

THE INTERNATIONAL LEGAL PRIVILEGE OF INTRANSIT CARGO TAKEN BY INTERNATIONAL CARRIERS IN THE CARIBBEAN

By Kulraj Kishore Kamta¹

Over a quarter million dollars of ammunition was seized by the Barbados police² under the Customs Act³ at the Grantley Adams airport from the defendants, owners of the carrier and bailee of the ammunition in *Comptroller of Customs v. Transporte Aereo Rio Platence*.⁴ S5 of the Barbados Customs Act empowers the police, as well as, Customs Officers to execute the Customs laws. Section 5 of the Barbados Customs Act reads:

‘For the purpose of carrying out the Customs laws all officers shall have the same powers, authorities and privilege as are given by law to members of the police force and it shall be the duty of every member of the police and of every constable to assist in the enforcement of law relating to any assigned matter.’

The Comptroller of Customs (herein called the Comptroller) sought to have a court order to forfeit and condemn the ammunition for want of an import licence.^{5a} By the Second Schedule of the Customs Act 1962–18 an import licence is required for importation of arms and ammunition, among other things, into Barbados. In the absence of English authorities on point reliance will be placed on Canadian, Guyanese and Australian authorities for a case law analysis.^{5b} A similar provision to that of the interpretation section of the Barbados Customs Act will be used to throw light on the manner in which the Guyana Court of Appeal interprets the Section. The ambiguity of the Barbados Customs Statute enabled the importer of the ammunition to evade the forfeiture of goods by the Crown despite the importation of a restricted item in the absence of an import licence. The implications of the Magistrate’s decision in the foregoing case will be discussed. An amendment of the Customs laws of Barbados, and Guyana, will be suggested in this essay.

The Transporte Aereo Rioplatence (herein referred to as TAR), carriers of the ammunition, had prior landing permission before touching down at the airport. Section 34(i) of the Barbados Act, like S67 of the Guyana Customs Act, requires that:

‘Report of every ship and aircraft whether laden or not, arriving at any part or Customs airport or any other place specially allowed in accordance with the provisions of any

enactment, from any place outside the Island and of all goods other than passenger's baggage, conveyed by such aircraft shall be made by the master of such ship, or, as the case may be, the commander, within twenty four hours of arrival to the proper officer on the prescribed manner

Section 34(4) states 'Where the master, commander or agent of any ship or aircraft to which subsection (1) applies fails to make *due* report as required by this section or *where any particulars contained in such report are false*, such master, commander or agent shall be liable to a penalty of five hundred dollars and all goods shall be liable to *forfeiture*. (This subsection is similar to section 70 of the Guyana Customs Act, Chapter 82:01) (Italics are my emphasis).

As a matter of construction, it is submitted, that 'due' and 'duly' means that the report under section 34(4) (Barbados) and section 70 (Guyana) of the Customs Acts must be precise in description, no more or no less. Otherwise a false declaration is made.

Upon landing the mandatory report under S 34(1) was made to the satisfaction of a Customs Officer on duty in *Comptroller v. TAR*. Thus the penalty provision of S 34(4) did not apply. However, clearance of the aircraft is equally essential for departure. In fact, S 80 of the Barbados Customs Act, like S 156 of the Guyana Customs Act, states:

'No ship or aircraft shall depart from any port, customs airport or other place in the Island, until the master or his agent or, as the case may be, the commander or his agent, has satisfied the proper officer that all the provisions of the Customs Laws and, in the case of a ship. Whereupon unless the proper officer has decided to withhold clearance in accordance with any other provision of law, such officer shall deliver to the master or his agent or, as the case may be the commander or his agent, a clearance in the prescribed form and the authority for the departure of such ship or aircraft as aforesaid.

In *Comptroller v TAR* the foregoing provision was satisfied. However, departure was delayed when the captain of the aircraft was signalled not to take off. Later, a police officer acting under the Customs Act seized and removed the ammunition.

In the lower court in Barbados the Crown contended that the ammunition being restricted goods, was liable to forfeiture under the Customs Act in the absence of an import licence which the defendants did not

obtain from the Minister of External Affairs contrary to the Second Schedule, Part II of the 1962 Barbados Customs Act which reads:

RESTRICTED IMPORTS

‘Arms and ammunition except with the written permission of the Minister’.

