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EXPLANATORY NOTE

Up until 1990, the final reports and annual reports of the Inter-American Juridical Committee were published by the OAS General Secretariat as part of the series titled *Reports and Recommendations*. Starting in 1997, the Secretariat for Legal Affairs resumed publication of those documents, this time under the title *Annual Report of the Inter-American Juridical Committee to the General Assembly*.

In keeping with the provisions of the *Manual for Classification of OAS Official Documents*, documents of the Inter-American Juridical Committee appear as part of series 'OEA/Ser.Q', the classification for documents produced by this organ. (See the list of resolutions and documents attached)

INTRODUCTION

Pursuant to articles 91.f of the *Charter* of the Organization and Article 13 of the Committee's Statute and the guidelines contained in General Assembly resolutions AG/RES.1452 (XXVII-O/97) and AG/RES.1669 (XXIX-O/99) for preparation of the annual reports of the Organization's organs, agencies and entities, the Inter-American Juridical Committee has the honor to submit its *Annual Report* to the General Assembly of the Organization of American States. This *Annual Report* is an account of the Juridical Committee's activities in 1999.

During the period to which this *Annual Report* refers, the Inter-American Juridical Committee's work program included such topics as the following: preparation of model legislation on illicit enrichment and transnational bribery; the enhancement of the administration of justice in the Americas; inter-American cooperation against terrorism; the legal dimension of integration and international trade; freedom of information: access to personal information and the protection thereof; the legal aspects of hemispheric security; study of the system for the promotion and protection of human rights in the inter-American sphere; convocation of the Sixth Inter-American Specialized Conference on Private International Law; preparation of a report on human rights and bio-medicine or on the protection of the human body; application of the United Nations Convention on the Law of the Sea by the States of this Hemisphere; the fight against tobacco: necessity and advisability of combating the tobacco habit; commemoration of the centennial of the 1899 International Peace Conference, and the international abduction of minors by a parent.

This *Annual Report*, which mainly concerns the progress made on the studies being conducted on the above topics, is divided into three chapters. The first is about the origin, legal bases and structure of the Inter-American Juridical Committee, and the period covered in the report. The second chapter elaborates upon the topics discussed by the Inter-American Juridical Committee at its 1999 regular period of sessions and also contains the texts of the resolutions approved at both sessions, with the specific documents attached. The third and final chapter discusses other activities carried out by the Juridical Committee, other resolutions it approved, and budgetary matters. Attached to the *Annual Report* are appendices with a list of resolutions approved, documents prepared, a chronological index and an index by name to help the reader locate them within this *Report*.

CHAPTER I

1. The Inter-American Juridical Committee: origin, legal bases, structure and purposes

The oldest predecessor of the Inter-American Juridical Committee was the International Commission of Jurists, created by the Third International Conference of American States, held in Rio de Janeiro in 1906. Its first meeting was in 1912, although its most important was the Congress of Jurists held in 1927, where twelve draft conventions in public international law were approved, as was the Bustamante Code of private international law.

Later, at the Seventh International Conference of American States, held in Montevideo in 1933, national committees were established for the codification of international law, as was the Commission of Experts, whose first meeting was in Washington, D.C., in 1937.

The First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics was held from September 26 to October 3, 1939. The Inter-American Neutrality Committee created there would operate for more than two years until, in 1942, resolution XXVI of the Third Meeting of Consultation of Ministers of Foreign Affairs, held in Rio de Janeiro, transformed the Neutrality Committee into the Inter-American Juridical Committee. At that same meeting, it was also decided that the seat of the Juridical Committee would be Rio de Janeiro.

In 1948, the Ninth International Conference of American States, meeting in Bogota, adopted the *Charter of the Organization of American States*, and with that created the Inter-American Council of Jurists composed of one representative from each OAS member State. Its functions were to serve as an advisory body on juridical matters and to promote the development and codification of public and private international law in the OAS. Its permanent committee was to be the Inter-American Juridical Committee, composed of nine jurists from the member States. The members of the Juridical Committee were to have broad technical autonomy and undertake the studies and *travaux préparatoires* entrusted to them by certain organs of the Organization.

Later, the Third Special Inter-American Conference, meeting in Buenos Aires, Argentina, in 1967, approved the *Protocol of Amendment to the Charter of the Organization of American States* or the *Protocol of Buenos Aires*. That Protocol eliminated the Inter-American Council of Jurists, whose functions were transferred to the Inter-American Juridical Committee, thus elevating the latter to one of the principal organs of the OAS.

Under Article 99 of the *Charter*, the basic functions of the Inter-American Juridical Committee are as follows:

... to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Under Article 100 of the *Charter*, the Inter-American Juridical Committee is called upon to:

... undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

The Inter-American Juridical Committee is headquartered in Rio de Janeiro, but in special cases may meet in any other place that it designates, after consulting with the member State in question. The Juridical Committee is composed of eleven jurists who are nationals of member States of the Organization and represent all the States. It enjoys the utmost technical autonomy.

2. Period covered in the Annual Report of the Inter-American Juridical Committee

A. Fifty-fourth regular period of sessions

The Inter-American Juridical Committee held its fifty-fourth regular period of sessions from January 18 through 29, 1999, at its seat in Rio de Janeiro.

