

**THE PROMOTION AND ENFORCEMENT OF WOMEN'S  
HUMAN RIGHTS WITHIN THE JUDICIAL SYSTEMS OF  
THE CARIBBEAN**

**By**

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A definition of what constitutes “human rights” may be appropriate before embarking on a discussion of how they can be promoted and enforced in relation to women.

My suggested definition is that they are basic inviolable standards which inhere in every human being and which others are expected to respect and recognise regardless of nationality, race, ethnicity, gender or religion. These rights are closely allied with ethics and morality and reflect the values of a community. They are invariably enshrined within the legal framework of a state and are enforceable if violated.

**The Universal Declaration of Human Rights** adopted in 1948 by the United Nations was the precursor of several treaties and conventions which have been ratified or acceded to by the member states, e.g. the twin Covenants on Civil and Political Rights and the Economic, Social and Cultural Rights. **The Convention on the Elimination of All Forms of Discrimination Against Women** is another of them, and will be the focus of this presentation.

Having ratified or acceded to an international treaty or convention implementation can be the most troubling. Questions as to enforceability in the municipal courts of the ratifying state arise. This depends in large measure on the relationship between a state's international obligations and its domestic or municipal laws.

According to the monist theory in international law treaties ratified by a state for the protection of the human person automatically become part of the municipal law of that state. The dualist theory, on the other hand, advocates separation of international law from municipal law, and international obligations of a state are not automatically incorporated into its municipal law which is supreme. For international treaties to be enforceable in the domestic court system of a state they have to be specifically legislated or adopted into the municipal law.

These theories have been criticised for not reflecting the reality, and are gradually losing ground. Changes in the role and domestic perception and understanding of international law in general and of international human rights law in particular, have led to an increased use of such law in municipal courts.

In countries where a treaty or convention is not incorporated into the domestic law its enforceability depends in large measure on the integrity and commitment of the particular state in honouring its international obligations and undertakings by enacting the necessary legislation to ensure enforceability in its municipal courts. Most of the countries within the

English-speaking Caribbean and which inherited the English common law and systems of government adopted the practice of the United Kingdom which followed the dualist theory; hence in our Region international treaties are not automatically incorporated into domestic law upon ratification, and separate legislation and enactment of statutes are required to ensure enforceability in the municipal courts of the state. Of course the legislation must in spirit accord and not be inconsistent with the State's obligations under the treaty.

Recently, in 2003, Guyana became the exception when its Constitution was amended by the **Constitution (Amendment) (No. 2) Act** with provision for the protection of human rights to the effect that "every person, as contemplated by the respective international treaties to which Guyana has ratified or acceded to, is entitled to the human rights enshrined in those treaties, and such rights shall be respected and upheld by the executive, legislative, judiciary, and all organs and agencies of Government". This is indeed a departure from the traditional process of separate legislative enactments to conform to the provisions of an international treaty. In effect there is automatic incorporation upon ratification.

Whichever approach is adopted to give effect to a state's obligations under a ratified international treaty there is no doubt that within recent times these treaties are being utilised with increasing regularity in the judicial systems of states with persuasive even though not always legal authority. It is therefore imperative that both the judiciary and the legal profession as a whole be aware of and become familiar with the well-known international treaties

which have been ratified or acceded to by the majority of states within the United Nations family.

## **THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN**

This Convention familiarly referred to as **CEDAW** is regarded as the “fons et origo” of the promotion of women’s rights, and was adopted by the General Assembly of the United Nations on 18<sup>th</sup> December 1979; it has since been ratified or acceded to by 180 countries or states parties to date. It is often described as an international bill of rights for women, and is multi-faceted in its content covering as far as it could all spheres of women’s lives. It defines discrimination against women as:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

By ratifying **CEDAW** states parties commit themselves to undertake measures to end discrimination against women which include incorporating the principle of equality of men and women in their legal systems and national constitutions, abolishing all discriminatory laws and practices, and

enacting laws which prohibit any form of discrimination against women. This is reflected in greater detail in **Article 2** of **CEDAW** which can be regarded as its “heart and soul” defining its spirit and intent. Under this Article states parties undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realisation of this principle;
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

- (g) To repeal all national penal provisions which constitute discrimination against women.