Section 5 of the Guyana Trade Act gives the Minister of Trade power to make similar regulations which, in application cover all imports, (with the exception of certain gifts into Guyana) and surely, arms and ammunition. The Barbados Customs Act expressly restricts the importation of arms and ammunition but where ammunition is intransit cargo it is covered by a proviso in the Barbados Customs Act. Aircraft stores, goods intransit or in transshipment are exempted from being termed restricted or prohibited goods in Barbados under Section 91 of the Customs Act. Under Regulations Nos. 20, 41, 42, 43, 196, 197, 198, 200 and 201 made under Section 275 of the Guyana Customs Act, prohibited or restricted goods which have been imported without an import licence can, it is submitted, be facilitated re-exportation without attracting the forfeiture clause of the Customs Act. In Guyana intransit goods enjoy the further immunity from duty. Section 154 of the Guyana Act states:

‘The provisions of the Customs Laws with reference to the exportation of warehouse goods, so far as they are applicable shall be deemed to apply to and include goods liable to duties of Customs transferred from the importing to an exporting aircraft or ship, and exported on drawback’.

Although ammunition is restricted the Crown failed, in *Comptroller v. TAR* to consider the implications of the proviso on intransit cargo. Section 91 of the Barbados Customs Act (like Section 45 of the Guyana Customs Act) which is a proviso on intransit cargo, is qualified to the extent that some other statute may put a total ban on aircraft stores, intransit cargo or in transshipment from being able to circumvent or avoid the import licence requirement.

Intransit is a matter of law. Luchhoo C. in *Burnett v. Frankel*⁶ said: . . . the obligation to ‘declare’, ‘report’, ‘enter’, ‘warehouse’, and all similar obligations which govern intransit goods under the Customs Regulations prior to re-exportation, determine what ‘intransit’ is in a legal sense.

In reality, ‘intransit’ goods can shortly be described as imported goods entered on importation, for transit or transshipment and which have confirmed with prevailing Customs Laws prior to re-exportation.⁷

There is no statute law in Barbados, subject to one inapplicable exception (that is, section 98 of the Customs Act) putting a total ban on

certain intransit items. Section 98 of the Barbados Customs Act states:

'The provisions of the Customs Laws with reference to the importation, prohibition, entry, examination, landing, warehousing and the exportation and clearance of goods so far as they are applicable, and subject to any regulations made under the Act regarding goods intransit, shall be deemed to apply the goods intransit to a destination beyond the Island.'

No such regulation was made.

In defending the case, TAR relied on the statutory interpretation of the word 'import' and the proviso mentioned earlier. The statutory meaning of the word 'import' is that once the goods are landed importation is effected. This obtains both in Guyana and Barbados.⁸ Even if there were no such section specifying when goods are imported one can rely, it is submitted, on Sections 68 and 154 of the Guyana Customs Act which produce the same effect. Taking these two sections together, it is submitted that as a matter of literal construction, goods, once landed, are imported goods. Apart from the meaning of the word 'import' in Section 2, of the Barbados Customs Act, three other common law jurisdictions will be relied on shortly for a case law analysis.

In Canada goods are said to be imported when, as the case of *Canada Sugar Refining Company v. R*⁹ the goods are landed and delivered, to the importer or his order or when they are taken out of the warehouse if, instead of being delivered, they have been placed in bond; and as a result, this must be at the point of discharge. In the Canadian Refining case it was held that by the true construction of the Customs Tariff Act, 1894, S4, as amended by the Tariff Act 1895, which in effect directs that duty be paid upon raw sugar 'when such goods are imported into Canada or taken out of warehouse for consumption therein', the date on which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or, when they are taken out of warehouse, if instead of being delivered they have been placed in bond.¹⁰