During that session, the members of the Juridical Committee were as follows: Keith Highet, João Grandino Rodas, Jonathan T. Fried, Luis Herrera Marcano, Luis Marchand Stens, Brynmor T. Pollard, Kenneth O. Rattray, Gerardo Trejos Salas, Eduardo Vío Grossi, Sergio González Gálvez and Orlando Rebagliati.

Dr. João Grandino Rodas, Vice Chairman of the Inter-American Juridical Committee, presided over the Committee's proceedings in the absence of its Chairman, Dr. Keith Highet.

The members of the Juridical Committee who were present for the fifty-fourth regular period of sessions were the following, listed in the order of precedence determined by the lots drawn at the session's first meeting, pursuant to Article 28.b of the Juridical Committee's *Rules of Procedure*:

Kenneth O. Rattray	Brynmor T. Pollard
João Grandino Rodas	Luis Marchand Stens
Eduardo Vío Grossi	Gerardo Trejos Salas
Sergio González Gálvez	Luis Herrera Marcano
Orlando Rebagliati	

Dr. Keith Highet and Dr. Jonathan T. Fried were unable to attend the fifty-fourth regular period of sessions.

Representing the General Secretariat, the following provided technical and administrative support: Dr. Enrique Lagos, Assistant Secretary for Legal Affairs; Dr. Jean-Michel Arrighi, Director of the Department of International Law; and Manoel Tolomei Moletta and Dante M. Negro, legal officers with the Department of International Law.

The agenda for this regular period of sessions of the Inter-American Juridical Committee, approved through resolution CJI/RES. 25/LIII/98, was as follows:

AGENDA FOR 54TH REGULAR PERIOD OF SESSIONS

(Rio de Janeiro, RJ, January 1999)

A. WORK TO BE COMPLETED IN JANUARY 1999

Transnational bribery

Preparation of model legislation on illicit enrichment and transnational bribery (CJI/SO/II/doc.2/92), [CP/RES.689 (1092/96)]

Rapporteurs: Drs. Eduardo Vío Grossi, Luis Herrera Marcano, João Grandino Rodas, and Brynmor T. Pollard

(included at own initiative and with mandate from the General Assembly)

B. WORK TO BE DISCUSSED IN JANUARY 1999 AND COMPLETED SUBSEQUENTLY

1. Right of information: access to and protection of personal information and data [AG/RES.1395 (XXVI-O/96)]

Rapporteur: Dr. Jonathan T. Fried

(included at the initiative of another organ)

2. Improving of the administration of justice in the Americas (CJI/RES.I-2/85)

[AG/RES. 1395 (XXVI-O/96)], (CJI/RES.20/LIII/98)

Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard, Luis Marchand Stens and Gerardo Trejos Salas

(included at own initiative and with mandate from the General Assembly)

3. Inter-American cooperation against terrorism (August 1994)

[AG/RES.1395 (XXVI-O/96)]

Rapporteurs: Drs. Luis Herrera Marcano and Luis Marchand Stens

(included at own initiative and with mandate from the General Assembly)

4. The application of the United Nations Convention on the Law of the Sea by the States of the Hemisphere (CJI/SO/II/doc.23/96)

Rapporteur: Dr. Keith Highet

(included at own initiative)

5. Preparation of a report on human rights and biomedicine or on the protection of the human body (CJI/RES.14/LIII/98)

Rapporteur: Dr. Gerardo Trejos Salas

(included at own initiative)

C. WATCHING BRIEFS ON SUBJECTS OF ACTIVE CONCERN

1. Convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)
[AG/RES.1393 (XXVI-O/96)]
Rapporteurs: Drs. Brynmor T. Pollard and João Grandino Rodas

(included at the initiative of another organ)
2. Juridical dimension of integration and international trade
[AG/RES. 1395 (XXVI- O/96)]
Rapporteur: Dr. Jonathan Fried

(included at the initiative of the General Assembly)
3. Commemoration of the Centennial 1899 of the Peace Conference.

Response to requests for comments on working papers received from the co-sponsors.

Assigned to working groups with a number of rapporteurs.

(included at own initiative)

Pursuant to Article 12 of the Juridical Committee's *Rules of Procedure*, the Chairman presented his report on the activities carried out during the Committee's recess.

B. Fifty-fifth regular period of sessions

The Inter-American Juridical Committee held its fifty-fifth regular period of sessions at its seat in Rio de Janeiro, August 2 through 27, 1999.

The members of the Juridical Committee at the time of that regular period of sessions were the following: Keith Highet, João Grandino Rodas, Jonathan T. Fried, Luis Herrera Marcano, Luis Marchand Stens, Brynmor T. Pillard, Kenneth O. Rattray, Gerardo Trejos Salas, Eduardo Vío Grossi, Sergio González Gálvez and Orlando R. Rebagliati.

Dr. João Grandino Rodas, Vice Chairman of the Inter-American Juridical Committee, presided over the proceedings in the absence of the Committee's Chairman, Dr. Keith Highet.