The legal status of women has been addressed in no small measure under articles which guarantee them the right to vote and hold public office, the equal right to acquire, change or retain their nationality and that of their children irrespective of their marital status, and equal rights within a marriage and upon its dissolution, including rights to matrimonial property. The perpetual problem of gender-based violence is not specifically addressed in any article of **CEDAW**, and there is no mandate or obligation on states parties to deal with it. Nevertheless some articles can be regarded as bearing some relationship to violence even though not specifically making mention of it, e.g. **Article 2**, (supra) and **Article 5** which urges states parties to modify the social and cultural patterns and conduct of men and women based on the idea of the inferiority or superiority of either of these sexes or on stereotyped roles for men and women.

As is the norm in relation to most international treaty bodies there is a monitoring mechanism in place to ensure compliance with the treaty by the states parties who have ratified it. For this purpose a Committee on the Elimination of Discrimination Against Women (which is also familiarly referred to as **CEDAW**, but which to avoid confusion with the Convention, I shall refer to as “the Committee”) was established comprising twenty-three experts of high moral standing from the accepted geographical regions of the world, sitting in their individual capacity, and it meets at least twice per year to examine reports submitted by states parties in accordance with their treaty obligations. The Committee also makes recommendations as it thinks

appropriate. In keeping with this mandate under **CEDAW** the Committee at its Eighth Session in 1989 and again at its Eleventh Session in 1992 adopted two General Recommendations (Nos. 12 and 19) on gender-based violence, the latter being more comprehensive and multi-dimensional. Both, however, urge states parties to take appropriate measures to eradicate gender-based violence in all forms.

The interaction in most international treaties is between the monitoring mechanism or committee and the state party. However, many of them also provide a complaints mechanism whereby individual citizens of a state party that has ratified a treaty has access to the monitoring body which is empowered to consider complaints and make recommendations for redress of breaches of a person's rights by a state party.

This complaints mechanism is usually given effect to by ratification by a state party of an Optional Protocol to the treaty thereby extending the interaction between the monitoring body and the citizens of the ratifying state party. Prior to 2000 **CEDAW** had no mechanism for individual women to approach the Committee mentioned earlier for redress of individual violations of their rights. I am pleased to state that there is now in place an Optional Protocol to **CEDAW** which over time may be ratified by all states parties who have ratified **CEDAW**. In our Region only Belize has so far ratified the Optional Protocol, but I hope before long all of the other CARICOM states will do so. Of course, before an individual can utilise the Optional Protocol certain conditions have to be satisfied. Unfortunately time does not permit me to deal with this in greater detail in this presentation.

Before moving on to enforcement of women's human rights in the judicial system, I think it apposite to mention that within our Caribbean region there is a Charter which has been signed and was adopted in 1997 by the Heads of Government of the Caribbean Community. It is the Charter of Civil Society, which gave effect to a recommendation of the West Indian Commission contained in its report "Time for Action". The Charter lays out in articles recognition of several principles which the Governments commit themselves to respect and strengthen, among which are respect for fundamental human rights and freedoms. Several rights are addressed – political rights, freedom of expression and access to information, equality before the law, women's rights, children's rights, inter alia.

Since I am here concerned with women's rights I shall mention those contained in Article XII of the Charter. In summary it states that all women shall have equal rights with men in all spheres, and such rights shall include the right to be afforded equal opportunities for employment and to receive equal remuneration with men for work of equal value, the right not to be discriminated against by reason of marital status, pregnancy or health-related matters which affect older women, and to legal protection including just and effective remedies against domestic violence, sexual abuse and sexual harassment.