The Australian case of *Wilson v. Chambers*¹¹ has held that even where goods are to be transhipped directly from one aircraft or ship to another such goods are nevertheless imported within the meaning of the Customs Tariff. The Guyana Customs Act contemplates a similar position.¹² In Wilson's case a quantity of paint was shipped in England and sent to a consignee in Sydney. The paint would have been dutiable under the Customs Tariff if imported into the Commonwealth. The ship did not go to Sydney but entered another port in New South Wales. The ship was about to discharge the paint there, and the consignee was willing to take delivery. While the ship was in the port an arrangement was made between Chambers, acting on behalf of the consignee, the captain of the ship, whereby the paint was taken over for the use of the ship. No Customs

entry was made in respect of the paint and it was not landed. By permission of the Customs Officer at the port, a guarantee having been given by the Captain to furnish a list of all dutiable stores consumed on the voyage to Melbourne, the next port of call, the ship left the port with the paint on board. No duty was paid in respect of any of the paint. It was held that the paint was imported, that the consignee had failed to enter the imported goods as required by S68 of the Customs Act 1901-1920, and that Chambers, had been directly concerned in that offence within the meaning of S236 of the Customs Act.¹³

To have a full understanding of the meaning of 'import', one should also look at the statute law of Australia.¹⁴ According to the Australian statute all imported goods shall be entered for home consumption or for warehousing or for transshipment. Therefore, imported goods may be: (a) landed goods; (b) goods for home consumption; or (c) intransit. However, it may not always include landed goods. Issacs J.¹⁵ observed that a vessel may call in at Melbourne or Sydney or may continue her voyage and yet it may be said that the goods it carries are imported within the meaning of the law, namely sections 68 and 75(b) of the Customs Act of Australia (1901-1920). The learned judge further observed that the expression 'imported goods' means "goods brought into Australia and in respect of which the carriage is ended or its continuity is in some way broken."¹⁶

In *C. R. Jacob & Sons v. Comptroller of Customs & Excise*¹⁷ the Full Court of the Supreme Court of Judicature, in what was then British Guiana, held that importation relate to physical presence of an item in the country. In the foregoing case the importer had paid duty prior to the arrival of the ship taking in a certain quantity of malt into Guyana. Subsequently, but before the ship's actual arrival, a bill was passed increasing the ad valorem duty of the malt. On challenging the increased rate which the Comptroller demanded, the Full Court decided against the importer. The Court held that the goods are not imported until they are in the country as the goods, the subject matter of the claim were not in the country when the duty was paid, the appellant was liable to pay duty at the existing rate at the time the goods arrived and not the duty in force at the time when they were on a ship bound for Guyana.¹⁸

In *Comptroller of Customs v. TAR* the Magistrate rejected the application of the Crown on behalf of the Comptroller. The Magistrate's decision turned on the meaning of the interpretation section of the Barbados Customs Act, namely section 2. According to the interpretation section 'import' means to bring or cause to be brought into the island transit goods, imported goods entered on importation for transshipment; and transshipment or intransit goods; in relation to the entry of goods means through the island or transshipment with a view to the re-exportation of the goods in question. The foregoing definition leads one to the conclu-

sion that all goods, once landed, are deemed imported within the meaning of the Customs Act of Barbados. The cumulative effect of Sections 19 and 68 of the Guyana Customs Act and Regulations 17, 18, 19 and 43 made thereunder is that ammunition can also, it seems, be imported without an import licence. This anomaly places Guyana in the same legal position as Barbados, where though an import licence is required under the Customs Act the provision can be circumvented to import ammunition without an import licence. Thus S 5(b) of the Guyana Trade Act 1973 (Rev.) and S 17(1) of the Firearms Act 1973 (Rev.) seem to have very little effect.

S5 of the Trade Act states:

The Minister may by order provide

(a)

(b) for prohibiting the importation or exportation of goods, or of any class or description of goods, from or to any country except under the authority of a licence granted by the Competent Authority.

S12 of the Firearms Act states:

No firearms or ammunitions shall be imported into Guyana by sea or air except at a prescribed port or at a prescribed aerodrome. By Regulation 4 made under the Firearms Act the prescribed port and aerodrome are Georgetown and Timehri.)

S 17(1) of the Firearms Act states:

Subject to this Act, no person shall *import*, purchase or acquire any ammunition to which this part applies unless he delivers to the Customs Officer in charge of the warehouse, or to the seller or transferor, as the case may be, a permit, (in this section referred to as a 'permit') authorising the importation or purchase or acquisition of such ammunition.

