with the United States concerning nuclear warheads. The Prime Minister observed that the agreement could not be made public "in accordance with NATO practice and considerations of military security." Similarly, the Ponsonby rule did not apply to agreements between the US and UK regarding the stationing of American long-range rockets and ballistic missiles in the United Kingdom.

Thirdly, the ROTA appears not to exempt 'executive agreements' from parliamentary scrutiny. Executive agreements are excluded under other systems incorporating constitutional provisions for the democratization of treaty making. In addition to 'treaties' that can only be made by the US President with the concurrence of two-thirds of the Senate, the President may, acting alone, enter into 'executive agreements'. These are treaties in international law and bind the United States in its international relations, but are not considered treaties under the Constitution and therefore are not subject to approval by the Senate.

What qualifies as an 'executive agreement' as distinct from a 'treaty' is a matter of some dispute. It is common ground that agreements relating to national security and defense probably qualify. The role of the chief executive as commander-in-chief of the armed forces and considerations of safeguarding military secrets have led to the view that agreements concerning such matters as the sale or acquisition of some categories of military equipment should not be subject to parliamentary review. Thus, the concept of the executive agreement was one of the grounds on which Prime Minister Pearson of Canada sought to justify his refusal, in 1963, to submit to Parliament the agreement with the United States concerning nuclear warheads. The Prime Minister was of the view that this was "an executive agreement, an exchange of notes between governments" and not "a treaty or heads of state agreement, which would require ratification and customary prior approval of the House of Commons." Beyond this, international agreements of relatively routine importance would probably also be regarded as executive agreements. A parallel may be drawn to the United Kingdom practice that refuses to subject certain agreements to the Ponsonby rule. These agreements are those not generally subject to ratification by the Crown. Ministers of government are empowered to conclude such agreements "in simplified form"; i.e., the agreements enter into force upon signature by the relevant Minister and without need for confirmation by the central government.

"Ibid."
(c) The Ratification Requirement

A treaty to which section 3(1) applies must be ratified by Parliament before the Minister of Foreign Affairs may deposit the instrument of formal acceptance. There are two different procedures for ratification. Where the treaty concerns the status, security, sovereignty, independence, unity or territorial integrity of the country ratification must be by Act of Parliament. As regard these treaties, too, Parliament must be afforded the opportunity to debate any relevant act of a foreign state. Legislative approval is also required if the treaty is to become enforceable as part of the law of the land. Where the treaty concerns the relationship of the country with any international organization, agency, association or similar body, Parliament may ratify by way of Resolution.

The important consideration is that no specified majority is required for ratification, whether by legislation or resolution. This means that a simple majority suffices. It follows that the government of the day is always in a position to use its majority in Parliament to ensure ratification of all international treaties that it wishes to adopt. Party discipline in Caribbean democracies could well make the ROTA model little more than a "talking shop" for partisan speeches by parliamentary representatives. There is no real submission of the treaty making power to genuine legislative supervision, except where the government is already experiencing a political insurrection.

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* ROTA, section 3 (5).
* Section 3 (2) (a).
* There is already some indication of this. Mixed reviews surfaced about the impact of the 1987 Act during discussion between this writer and officials in the Legal Affairs ministry in Antigua. On the positive side the Act ensures public information and awareness, as well as democratic discussions on treaty obligations and implications. On the negative side (treaty obligations become politicized and subject to political priorities and delays, particularly in the often lengthy parliamentary debates in which governmental and opposition members are each given at least one hour to make presentations often broadsides on governmental performance, can slow down the ratification process. This in turn can lead to a delay in the acceptance of conventions. Treaty adoption has also been slowed by failure to adopt treaties within particular parliamentary sessions.

This contrasts sharply with the United States model. The US President must secure the support of two-thirds of the Senate before being able to adopt treaties and there is, therefore, a real risk that treaties favored by the executive will be refused by the legislature. In consequence, serious, substantial, and sustained efforts are made by the White House to explain the treaty regime and the obligations and benefits which it holds for the country. Relatedly, White House lobbying of individual members of Senate (including the "working of the phones" concept) has become an important feature of the relationship between the Executive and the Congress.