Interestingly, the Charter provides for the states to submit periodically to the Secretary General of CARICOM reports on measures adopted and progress achieved in compliance with the provisions of the Charter. One wonders

how many citizens of the member states of CARICOM are aware of this Charter, and I suspect the provisions are honoured more in the breach than in the observance. I think Heads of States need to be reminded periodically of their obligations under this Charter. Most of its provisions mirror in large measure the provisions of international treaties which the States of CARICOM have ratified, particularly CEDAW, but is never mentioned or considered maybe because it has no binding sanction.

## **ENFORCEMENT IN THE JUDICIAL SYSTEM**

As mentioned earlier we in the Caribbean as colonies within the former British Empire inherited the English common law and all of its statutes without exception. While some were repealed and amended after the colonies became independent we still maintain to a large extent the practice and procedure of the English court system; in some instances we still lag behind even though the English system has changed. Many of the old statutes which we inherited as well as the common law perpetuated the stereotypical role of women as being inferior to men and akin to chattels capable of ownership and protection.

Over the years the legal status of women has improved significantly in many areas of their lives although much more needs to be achieved. Archaic laws which perpetuated the inequality of status between men and women have been repealed. However, while the executive and legislative branches of government are obligated to ensure that appropriate measures are taken and

laws enacted to enforce the rights of women, it is to the courts and the judiciary of a state that one looks for protection of these rights and redress for their violation. Laws may be enacted to promote one's rights, but unless they can be enforced legally and violation redressed they will be nothing more than "sounding brass and tinkling cymbal".

There are several legal issues pertaining to women's rights which need to be addressed through judicial interpretation and decisions, e.g. employment laws which discriminate against women in relation to earnings and conditions of work, nationality, inheritance and intestate succession, entitlement to matrimonial property upon dissolution of a marriage, custody of children, the position of women in common law relationships, the ever-increasing problem of HIV/AIDS, termination of pregnancies, the rights of the elderly and of the physically challenged. Most of these issues are addressed directly or indirectly within specific articles of **CEDAW**, and I shall illustrate from a publication entitled "*A Digest of Case Law on the Human Rights of Women*" and issued by the Asian Pacific Forum on Women, Law and Development, how the courts in Asia and the Pacific have utilised **CEDAW** in determining matters concerning the rights of women. The first is the case of **Nushatina Hasibuan -v- Pt. Indonesia Toray Synthetics, et al (1988)** in which the Court of Appeal of Indonesia considered whether a lower mandatory retirement age for women constituted sex discrimination, and was in breach of Indonesia's Labour Act which prohibited discrimination on the ground of sex, as well as in breach of **CEDAW**. The Court upheld a decision of the lower court made in favour of Ms. Hasibuan, expressly adopted the definition of discrimination used in

**CEDAW**, and applied it directly to the circumstances of the case rejecting the argument that it must adapt to local social norms. Reference was made to Articles 1, 4 and 11 of **CEDAW**.

In the case of **Humaria Mehmood –v- The State (1999)** a court in Pakistan was called upon to consider among other issues the meaning and role of consent in a valid marriage under Pakistani law, and held that a marriage without consent is invalid. The Court noted that its findings accorded with a number of international instruments that protect the rights of women, and that Pakistan was a signatory to **CEDAW** which enjoins member states in **Article 16** to take all appropriate measures to ensure equality in matters of marriage and the right to consensual marriage.

Another example of the use of **CEDAW** is the Indian case of **Mrs. Githa Hariharan and another –v- Reserve Bank of India and another (1999)** where the issue of sex discrimination under Indian guardianship laws arose. There was a challenge to the Hindu Minority and Guardianship Act 1956, and the Court considered whether it contravened the equality provisions of the Indian Constitution on the basis that they exclude mothers from being the natural guardians of their children during the father's lifetime which was a discrimination against mothers on the basis of their sex. The Supreme Court granted relief by broadening the meaning of the Act rather than striking it down as being unconstitutional, and based its interpretation of the Act on **CEDAW**. The Court observed that domestic courts in India are under an obligation to construe domestic laws in line with international conventions and norms.