The implications of the foregoing sections, are it seems:

(a) Though the importation of ammunition is restricted and cannot on the face of the law be imported without an import licence the law can nevertheless be manipulated to effect importation without the licence;

(b) Though the designated points are mandated for importation of ammunition the law can be circumvented for the importation at other than the designated ports and aerodrome; and

(c) The legal device that allows this is the privilege accorded intransit cargo.

In the absence of an import licence in *Comptroller v TAR* and the cargo being imported goods within the meaning of the law, entities the

Comptroller to have the ammunition forfeited and condemned under S 50(1) of the Customs Act, Barbados. S 50(1) of the Act states: where any goods

(a)

(b) the importation of which for the time being prohibited or restricted by or under any enactment, are imported, . . . the goods shall, subject to subsection (2), be liable to forfeiture.

However, a section of the Barbados Customs Act has the effect whereby when unlicensed cargo is landed and reported the External Affairs Minister is deprived of his authority concerning his permission being necessary to import the restricted goods.¹⁹ The operative effect of Part II of the Second Schedule and S 50(2) of the Barbados Customs Act results in, it seems, unintentional deprivation, of the powers of the External Affairs Minister. Once landed, which is by Barbados and Guyana Statute Law synonymous with imported, the ammunition no longer requires the Minister's permission in order for the Comptroller to exercise his discretion which includes allowing the imported goods to go intransit. Technically, this means any carrier can import cargo, which includes ammunition, without an import licence. Thus permission from the Minister though on the face of the law is necessary for restricted goods is nevertheless not absolutely necessary for restricted goods to be imported into Barbados and Guyana within the meaning of the Customs Acts. The foregoing interpretation leads to absurd results but nevertheless seems correct.

The present state of the law is most unsatisfactory as here is where law and commonsense part company. The defence was able to exploit the loophole in the law and successfully defended the action brought by the Crown²⁰ in *Comptroller v. TAR*. In the event of goods being imported without an import licence, and the goods are intransit or for the ship's stores, any seizure can be counteracted by relying on the relevant section. S 91 of the Barbados Customs Act states:

Goods imported in transit or in transshipment or as the stores of any ship or aircraft shall not be deemed to be goods prohibited or restricted to be imported in transit or in transshipment or ships or aircraft stores by any enactment prohibiting or restricting the importation or exportation of goods.

Section 91 of the Barbados Customs Act saves two categories of cargo from being caught by the Customs import restrictions. To fall within the proviso the goods must be either intransit or intranshipment or stores of the carrier. Consequently, the Grantley Adams and Timheri airports and Georgetown or Bridgetown harbours can legally be used as transshipment ports for arms and ammunitions to countries unfriendly to Barbados and Guyana or countries which pursue policies inconsistent with the

foreign policies of the two Caricom partners. In fact, this is precisely what Guatemala seems to be doing with success. The present state of the Customs law makes Barbados unable to obstruct the Guatemalan regime from posing further threats on the upcoming independence of Belize. At least the ability to forfeit and condemn arms and ammunition would enable Barbados in its foreign policy to support Belizian independence drive, without giving any territorial concession.^{21a} It is suggested that Barbados as well as Guyana should amend its Customs Act to remedy the present state of the law and also facilitate Belize's right to self determination.^{21b} Any enactment which is merely regulatory will not, it is submitted, be in conflict with the basic rules set out in the 1944 International Civil Aviation Conference in Chicago.

One important point is that by other countries enacting better legislation will facilitate protection on a mutual basis. The possibility of Barbados, for instance being invaded or plunging into a civil war is not far fetched despite the political stability at home and friendly relations with the CARICOM group within the region. Only two years ago Sidney Burnett-Alleyne was held in Martinique with a shipment of arms which it was purported, was to be used to topple the recently elected Barbados Labour Party Government.²² In 1978 there was another plot by Alleyne. The French Government refused extradition claiming that their extradition law does not cover political offences.²³ Barbados and Guyana would therefore be safeguarded, at least legally, by enacting better legislation with reciprocal enforcement provisions. New legislation should avoid giving legal protection for the importation of ammunitions, however styled, whether as intransit or not, so as not to provide staging posts for external aggression.²⁴