(d) Ratification and Implementation

Again, in contrast with the US constitutional provision which makes treaties accepted by the state "part of the law of the land", the ROTA ratification process bears no necessary relationship to implementation of the treaty provisions in the law of Antigua and Barbuda. Here, it is perfectly possible for Parliament to ratify the treaty without the treaty becoming part of national law. This is apparent from the fact that parliamentary ratification may be by way of an Act or Resolution. It is possible for a treaty to be ratified by Resolution and then for provisions of that treaty to be legislated into local law on a subsequent occasion. Where the route of implementing legislation is taken, the treaty may be adopted by repetition of its provision or by reference. In the latter case, the convention will normally be included as a schedule to the implementing Act. But the general lack of automaticity is evident in section 3, paragraph 3. This provision is to the effect that "no provision of a treaty shall become part of the law of Antigua and Barbuda except by or under an Act of Parliament" Far from adopting monism, therefore, Antigua and Barbuda has given an enhanced legislative status to the old dualism of the British common law. The democratization process is envisaged as bringing greater awareness of international law making into the national realm. The Act does not attempt to articulate international law into the national law in such a way as to make treaties
accepted by the state the source of rights and obligations for individuals without more.

(e) Denunciation

The ROTA deals with parliamentary involvement in the decision to denounce treaties in an unsatisfactory manner. Section 4 requires that the Minister responsible for external affairs informs the House of the fact that the state has ceased or has done an act whereby it will cease to be a party to a treaty covered by the Act. Further, the Minister must so inform the House at the earliest opportunity and in no case later than the second sitting of the House after the expiration of one month from the date of denunciation.

Denunciation is not generally dealt with in countries with constitutionally established procedures allowing for legislative involvement in treaty making. Evidently, therefore, the provision on denunciation in the ROTA is an advance upon the US position and that of the other developed democracies incorporating the legislature into treaty making. On the other hand, the ROTA clearly does not go far enough. Termination of treaty relations, no less than acceptance of treaty regimes, should be subject to full parliamentary participation. It is at least arguable that the process whereby the state terminates its treaty obligations is of no less importance to the citizens than the process whereby the state enters into those treaty arrangements. In both instances, the democratic entitlements of the nationals are engaged.

An illustration of this point is provided by the recent denunciation by Jamaica of its adherence to the Optional Protocol to the International Covenant on Civil and Political Rights. This action was taken by the Jamaican Government for the express purpose of limiting the time taken in appealing the sentence of death by persons convicted of first degree murder. There are indications that Trinidad and Tobago and other Caribbean countries are likely to follow Jamaica's lead and withdraw from some international human rights conventions which give condemned murderers an opportunity to delay execution while alleged human rights abuses are investigated. Restricting the appellate process in this way is thought by Caribbean governments to be required under the Privy Council decision in *Pratt and Another v. Attorney-General of Jamaica.* In this case the Privy Council was of the opinion that detention of condemned murderers on death row for more than five years amounts, in the normal course of events, to cruel, inhuman and degrading punishment.

Termination of Jamaica's participation in the Optional Protocol without parliamentary involvement has been heavily criticized. McIntosh suggests that *Pratt* was wrongly decided and that withdrawal by Caribbean governments from international human rights agreements in order to satisfy the Privy Council's ruling compounds the error. Vasciannie is of the view that withdrawal from the Protocol has the unintended consequence of depriving all Jamaicans of the entitlement to petition the United Nations Human Rights Committee on a host of issues having nothing to do with the death penalty. In particular, the entitlement of every citizen to seek international investigation of alleged abuses by the law enforcement agencies of the state was taken away by the stroke of the pen of the Minister for Foreign Affairs, without consultation with the people. The logical extension of this argument is that the Executive's competence to withdraw from treaties should be subject to confirmation by or consultation with other elements of the society. Parliament is the obvious body whose blessing the Executive should seek before proceeding to terminate the state's treaty commitments.

VI. CONSTITUTIONAL ENTRENCHMENT

The ROTA model could be improved by the adoption of an amendment to Caribbean constitutions that entrenches the principle of parliamentary participation in treaty making. The most obvious
improvement that such an amendment would bring is greater protection for the principle. The ROTA, as an ordinary Act of Parliament remains vulnerable to repeal by subsequent legislation passed by a simple majority. There are already rumblings of discontent with the operation of the statute, both are regards the delay in treaty making which it inevitably engenders, and in its provision of an additional forum for negative criticisms of governmental performance. These criticisms are sometimes unrelated to content of the treaty proposed for adoption. However, another view of the public right of participation through the democratically elected representatives in parliament suggests that the ratification process would benefit from constitutional entrenchment, thus rendering the entitlement immune from repeal by ordinary legislation. Constitutional entrenchment is in fact adopted in the United States and in most democratic countries outside the Commonwealth. This has led to public discussion and debate of proposed treaties becoming part of the cultural landscape of these countries.