In the area of criminal law particularly in trials for the offence of rape and sexual assault there is a legal requirement that the victim's evidence must be corroborated or in layman's terms must be supported. Judges are mandated to advise juries of the dangers of convicting an accused on the uncorroborated testimony of a victim. Perhaps this came about because it was felt that a woman could easily allege that she was raped, and it is invariably her word against that of the accused. Whatever the reason, it operated against female rape victims to a large extent. Efforts have been and are being made in some jurisdictions around the world to remove the requirement for corroboration in sexual offences, and a case from the Pacific Island of Kiribati illustrates this. **In The Republic of Kiribati –v- Tieta Timiti & Rabaere Robuti** the Court was asked to consider whether the rule of corroboration in the law governing rape in Kiribati discriminates against women and was contrary to the provisions of the Constitution and **CEDAW**. It involved the rape of a woman allegedly by two men whose defence was that intercourse was consensual. The prosecution, even though the victim's evidence was corroborated by three witnesses, argued that the requirement for such corroboration violated the rights of women under the Constitution which guarantees all citizens equal protection under the law without discrimination. The Court was asked to consider the principles formulated in **CEDAW** and other international instruments that protect the rights of women. Although this case did not result in having the rule of corroboration changed the Court was presented with the opportunity to consider the claim that the requirement of corroboration is discriminatory against women under **CEDAW**.

Within the Region in an appeal before the Eastern Caribbean Court of Appeal of **Gladstone Gooderidge –v- The Queen (C.A No. 13/1997)** where the Appellant had been convicted for indecent assault of a child aged six years then Chief Justice Dennis Byron in the course of his judgment made reference to the fact that St Vincent and the Grenadines (where the offence was committed) had ratified **CEDAW** and hence the international norms that are therefore applicable in the society included the duty of the State to protect the interests of the girl child against domestic violence and sexual abuse.

On the vexed question of spousal abuse where a wife is charged with killing a husband in retaliation for prolonged and continuous physical violence she is usually prohibited from raising this as a defence to a charge of murder since it is argued that it does not satisfy the requirements of self-defence. This is still so in many jurisdictions, but some have moved towards permitting continuous abuse to be used as a defence. It is familiarly called “battered woman’s syndrome”. I cannot state with any degree of certainty whether in our Region this is now available as a defence to women charged with killing their abusive husbands or partners. If it is not, one hopes that it will not be long before the criminal of our states are amended to permit it.

A feature of life in Caribbean societies is the common law relationship which unfortunately is not always recognised, and until recently very few countries had any laws enacted to protect women in such relationships. Women in these unions were not, and maybe in some jurisdictions are still

not entitled to maintenance from their partners nor to any right to property acquired during the relationship except upon strict proof of a specific contribution to its acquisition.

This has changed in some Caribbean jurisdictions, and Barbados must be commended for leading the way since 1981 with the passage of **The Family Law Act** which makes no distinction between parties in a marital or common law relationship with regard to maintenance; the right to be maintained arises only where the other party in the marriage or union is unable to support herself or himself adequately. The Act applies equally to women and men, and for the first time, I am sure, in the Region there is not an automatic right to be maintained or a corresponding duty to maintain arising solely by virtue of marriage or cohabitation. The Act also imposes an obligation on both parents whether married or in a common law union, to maintain their unmarried children under the age of eighteen (18) years. A similar approach was adopted in relation to rights to property. No distinction is made between matrimonial property and property acquired during cohabitation of persons in a common law union. The Act empowers a Court to make a declaration to title or rights to property in proceedings between parties to a marriage or common law union.

In Guyana the **Married Persons (Property) (Amendment) Act, 1990** empowers a court to make orders concerning property acquired during marriage or a cohabitation, and for this purpose any reference to a "wife" in the relevant section of the Act shall include reference to a single woman living with a single man in a common law union; similarly reference to a

“husband” shall include a single man living together with a single woman in a common law union.

The related problem of family inheritance also needs to be addressed. Over the years this has been an area where women have encountered discrimination. Again women in common law unions as well as children born out of wedlock were not, and in some Caribbean jurisdictions are still not entitled to share in the estate of a deceased cohabitant or father who dies intestate. Their entitlement rests solely on a bequest made in a will by the deceased if he is so minded.