The Juridical Committee members who were present for the fifty-fifth regular period of sessions were, in the order of precedence determined by the lots drawn at the first meeting and in accordance with Article 28.b of the Juridical Committee's *Rules of Procedure*, as follows:

Luis Marchand Stens	João Grandino Rodas
Sergio González Gálvez	Orlando R. Rebagliati
Jonathan T. Fried	Eduardo Vío Grossi
Luis Herrera Marcano	Gerardo Trejos Salas
Brynmor T. Pollard	

Representing the General Secretariat, the following officers provided technical and administrative support: Dr. Enrique Lagos, Assistant Secretary for Legal Affairs; Jean-Michel Arrighi, Director of the Department of International Law; and Manoel Tolomei Moletta, Kathleen Lannan and Dante M. Negro, legal officers with the Department of International Law.

At its twenty-ninth regular period of sessions (Guatemala City, June 1999), the OAS General Assembly re-elected Dr. Keith Highet of the United States and Dr. Eduardo Vío Grossi of Chile to membership on the Inter-American Juridical Committee. Their terms will run from January 1, 2000, to December 31, 2003.

The Inter-American Juridical Committee's agenda at its fifty-fifth regular period of sessions, approved through resolution CJI/RES.2/LIV/99, was as follows:

**AGENDA FOR THE
55TH REGULAR PERIOD OF SESSIONS
(Rio de Janeiro, August 1999)**

A. WORK TO BE COMPLETED IN AUGUST 1999

1. Improving the administration of justice in the Americas
(CJI/RES.I-2/85) [AG/RES. 1395 (XXVI-O/96)] (CJI/RES.20/LIII/98)
Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard,
Luis Marchand Stens and Gerardo Trejos Salas
(included at own initiative and with mandate from the General Assembly)
2. Inter-American cooperation against terrorism (August 1994)
[AG/RES. 1395 (XXVI-O/96)]
Rapporteurs: Drs. Luis Herrera Marcano and Luis Marchand Stens
(included at own initiative and with mandate from the General Assembly)

B. WORK TO BE DISCUSSED IN AUGUST 1999 AND COMPLETED SUBSEQUENTLY

1. Right of information: access to and protection of personal information and data
[AG/RES.1395 (XXVI-O/96)]
Rapporteur: Dr. Jonathan T. Fried
(included at the initiative of another organ)
2. Preparation of a report on human rights and biomedicine or on the protection of the human body
(CJI/RES.14/LIII/98)
Rapporteur: Dr. Gerardo Trejos Salas
(included at own initiative)
3. The application of the United Nations Convention on the Law of the Sea by the States of the Hemisphere
(CJI/SO/I/doc.23/96)
Rapporteur: Dr. Keith Highet
(included at own initiative)

4. Hemispheric security
(CJI/doc.19/99)
Rapporteur: Dr. Sergio González Gálvez
(included at own initiative)
5. The *Charter of the Organization of American States*: limitations and possibilities
(CJI/doc.20/99)
Rapporteur: Dr. Eduardo Vío Grossi
(included at own initiative)
6. Study of the system for the promotion and protection of human rights at the inter-American level
(CJI/doc.17/99 rev.2)
Rapporteur: Dr. Gerardo Trejos Salas
(included at own initiative)

C. WATCHING BRIEFS ON SUBJECTS OF ACTIVE CONCERN

1. Convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)
[AG/RES.1393 (XXVI-O/96)]
Rapporteurs: Drs. Brynmor T. Pollard and João Grandino Rodas
(included at the initiative of another organ)
2. Juridical dimension of integration and international trade
[AG/RES.1395 (XXVI-O/96)]
Rapporteur: Dr. Jonathan Fried
(included at the initiative of the General Assembly)
Commemoration of the Centennial of the 1899 Peace Conference
4. The struggle against tobacco: need and advisability of combating smoking
(CJI/doc.2/99 rev.1)
Rapporteur: Dr. Gerardo Trejos Salas
(included at own initiative)

This resolution was unanimously approved during the 29 January 1999 session, in the presence of the following members: Drs. João Grandino Rodas, Kenneth O. Rattray, Eduardo Vío Grossi, Sergio González Gálvez, Orlando R. Rebagliati, Brynmor T. Pollard, Gerardo Trejos Salas, and Luis Herrera Marcano.

The Juridical Committee addressed the request received from the General Assembly which, in resolution AG/RES.1691 (XXIX-O/99), had asked that the Committee issue the opinion requested of it in resolution CD/RES.10 (73-R/98), adopted by the Directing Council of the Inter-American Children's Institute (IIN) at its seventy-third regular meeting.

In accordance with Article 12 of the Committee's *Rules of Procedure*, the Chairman of the Inter-American Juridical Committee presented his report on the activities carried out during its recess. He reported that Dr. Keith Highet, Chairman of the Committee, had submitted to the OAS Permanent Council a report on the work of the Inter-American Juridical Committee. That report appears in the third part of this *Annual Report*.

The Chairman of the Inter-American Juridical Committee also reported that at the twenty-ninth regular period of sessions of the OAS General Assembly, held in Guatemala City in June 1999, Dr. Brynmor T. Pollard had presented the *Annual Report* on the Juridical Committee's work in 1998. That report also appears in the third part of this *Annual Report*.