Constitutional entrenchment of parliamentary participation would also enhance the international law efficacy of the process. One disadvantage of the use of ordinary legislation in the form of the ROTA is its limited international law effectiveness. Foreign states are not likely to have knowledge of the distribution of national competence in treaty making where the relevant rules are obscured by placement in ordinary legislation. Under the 1969 Vienna Convention, a breach of the municipal law requirements concerning the competence to conclude treaties will invalidate the treaty only if the national requirements are "manifest and concerned a rule of [the state's] internal law of fundamental importance." The relevant decisions suggest that this formula presupposes that the national requirements are found in the state's constitution. After all, a constitutional provision on parliamentary participation is the legislative methodology most likely to make the rule "manifest". Similarly, embodiment in constitutional law also implies that the process is of fundamental importance in furthering the objectives of democratization and civil society.

Merely to secure constitutional enactment is not, of course, enough. The substantive content of the parliamentary entitlement must be spelt out. A number of considerations arise here. First, the central question of how best to ensure meaningful participation by parliament and the populace in treaty making must be treated. As we have seen from the discussion of the ratification requirement under the ROTA, one issue which must be considered by reformers of Caribbean constitutions is whether the requirement for parliamentary approval of treaties is to be satisfied by a simple or qualified majority. The requirement for a simple majority tends not to engender effective parliamentary supervision of treaty making by the executive. Whether adoption of a qualified majority, say two-thirds as obtains in the United States, is a viable solution is open to question. On the one hand, failure by the executive to secure such a majority could be a serious obstacle to efficient management of the country's affairs. Anecdotal evidence gathered in Antigua suggests that parliamentary debates pursuant to the ROTA procedure tend to be highly politicized and partisan. It is conceivable that an opposition in parliament could withhold its approval to treaties as part of a wider campaign to embarrass the government and frustrate its policies. The political maturity required to regard foreign affairs as a matter for bipartisan consensus could well be lacking in most jurisdictions. On the other hand, the phenomenon of "landslide" victories is very familiar to the Caribbean electorate. In the recent past the political party forming the government has secured huge majorities at the polls. These lopsided victories can give rise to constitutional problems. For present purposes it suffices to point out that, in these circumstances, satisfaction of a two-thirds requirement is not likely to

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9 Harris, supra, pp. 827-829.
be problematic. At the same time, the mere attainment of the qualified majority by a government with an overwhelming number of members in the House is unlikely to provide the desired multiparty consensus on foreign policy.

Another approach towards the ensuring of significant popular contribution to treaty making requires that the constitution pay particular attention to the process whereby parliamentary approval of treaties is secured. Specifically, subjecting the treaty to multiple readings has the advantage of generating public interest and debate in the treaty making and ratification process at an early stage. In these circumstances, parliamentarians are likely to be aware of public sentiments regarding the treaty prior to casting their final vote in parliament. Relevant features of Caribbean states include small economies, volatile electorates, and the absence of genuinely independent public institutions. Although not perfect, the technique of fostering informed public debate that impacts upon parliamentary discussion of treaty ratification might be the best that can be achieved in the current circumstances.

Second, the matter of the range of treaties that must be submitted to the rule of parliamentary participation requires greater clarity than exists in the ROTA. A preliminary concern must be for the definition of the term 'treaty'. For purposes of parliamentary involvement, the concept should be widely construed. The fundamental objective is to include all international agreements that have significant impact upon the nation, its nationals, and its resources. It follows that, provided this litmus test is satisfied, so-called 'transnational development contract' with foreign corporations, agreements with international organizations, and agreements that include non-independent territories, should all be included.