This imposes untold hardship on women in common law unions with men who are married but separated from their wives, and who form lasting relationships with these women sometimes in excess of years spent in a marital union. Upon death of the male cohabitant intestate these women and children of the union could be left penniless, and all of his assets sometimes acquired through the industry and cooperation of the common law wife could be inherited solely by the lawful wife and children of the marriage. In like manner a lawful wife could be disinherited by a husband who might have harboured undisclosed grudges against her for years by leaving nothing for her in a will. Unlike the common law wife the lawful wife's position was secure if the husband died intestate.

By passage of the **Family and Dependants Provision Act 1990** the position of these women in Guyana has been addressed. The Act empowers the Courts to make provision for the spouse, child, child of the family or

dependant of a deceased person out of his/her estate. For the purposes of the Act which is gender-neutral any reference to a wife includes a single woman or man living together with a single man or woman in a common law union for seven continuous years immediately preceding the date of death. There is a proviso, however, that only one such union shall be considered for any benefit under the Act. Multiple relationships are not entertained; also reference to a single woman or single man includes a widow or widower or a woman or man who is divorced.

The Act also provides for a wife, husband, child or dependant who was maintained by the deceased to apply to the Court where a disposition to them made under a will or an entitlement on intestacy is not regarded as reasonable financial provision for the applicant.

I am informed that similar legislation exists in Barbados and hopefully in other Caribbean jurisdictions; if not, I commend this to those states where no such provision is made for the disadvantaged women and children referred to earlier.

At the international level the Committee on **CEDAW** recognised that there are some countries where the law and practice concerning inheritance and property result in serious discrimination against women who may receive a smaller share of their husband's or father's property upon his death than would their male counterparts. To address this problem the Committee in General Recommendation No. 21 in 1994 urged states parties to include in their reports information on the legal or customary provisions relating to

inheritance laws as they affect the status of women in order to ensure that men and women in the same degree of relationship to the deceased rank equally in succession and enjoy equal shares in the estate.

There are a few areas of discrimination which have not been addressed either by legislation or within the judicial systems of our Region to any significant degree as far as I can ascertain. The field of employment springs to mind. Most countries have legislation which protects workers' rights of employment, and provision for payment of wages commensurate with work performance. After years of bargaining, women succeeded in receiving equal remuneration as men for equal work performed. However, this did not always take into account the fact that tasks carried out by women could not always be equated with tasks carried out by men. **Article 11** of **CEDAW** sought to correct this discrimination by introducing the concept of equal pay for work of equal value. It states inter alia:

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”

At its Eighth Session in 1989, the Committee adopted General Recommendation No. 13 on **Article 11** and made reference to the International Labour Organisation Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value which has been ratified by a large majority of states parties to **CEDAW**. The Recommendation urges those states parties that have not as yet ratified the ILO Convention No. 100 to do so in order to implement **Article 11** of **CEDAW** fully; further, they should support, as far as practicable, the creation of implementation machinery and encourage the efforts of the parties to collective agreements, where they apply, to ensure the application of the principle of equal remuneration for work of equal value. I remind you here of a similar provision in CARICOM's Charter of Civil Society. In order to implement **Article 11** states parties should consider the development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature in which women presently predominate, with those jobs in which men presently predominate, and include the results in their reports to the Committee.

I have not been able to ascertain whether the labour laws of some or any of the states of our Region have been amended to give effect to **Article 11** of **CEDAW**. If they have not, urgent attention should be given to doing so if women's involvement in the work force is to be meaningful.