The Inter-American Juridical Committee also took up document *Report by the Chairman of the Inter-American Juridical Committee to the Committee on Juridical and Political Affairs of the Permanent Council* (CJI/doc.24/99), presented by its Chairman, Dr. Keith Highet, concerning the activities carried in the period from January to April 1999. That report appears below:

**REPORT BY THE CHAIRMAN OF THE
INTER-AMERICAN JURIDICAL COMMITTEE TO THE
COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS
OF THE PERMANENT COUNCIL**

(presented by Dr. Keith Highet)

On Thursday, March 25, 1999 I had the honor of representing the Juridical Committee at the meeting of the Committee on Juridical and Political Affairs (Comisión de Asuntos Jurídicos y Políticos) of the Permanent Council of the Organization, in order to deliver our *Annual report* for 1998 and a status report for the year in progress. (The 1998 *Annual report* has been carefully prepared by the Secretariat for Legal Affairs and already distributed to each of us.)

My oral presentation therefore had to do three things: (i) to summarize, but not to repeat, the main achievements of the Juridical Committee in 1998 as noted in the *Annual report*; (ii) to indicate what was now on our agenda and what we had done in January in Rio; and (iii) how the Juridical Committee might be more effectively used by the Organization itself. My remarks are attached hereto as Annex A.

Speaking *viva voce*, I took pains to thank the Ambassadors present for their support in our "budgetary crisis" of last November as well as to indicate how much the Juridical Committee appreciated the backup and support of the Secretariat for Legal Affairs. My impression of the reception given by the Committee on Juridical and Political Affairs was that they were very pleased with our work in the past year and that they remain highly supportive of the IAJC and its role in the Organization—as well as its unique position amongst international organizations. The tone of the questions and responses, particularly insofar as point (iii) above is concerned, was enthusiastic and positive.

There was, for such a meeting, a relatively lively discussion. Nine delegations put questions to me about my presentation and about the annual report, and I responded to each as summarized in the attached Annex B.

On the following day, March 26, 1999, I again had the honor of representing the Juridical Committee: this time at a ceremony at the OAS conducted in conjunction with the Inter-American Development Bank, on the occasion of the signature of the *Cooperation agreement* in support of the implementation of the *Inter-American convention against corruption*. The President of the Bank and the Secretary-General of the OAS made brief speeches, and the joint effort to implement the *Convention* was launched.

On a personal note: I was so pleased that your meeting in Rio in January went well and—as I had of course anticipated—that João Grandino Rodas proved such an excellent chairman. (Many thanks to him and to all of you for putting up with your lame Chairman!) Several of you have called and written me; I much appreciate these contacts and expressions of good will, and thank you all warmly.

As I write, I am in the last fortnight of chemotherapy that has been going on since November; January and February were consumed with daily radiation treatments as well as additional chemotherapy; but I am now almost out of the woods. When I see you in August, I hope to have a full head of hair so that I don't frighten you too much.

The meetings here in Washington, D.C., intended to continue the work on indigenous peoples ran into a bureaucratic roadblock and so Luis Herrera was not required, as planned, to attend. Brynmor Pollard represented the Juridical Committee excellently well at the meeting in Lima, Peru, of law officers of the Americas. The Dutch Government has invited me to participate in May, both personally and on behalf of the Juridical Committee, as chair of The Dispute Resolution Panel of the Centennial Celebration of the 1899 Peace Conference in The Hague—by which time I will be fully able to travel.

In early June I will be presenting a report to the General Assembly of the OAS in Guatemala; and I look forward to seeing you of course on August 2nd in Rio. Please be minded that—if you have to choose one fortnight over the other, or have to decide the weeks when you might be able to participate in the Juridical Committee's work—we will probably try to “front-end load” our agenda as much as possible so as to avoid wasting time during the first week, moving briskly through our agenda so as to finish most of the substantive discussions, if possible, by the close of the third week of the regular period of sessions.

Of course we will not know how much work may have been added to our existing load until July, but if all goes well it might be possible for the Juridical Committee to finish most of its own work by August 20th. This would be advantageous for the OAS budget and would also allow any Committee members who have been charged with drafting responsibility to continue their work at the office in Rio during the week of August 23rd.

My warmest greetings to each of you from Washington, where the cherry blossoms are just coming out and the skies are (at least today) a beautiful cerulean blue.

* * *

ANNEX A

1) Expression of condolences on the tragic assassination of Dr. Luis Maria Argaña, the Vice-President of Paraguay, in Asunción.

2) Mr. Chairman of the Committee on Legal and Political Affairs of the Permanent Council, Ambassador Mauricio Granillo; Ambassadors Members of this Committee: greetings from the Inter-American Juridical Committee of your Organization.

The *Annual report of the Inter-American Juridical Committee* has been prepared and circulated as CP/doc.3163/99 of 26 February 1999.

- a) [Work at the 52nd and the 53rd ordinary periods of sessions in 1998 and the first of the two 1999 sessions, number 54, held in Rio de Janeiro in January 1999](#)

This document, as submitted, contains the *Annual report* for the year 1988 as decided at the 53rd regular period of sessions in Rio de Janeiro last summer and fully describes the topics dealt with by the Inter-American Juridical Committee during the 1988 regular periods of session.