At the more substantive level, a case could be made for excluding agreements regarding national security from full parliamentary review where public discussion could cause national security to be compromised. Even here, however, such agreements could be submitted to a parliamentary committee composed by representatives of the various parties in parliament. It would also be possible for any member of parliament or of the public to seek judicial review of a government decision to send a treaty to the parliamentary committee rather than to the plenary body. Agreements of a routine nature and which are at present concluded by Ministers in the simplified form may also be excluded from full parliamentary debate. However, the initial draft of such pacts should be laid on the Table of both Houses of Parliament for information. This procedure would allow members of parliament and the public to seek judicial determination of any dispute concerning the categorization of the treaty.

Third, the question of treaty implementation in national law must be addressed in any constitutional reform of the issue of parliamentary participation in treaty making. Opting for the direct application of treaties in municipal law of all treaties ratified by parliament would appear to be the logical choice. It is now customary that where the legislature participates in the process of ratification, ratification becomes a legislative act. Consequently, the treaty becomes effective in international and in municipal law simultaneously. However, it must be borne in mind that treaties incorporated in this way are nonetheless subject to the distinction between 'self-executing' and 'non-self-executing' agreements. Self-executing agreements can be given legal effect without further implementing national legislation; a non-self-executing treaty requires enabling legislation before it may be relied upon before a municipal court. The question whether a treaty is or is not self-executing is a matter for national determination and practice differs widely among countries. In order to be considered applicable without more, the two most important criteria are, first, that the treaty creates clear and enforceable rights and duties and is not merely goal-oriented or programmatic in nature,’ and, second, that the treaty creates these rights and obligations for individuals.

I am grateful to Professor SCR McIntosh for raising this possibility in discussions of an earlier draft of this paper.

Fourth, and finally, a comprehensive constitutional treatment of the parliamentary power to ratify treaties must also encompass parliamentary competence to participate in the decision of the state to withdraw from such agreements. The procedure adopted for parliamentary ratification ought to apply, mutatis mutandis, to parliamentary denunciation of the treaty. As with ratification, the government would initiate discussion of the proposal to withdraw from the treaty. Again, as with ratification, the actual instrument containing the decision to withdraw from the treaty would be communicated to the international community by the Minister with responsibilities for foreign affairs.

VII. CONCLUSION

Modern societies providing for parliamentary participation in treaty making have, unquestionably, strengthened the notion of participatory democracy. The peoples’ representatives in parliament become involved in the formulation of the international rules for the conduct of the world’s inhabitants. Parliament helps to decide the purposes to which global public resources will be put. Parliamentary treaty making also serves a public information function; the publicity generated enables and empowers citizens to discuss the merits of undertaking specific international commitments. Together, the people, parliament, and the executive, contribute to their society’s efforts at international law making.

One feature of the Westminster Model of governance inherited from the British has been the total exclusion of the Caribbean legislature from treaty making. This has been made worse by the failure of Caribbean constitutions to adopt conventions, evolved in British practice, which ameliorate the harshness of the strict rule of executive monopoly in treaty making. The conventions provide for the submission of treaties to parliament for approval, and mandate that proposed treaties be laid before parliament for information and debate. Another feature of the Westminster Model is the divorce between treaty formation at the international law level and treaty implementation in national law. Again, a convention of the British constitution requires that the Crown obtain passage of enabling legislation before ratification of certain multilateral treaties. This practice renders viable the otherwise seemingly watertight distinction between treaty conclusion and treaty performance. However, Caribbean adherence to the habit is ad hoc; moreover, the practice seems not to be accompanied by any opinio juris that it is required by the constitution.

The Ratification of Treaties Act 1987 of Antigua and Barbuda represents an important stage in the development of a Caribbean response to the challenge of integrating a multiplicity of state organs into the state’s formation of international law. In many respects the Act goes beyond the law and practice of the United Kingdom which for so many years governed the relationship between Caribbean territories and the international community. In at least one respect it goes beyond the model represented by the US Constitution. But the Act is not perfect. While eschewing the British tradition by giving Parliament a formal role in treaty making, the ROTA maintains the old dichotomy between treaty formation and treaty implementation. Several other weaknesses are also evident. Thus, in the present era of reform of Caribbean constitutions, some thought may be given to the ways in which the experiment undertaken in Antigua and Barbuda may be further elaborated and developed. One way forward could be the constitutional entrenchment of a clause, suitably drafted, which provides for meaningful parliamentary participation in treaty making.