Another important area of women's human rights to a large extent has not been given the serious attention it deserves. It is the all-pervasive scourge

of HIV/AIDS. One wonders how many states have legislation in place to protect women, and men, from carriers of the virus who intentionally infect others bearing in mind, however, that women are a particularly vulnerable group within marital or other relationships, not very often having the power to insist on safe and responsible sexual practices. **The Beijing Declaration and Platform for Action** which was formulated and adopted at the **Fourth World Conference on Women** in 1995 addressed the ever-increasing problem of HIV/AIDS, and paragraph 108(b) under Action to be taken by Governments urged them to:

“Review and amend laws and combat practices, as appropriate, that may contribute to women’s susceptibility to HIV infection and other sexually transmitted diseases, including enacting legislation against those socio-cultural practices that contribute to it, and implement legislation, policies and practices to protect women, adolescents and young girls from discrimination related to HIV/AIDS.”

Action has to be taken by governments in our Region to eliminate socio-cultural practices which contribute to the spread of HIV/AIDS, and if no such action has been taken by some of our Governments I strongly urge them to do so in order to remove this scourge from our midst, and to empower our courts to deal with the consequences which arise from it.

## **CONCLUSION**

In concluding this discourse I refer again to the **Beijing Platform for Action** mentioned earlier which can be regarded as a comprehensive

blueprint for removing discrimination against women and developing strategies to advance their improvement in all areas of life. One such strategic objective is to ensure equality and non-discrimination under the law and in practice. To achieve this, Governments are required, inter alia, to:

- (a) “Review and amend criminal laws and procedures, as necessary, to eliminate any discrimination against women in order to ensure that criminal law and procedures guarantee women effective protection against, and prosecution of, crimes directed at or disproportionately affecting women, regardless of the relationship between the perpetrator and the victim, and ensure that women defendants, victims and/or witnesses are not revictimized or discriminated against in the investigation and prosecution of crimes.”
  
- (b) “Strengthen existing or establish readily available and free or affordable alternative administrative mechanisms and legal aid programmes to assist disadvantaged women seeking redress for violations of their rights.”

The last mentioned objective is absolutely necessary in the enforcement of women's human rights. Invariably many women are confronted with a dilemma of being unable to afford competent but high-priced lawyers to seek redress for wrongs committed against them because of the need to provide necessities for themselves and their children. This is especially so in the case of female single-headed households. There is a crying need in most of the Caribbean states for state-funded, well organised legal aid schemes

which can provide legal services for the disadvantaged in the society and particularly women who are the victims of recalcitrant husbands and partners who habitually default on payments of maintenance and child support. Promoting women's rights will be meaningless if breaches of these rights cannot be redressed due to women's fragile financial situations. Both Governments and the legal profession in the Region have an unqualified duty to ensure that the disadvantaged can ventilate their rights in the courts of their states.

Ratification of international treaties is commendable, but will avail nothing if the rights which these treaties seek to protect cannot be enforced or protected by those for whose benefit they are ratified. This brings me to the need for education and sensitising judicial personnel and the legal profession as a whole about women's human rights. Over the years this has not been an area with which judges and lawyers are familiar; to be fair women's rights were not regarded as being of any significance, and so were not the focus of special consideration or attention. Happily, we are in a new era, and with women's rights being regarded as any other human right those who administer justice have to focus attention on them, and be sensitive to the need for redress of violations of these rights. In order to do this there is also a need to be familiar with international treaties generally something which was never before considered relevant in the judicial process. With increasing frequency international treaties are being utilised to enforce individual rights of the citizens of states which have ratified them. It is therefore imperative for those who administer justice to recognise their significance and give effect to them.

In concluding this presentation I adopt the following passage from a presentation of that well-known jurist and advocate of women's rights, former Chief Justice P.N. Bhagwati of India at a Judicial Colloquium held in Hong Kong in 1996. The topic was "Creating a Judicial Culture to Promote the Enforcement of Women's Human Rights", a topic somewhat similar to my presentation tonight. He said this, which I humbly adopt:

"Judges have a creative function. They cannot afford to just mechanically follow the rules laid down by the legislature; they must interpret these rules so as to reconcile them with the objectives of justice which are encapsulated in the international norms of women's human rights. So long as judges are sensitive to women's human rights and are prepared boldly to advance the law through a process of creative interpretation, women's human rights will be safe."

Let us ensure that in our Caribbean Region they are and will always be safe.