In March, the 52nd regular session was held in Santiago, Chile, with President Eduardo Vío Grossi in the Chair and myself acting as Vice-Chairman. The work in the 52nd period of sessions is described on pages 4 through 7 of the introductory chapter 1 enclosed with the *Annual report*

submitted on 26 February and prepared on 28 August, which has been circulated to the *Comisión de Asuntos Jurídicos y Políticos del Consejo Permanente* at the end of February.

The work at the 53rd regular period of sessions, held in our headquarters in Rio de Janeiro in the month of August, is described in full on pages 8 and 9 of the *Annual report* and former Chairman Eduardo Vío Grossi has attached a report reproduced at pages 10 through 14 in which he comments on activities conducted during the recess.

The agenda for the 54th regular period of sessions, which was held in January 1999 in Rio, is set forth at pages 14 and 15 of the *Annual report* and should be self-explanatory. I was unable to be present at these meetings for health reasons but they were smoothly and expertly conducted by the Vice Chairman of the Juridical Committee, Dr. João Grandino Rodas, of Brazil, and all the work so indicated in the agenda at pages 14 and 15 was completed as noted.

We would like to draw the attention of the *Comisión* to our efforts to simplify the presentations of the agenda of the Juridical Committee. We have divided our work into three categories, essentially: work to be completed during a session; work to be discussed in the session but completed subsequently; and "watching briefs on subjects of active concern". This gives a better idea, we thought, of the activities of the Juridical Committee and of its present responsibilities. For the balance of our *Annual report* permit me to read only two paragraphs from the introduction at page 1, which read as follows:

The Inter-American Juridical Committee is honored to present to the General Assembly of the Organization of American States its *Annual report* covering its activities during 1998, in compliance with Article 90 f) of the *Charter of the Organization* and Article 13 of its *Statute*, as well as the instructions in the resolution adopted by the General Assembly [AG/RES.1452 (XXVII-0/97)], dated 5 June 1997, covering the preparation of annual reports by the agencies, organs and entities of the Organization.

During the period covered by this *Annual report*, the Inter-American Juridical Committee carried out a series of studies on topics such as the American declaration on the rights of indigenous peoples, issued an Opinion on the Draft Protocol to reform the *Charter of the OAS* and draft resolution regarding the change in the American Declaration of Human Rights and Duties, inter-American cooperation to combat terrorism, the international cooperation to curb corruption in the countries of the Americas: illicit enrichment and transnational bribery, the role of the Committee as a consultative body of the OAS, democracy in the inter-American system, the right to information, access to and protection of information and personal data, improvement of the administration of justice in the Americas, legal scope of international integration and international trade: the clause on most favored nations, convening the Sixth Special Conference on Private International Law (CIDIP-VI) and the celebration of the 1899 Peace Conference Centennial.

b) Agenda for the 55th regular period of sessions now scheduled for August 1999 in Rio de Janeiro

The work on the Agenda of the Juridical Committee for its 55th regular period of sessions in Rio at present will consider the following matters. The Juridical Committee has now completed, together with CP/doc.3146/99 of 11 February 1999, the work requested of it in connection with the model law on transnational bribery, which comprised Annex 1 to the Juridical Committee report adopted at its 53rd regular period of sessions in August 1998 and which may be found with full introductory materials at pages 87 through 102 of the *Annual report of the Inter-American Juridical Committee*. Annex 1 of course relates to transnational bribery and not to illicit enrichment.

This latter topic, which formed the second half of the overall anti-corruption commentaries supplied by the Juridical Committee, is contained in Annex 2 in the form of model legislation and commentary and may be found at pages 19 through 25 of the report of 11 February 1999 which emanated from the 54th regular period of sessions held in Rio in January of this year and which is currently dated 11 February and addressed to the Permanent Council of the Organization. Our work in the area of illicit enrichment and transnational bribery, as requested by the Permanent Council, has therefore come to an end. The Juridical Committee stands ready to provide further comment or elaboration, if so requested.

In our August 1999 meetings, we are now seeking to finalize a report, the rapporteur being Dr. Jonathan T. Fried of Canada, concerning the right of information and access to the protection of personal information and data. This was discussed at the January 1999 meeting and we hope to complete this work in August; it is item B-1 on page 15 of the *Annual report*.

Likewise, we are still seeking further comments from members of the Juridical Committee relating to the improving of the administration of justice in the Americas, the topic identified in paragraph B-2 of the *Agenda* for the 54th regular period of sessions and again to be found at page 15 of the *Annual report*.

Items 3, 4 and 5 under B on page 15 will also be taken up; it being hoped that some concrete expression may be made in relation to inter-American cooperation against terrorism (item 3); there will be a brief report from me concerning the duties of the states of the hemisphere in respect of the Montego Bay 1982 *United Nations Convention on the Law of the Sea* and compliance therewith; as well as a brief report on the interesting new topic of human rights and biomedicine as submitted by another member of the Juridical Committee.

As members of the Juridical Committee are aware, the meeting of experts advising on the 6th Specialized Inter-American Conference of Private International Law (CIDIP-VI) occurred here in Washington late last fall, and the topics for CIDIP-VI were fully discussed here at the headquarters.