The two municipal statutes (Customs Act) ought to be amended to effect seizure and condemnation of arms and ammunition even if they are ship's stores or intransit cargo unless a prior permission is given or a licence is obtained beforehand. Permission here means customs or security permission as distinct from landing permission. In the presence of the proviso on ship's stores and intransit cargo the Customs officer could have tried to ascertain the accuracy of the report under S 34 of the Barbados Customs Act in *Comptroller of Customs v TAR*. It must be noted that ammunition dealers and carriers are in the habit of overdeclaring their cargo with a view of saving them from underdeclaration. Overdeclaration, it is submitted, as a matter of construction, is a false declaration under S 34(4) and 70 of the Barbados and Guyana Customs Acts. But though it may be unreasonable to charge someone for overdeclaration this may be an offence technically. By statute, meaning S 5 Perjury Act (which seems analogous with the false declaration sections of the Guyana and Barbados Customs Acts) the defendant must know the statement to be false or not believe it to be true. So also at common law the matter sworn must either be false in fact, or if true, the defendant must not have

known it or not have believed it to be so.²⁵ Here may be an avenue for prosecution.

The decision of the Magistrate in *Comptroller v. TAR* is an illustration of an old law unable to meet the promises of regionalism and the need for cooperation against hegemonic regimes in the Caribbean and Latin America. There is an urgent need to amend and update not only the Customs Laws but many others.²⁶ Recent reports by the Canadian and British Broadcasting Corporations indicate that Antigua and Spain have been used as transshipment points of arms to South Africa.²⁷ It seems that the Customs Laws of many countries allow intransit items to enjoy similar privilege.

FOOTNOTES

1. The undergraduate writer is a Customs & Excise Officer, and Jessup participant. He is presently co-authoring a four chapter manuscript *International Criminal Law and Regionalism: The West Indies*. He is also co-author (with Lagaris, formerly U.N. legal expert) of *International Criminal Law: The Regional Police Training Centre in Development*.
2. Magistrate's finding, p. 1.
3. Customs Act 1962-18, Second Schedule Part II which is still applicable to Barbados despite recent revision of the Customs Act. This writer subscribes to the view that Art 38(1)(d) of the statute of the International court of justice should be construed to mean that decisions of municipal courts form a secondary source of international law. Cogent arguments can be advanced to this effect. See Lauterpacht, *Decisions of Municipal Courts as a source of International Law*, X B.Y.I L65 (1929).
4. Unreported Civil matter No. 5261 of 1977 - Magistrate's Court, Bridgetown, Barbados, West Indies. Jurisdiction in TAR case was based on the well known principle of territoriality.
- 5a. Advocate News, 'Government Application Turned Down Saturday Jan. 7th, Barbados, West Indies.
- 5b. See explanation why it is contended no English authority on point exists in footnote 9.
6. *Burnett v. Frankel*, Unreported Court of Appeal decision No. 10/74, p. 8, Georgetown, Guyana.
7. *Id.*, 10.
8. Sections 2 and 246(1) of Barbados and Guyana Customs Act respectively.
9. *Canada Sugar Refining Co. v. R. (1898) AC 733*. This Privy Council decision is regarded by the present writer as one of a Colonial Court, namely an extension of the Canadian judicial hierarchy and not as an English court. The school of thought that the Privy Council is an