In May this year I will be representing the Juridical Committee as Chairman of the Group on Dispute resolution to be convened at the ceremonies commemorating the Centennial of the 1899 Hague Peace Conference. This will be held at The Hague at the invitation of the Dutch Government and with the cooperation of the Government of Russia. This work will be without expense to the budget of the Juridical Committee, and I will be reporting back to the Juridical Committee concerning any continuation which may be required of our earlier work of commentary made to the Centennial of the 1899 Peace Conference in relation to the three subjects referred to us last summer and which were discussed at some length at the Third Joint Meeting With Legal Advisers of the Ministries of Foreign Affairs of the Member States of the OAS at Itamaraty Palace in August, the meetings were fully attended by a number of Legal Advisers of Latin American countries and also present by invitation were representatives of the Dutch Ministry of Foreign Affairs and the Russian Embassy.

Our work was warmly appreciated by the organizers in the Centennial of the 1899 Peace Conference and I am proud to tell the *Commission* that the Juridical Committee took the lead and made the first comments of any international body on the topics being considered by the Centennial Commission.

This work is described in pages 125 through 136 of the 1998 Annual Report and is worth referring to. The topics on which our comments were requested and were supplied are:

- i. Development of international law relating to disarmament and arms control since the First Hague Peace Conference (pages 126 – 128 of the *Annual report*);
- ii. International humanitarian law and the laws of war (page 128 of the *Annual report*), and
- iii. The peaceful settlement of disputes (pages 128 –136 of the *Annual report*).

The Commission will also note that the Juridical Committee has been striving to improve, together with its agenda, the businesslike quality of the conduct of its work, and to this end is contemplating sessions which may range to periods of three weeks each for the Winter and Summer sessions rather than the two weeks and four weeks currently enjoyed. Our main concern is efficiency of our output and the budget of the Organization.

The Juridical Committee would like to express its thanks to the Organization for having maintained its budget within tolerable limits, so that we can still continue to function effectively as your advisory body on juridical matters under Article 98 of our *Charter*.

3) Role of the Inter-American Juridical Committee

At each meeting of the Juridical Committee there is much discussion of our role. What is the *papel* of the *Comité*? It is in fact an international treasure, an institution that is not replicated in any

other international organization. We are not a court and not a chamber of arbitration. We are not the International Law Commission. We cannot handle cases and we do not draft universal conventions for worldwide diplomatic conferences. The history and basic duties of the Juridical Committee is set forth at pages 2 and 3 of the *Annual report* (English version) which is before you; in particular I refer to Articles 98 and 99 of the *Charter*.

In my relatively brief but immensely agreeable association with the Juridical Committee, I have noted that the its finest hour always seems to be when it acts in response to specific questions forwarded to it by the Permanent Council or the General Assembly. I refer to the work we did two years ago on the United States Helms-Burton Act – or more properly – on the legal principles that appeared to be presented by aspects of the Helms-Burton Act. I refer also the work done by the Juridical Committee before I joined it as a member, namely on the *Alvarez-Machain* case decided by the United States Supreme Court, and other important topics of current concern that were forwarded to the Juridical Committee by organs of the Organization and as to which the Juridical Committee's responsibility under articles 98 and 99 of the *Charter* was engaged.

Of course the Juridical Committee is always ready to respond by giving commentary on draft conventions and declarations, in much the same way that we formulated a response at the 52nd regular period of sessions to the inquiry concerning the declaration on indigenous peoples' rights in the hemisphere and on the question relating to the status of women in the constitutive documents of the Organization at that same session.

It is excellent for us, as your juridical brothers, to respond to specific legal questions of this nature. Even better than general commentary, such as on the proposed declaration on indigenous rights submitted by the Inter-American Commission on Human Rights of the Organization, *specific* legal issues and questions can be forwarded to the Juridical Committee and dealt with in a context of clarity and economy. We were pleased to be able to contribute, as I have noted above, our comments in the forms of draft model legal provisions on the *Inter-American convention on transnational bribery and illicit enrichment*, and we hope that our work will be as well received by our Organization as it was enthusiastically performed.

4) Perhaps some personal observations of the Chairman of the Juridical Committee might be in order. I speak only for myself, but I wish to address you on these points because I think that they are important. On problems of inter-American scope, the Permanent Council and the General Assembly of the Organization must remember that we are a *juridical* Committee and that we are, theoretically at least, ideally designed to respond the legal and juridical problems of inter-American scope.

This offers the Organization the important ability to separate out legal and political issues present in matters of concern to it, and to throw the legal ones to us.

Perhaps it would be best if, whenever a specific case or controversy were to arise – and here I refer to the issues such as the Falklands/Malvinas; *Alvarez-Machain*, and even Helms-Burton, where care and attention must be given in formulating the question or request to be made to the Juridical Committee to be sure that the Committee is not suffering in a ghostly manner from pretending to be a little tribunal adjudicating a matter or responding to a specific case or controversy as if the parties were before us with pleadings.

We know that you know that we know that we cannot do this. Thus, requests to the Juridical Committee that will ask us to comment on international legal issues presented of relevance to the inter-American system and the Organization that *emerge* from current controversial matters are those that are best suited for prompt and elegant reaction by your Committee to you. In the future, questions may arise, for example, concerning the “most-favored-nation clause” as to which we are still considering reporting; they may also arise concerning problems relating to national “certification”, by member States; or discrimination against foreign nationals concerning land ownership in the Americas; requirements for “domestic” or “foreign” content in national media; recourse to international tribunals to invalidate determinations made by national courts; problems may well arise concerning inter-American aspects of economic agreements and international trade law; and perhaps our attention may be directed to topical matters of great interest such as recent cases in the International Court of Justice and the United States Supreme Court concerning

application and interpretation of the Vienna Convention on Consular Relations and the case of Angel Francisco Breard that was sadly decided last April by the United States Supreme Court in the teeth of a World Court request for provisional measures of protection, in a case brought by Paraguay, which did not succeed in obtaining a delay of execution of Mr. Breard. Although Paraguay has withdrawn her case, a similarly unsuccessful case, brought by Germany concerning the United States, is still pending in the International Court of Justice.

We are sure that other matters of specific concern will also arise. In any such case, the Organs of the Organization would do well to keep in mind that it would help us to avoid days of wrangling over our constitutional duties in an effort to please, and comply with the instructions received by us from the Organization, where legal issues and political issues must firmly be separated and further worthy legal issues are best couched in terms of general application so as not to give the appearance of being a resolution of a specific case or controversy or – perhaps even worse – a specific criticism of a decision of a national court. Here of course the current concerns regarding the fate of General Pinochet following yesterday's decision of the House of Lords may be of great relevance.

Thus, the Juridical Committee in past years could well have been asked: What are the legal implications, or acceptability under international law, of the unilateral adoption by a member State of an internal law creating derivative multiplied liability within its own courts that extends to any citizen of any State for any activity anywhere in the world that contributes to a sale of property that has been nationalized from citizens of the first State, but as to which no compensation had effectively been paid? (This is a rough reformulation of the famous Helms-Burton question.)

Similarly, what are the legal implications of a decision of the Supreme Court of a member State that refuses to set aside decisions of its lower courts refusing to invalidate a criminal process taken against the citizen of another State, who had been kidnapped by the agents of the first State from the territory of the second, without the agreement of the second State? (This could be a rough transliteration of the request to consider the United States Supreme Court decision in *Alvarez-Machain*.)

Finally: what legal issues are presented in a situation where one member State invades with armed force the territory of islands also claimed, but occupied by, another State, and when that other State repels that invasion with a limited but decisive use of countervailing force and reoccupies those islands – it being noted that such use of countervailing force resulted in serious loss of life by the military personnel of the first member State? (This of course might have been a more generalized formulation of the Malvinas/Falklands question.)

5) If one perceives the growth of international institutions into the next century as being essentially a continuation of the voyage of the Beagle, it helps clarify the mind. The Beagle as we all remember was the vessel on which Charles Darwin traveled to The Galapagos a hundred and fifty years ago and through the Beagle Channel known well to two of our member States. In the course of this four-year voyage, the great English naturalist formulated his theory of natural selection and survival of the species.

These rules are equally applicable by transposition to international organizations and to the growth and development of international law, both on a general and on a regional plane such as that which we, uniquely and in prominence amongst all other regional organizations, so proudly occupy. The same natural selection and evolutionary process will apply within the Organization, as noted by the Secretary General's report only two years ago, which we are for our part attempting to meet, respond to, and to fulfill. The report and recommendations of the Secretary General for the continued growth of the Organization are precisely an expression of its evolution into the 21st century.

These same rules should apply to your *Comité Jurídico*. We do not wish to be discovered, by a future legal Charles Darwin, embedded in the rocks of Patagonia as a fossil dinosaur, dead from desuetude. (Perhaps our food sources might all have been obliterated by the arrival of an immense comet: Helms-Burton 2.) Quite seriously, however, the time is right for the Organization to make a reconsideration of the possible roles of the *Comité Jurídico* within the various limits of practicality. These would be: our ability to meet and devote ourselves wholeheartedly to our work; the support

available from the Department of International Law of the Secretariat for Legal Affairs – which has given us invaluable administrative and legal backup any time when we have requested it, but which naturally has limitations of budget and personnel; and our own budget and that of the Organization.

It would be my suggestion that for future assignments to the Juridical Committee the organs of the Organization consider more seriously using us more, rather than less – but at the same time using us more generally rather than to resolve a specific controversy – at least in appearance.

Although this juridical use would be on a higher juridical plane, on the one hand; on the other, the questions and opinions requested to the Juridical Committee should be as precise and limited, or at least as specific, as the intelligent requirements of the situation will permit.

It is best to ask us more frequently to render our opinions on smaller subjects, but those subjects should be ones that can be addressed legally or juridically without difficulty by the Juridical Committee.

We therefore invite the Organization, whenever problems are presented before it which embody elements of a juridical nature, to consider whether any questions might usefully be answered for the Organization and its organs by the *Comité Jurídico*, in accordance with its role under articles 98 and 99 of the *Charter*. We will continue to serve as an advisory body in juridical matters, and we respond best to questions put to us that are concise, practical, and legal. Ernest Hemingway defined courage in *For whom the bell tolls* as being “grace under pressure.” The pressure that can be given to the *Comité Jurídico* in terms of specific requests for advice on juridical aspects of the current concerns of the Organization is welcomed. We would like to continue to remain, with our warmest greetings, at your full disposition and service.