- English court is rejected.
10. Id.
 11. *Wilson v. Chambers* 38 CLR 138.
 12. S 16.
 13. *Wilson v. Chambers* 38 CLR 138.
 14. S 68.
 15. *Wilson*, 138.
 16. Id.
 17. Reports of Decisions in the Supreme Court of British Guiana and in the West Indian Court of Appeal, 1957 pp. 11 – 15.
 18. Id at 12.
 19. Magistrate's interpretation in *Comptroller v TAR* at p. 6. This reasoning it was submitted, was sound. The Court of Appeal indicated the correctness of this viewpoint later. See, Guyana Chronicle, 'Barbados to release Ammo' Sept. 27, 1978 at p. 6. Though the C.A. came to the correct conclusion the present writer does not agree fully with the reasoning of Chief Justice Douglas, Mr. Justice Williams, and Mr. Justice Husbands.
 20. Advocate News, op. cit. The case was ably argued by Mr. David Simmonds.
 - 21a. The foreign policy of Barbados, Trinidad, Jamaica and Guyana is the same where Belize independence is concerned. See Guyana Chronicle, *External Affairs Minister John Donaldson Speech* (of Trinidad) at United Nations General Assembly, Oct. 19, 1978 and Sunday Advocate News, *Barbados to Assist Belize*, March 12, 1978 p. 6 Col. 1 – 4.
 - 21b. Self determination, it is argued by some writers is a political concept not yet recognised as legally binding in international law. However, some commentators argue that self-determination is a customary international law concept. Writers regard self-determination as jus cogens. See Prakash Sinha, *Has Self Determination become a principle of International Law Today* 14 IJIL 334 (1974); Dinstein, *Collective Human Rights of Peoples and Minorities* 25 Int'l & Comp. L.Q. 102 at 106 (1976); U. Umo Ziercke, *Self Determination in International Law* 187-89 (1978).
 22. The Nation, *Thursday in Martinique* Nov. 7, 1976, Bridgetown, Barbados.
 23. The principle of non-extradition for political offences is fully established in international criminal law. See for instance Art. 3 of the Afro Asian Convention on Extradiction; the test applied in *Re Neunier (1894)* 2 QB 415; *Re Castioni (1891)* 1 QB 149; *R v. Governor of Brixton Prison ex p. Kalczycki* (1955) 1 QB 540. For an illuminating treatment of non-extradition for political offences, see Cherif Bassiouni and V. Nanda, *Treatise on International Criminal Law VII* (Charles C. Thomas Publ.). As for extradition in Jamaica see Patrick Robinson, *Extradition: Jamaica case law and the need for reform*, *West Indian Law Journal*, May 1976. As for what seems latest, and most unfair

attitude of Queens Bench on admissability of evidence after an extradition order has been made see *R v. Farringdom police station*, officer in charge ex p. Nobles, *Criminal Law Review*, July 1977 at p. 422.

24. As defined by the United Nations select committee on aggression, see Benjamin Ferencz, *Defining International Aggression. The Search for World Peace* (Dobbes Ferry Oceana, 1975).
25. Archbold, *Criminal Pleading Evidence and Practice* (26th ed.) Heading: False statutory declarations and other false statements without oath p. 1187.
26. For instance, the municipal law to deal with international terrorism; hijacking; laws of the sea; Treaty making; Fugitive Offenders Act (which includes updating the inadequate and old fashioned English Act in the West Indies; the question of Municipal Courts exercising jurisdiction over trading vessels owned partly or fully by foreign sovereigns as was raised in the recent Guyana-Suriname SAGAM Affair. West Indian Courts should, it is submitted, adopt either the *Harvard Research Draft Convention on Competence of legislatures in Regard to Foreign States* or the *Asian African Legal Consultative Committee, Report* (of 3rd Session), See 26 Am. Jnl. Int'l Law Supp 451; *Matsuda Report on the Competence of Courts in Regard to Foreign States, Committee of experts for the Progressive Development of International Law* 22 Am. Jnl. Int'l. Law 127 (1928); Michael Cardosa *Proposed Legislation of Jurisdiction Immunities of Foreign States* in Vol. 8, No. 3 *International Law* 422 (1974); there is also need for enactment of a modified Civil Aviation (Montreal Convention Act) especially Sections 3, 4 and 5 which needs redrafting to be more comprehensive. The Cubana experience has shown the limitations of the sections. Some countries in the Caribbean have not even enacted the Convention. Barbados has enacted the Convention. The Williams Commission of Inquiry found that the Cubana Crash occurred at 4.6 miles off Barbados so jurisdiction to put the suspects of the sabotage on trial was declined.
27. William Cran, *World Special Event, Arms for South Africa. The American Connection*. Canadian Broadcasting Corporation & B.B.C. WGBH. Ed Foundation, Boston, 1978.
28. Including Guyana (ch. 82:01) Barbados, Antigua, England, Spain, Australia and India See *Mitra on Customs*, Eastern Law House, Calcutta, India, 1978.