Thank you very much.

* * *

ANNEX B

The following nine questions were put to me following my presentation of the *Annual report of the Inter-American Juridical Committee* to the Legal and Political Affairs Subcommittee (Comisión de Asuntos Jurídicos y Políticos) of the Permanent Council of the OAS on March 25, 1999.

The name of the member State whose representative asked the question is underlined; the questions and other comments of delegations *are in italics*; my answers are given in plain type.

1. Antigua and Barbuda

What is the reason for the delay in presenting our study concerning the implications of the 1982 Law of the Sea Convention for Member States?

I explained that I had been the proponent and draft rapporteur but that I had been sidelined because of an illness. We were hoping to consider a draft in August and would then decide on the content and presentation of a report.

The Juridical Committee was urged to take note of the potential importance of this study for smaller member States and in particular the island States of the Caribbean.

Note taken.

2) Peru

What is the situation concerning the International Law Course?

The 1998 Course was fully described in the 1998 Annual Report and we all felt that it had been most successful. In general the Courses were becoming increasingly well-staffed and well-received, with qualified students and enthusiastic faculty. The subject for the 1999 Course (cf. p. 147 of *Annual report*) was “New Challenges in Public and Private International Law.”

3) Guatemala

The following questions were put.

(i) *What is the situation concerning our work on indigenous peoples?*

Our immediate work on the draft declaration on indigenous peoples' rights had been concluded with the report submitted after our Santiago meeting a year ago, but the Juridical Committee always stands ready to provide additional answers, responses, comments, and suggestions to any follow-on work that may be referred to it.

(ii) *What is the situation concerning our work on disabled persons?*

The same general comments apply to the questions concerning a draft convention on disabled persons, as to which the Juridical Committee has already made comment.

(iii) *Please advise concerning the International Law Course.*

As just responded to in the case of Peru's comment, the 1998 Course was fully described in the 1998 Annual Report; we all felt that it had been most successful.

(iv) *Give more comment on the meeting with hemispheric Legal Advisers and the Hague Centennial Program.*

I gave a brief further description of the meeting of Legal Advisers and The Hague Centennial commentaries, stressing how interesting and valuable the Legal Advisers' meeting appeared to us.

(v) *All legal questions have political implications: how do we separate these elements?*

We do our best by analyzing each question or referral as to its more purely juridical content, responding to that content in a manner designed to be of general legal purport. An example was the 1997 report on the Helms-Burton Law, which tried to separate the legal elements from their political background. The political effect on a legal opinion is a different matter; all the Juridical Committee can do there is to exercise abundant care.

4) United States

Commented favorably on the Juridical Committee's professionalism and legal ability. Indicated that the Juridical Committee's work on the Draft Declaration on the Rights of Indigenous Populations and on the Draft Convention on Disabled Persons had been most valuable.

We much valued the appreciation of the Council in this regard. Substantial thanks were owing to our member Luis Herrera Marcano for his energetic work on the indigenous populations draft.

5. Panama

(i) *Requested that I as Chairman congratulate the Juridical Committee on its past year's work and on the approach and agenda.*

Accepted with gratitude.

(ii) *Further asked about the International Law Course.*

I referred to my earlier responses to Peru and Guatemala.

(iii) *Asked when we were planning another joint meeting with hemispheric Legal Advisers.*

I replied that this item was only to occur every other year, not annually.

(iv) *Regret was expressed that this meeting was not held annually.*

[Note to Legal Secretariat: could we not change this without substantial expense?]

6. Haiti

(i) *Concerning the type and subject of our opinions, it might be useful if the Juridical Committee could provide a list of subjects as to which opinions could be requested by the Organization.*

The Juridical Committee should and will consider this. Doubtless part of the exercise would be to indicate what current international legal issues might be appropriate for Juridical Committee

study, and thus attractive to the Organization for identification of the legal issues contained therein and referral of those issues to the Juridical Committee for its opinion. (Examples: narcotics “certification”; most-favored-nation clauses; *forum non conveniens*; the Pinochet issues; the “Breard case” issues; national content questions; trade issues.)

(ii) *Could the Juridical Committee also help the Committee or other organs in their formulation of a proposal for referral of a question?*

By all means, as long as the Juridical Committee or its designee would not be viewed as interfering in the political processes of the Organization. As Chairman I was always on call here in Washington and would, together with the Legal Secretariat, always be delighted to consult with representatives of member States when they are engaged in the process of drafting and formulating questions for referral to the Juridical Committee. This would be desirable as long as it made the work of the Juridical Committee more effective.

7. Venezuela

(i) *Kind remarks about the Chairman’s regained health.*

Happily accepted, with thanks.

(ii) *Kind remarks about Eduardo Vío Grossi for his excellent chairmanship.*

Again enthusiastically accepted, specifically because this was also the unanimous view of the members of the Juridical Committee. Dr. Vío had provided two years of active and imaginative leadership and we were much in his debt. The meetings in Santiago had been very productive and most agreeable, and the hospitality and care extended by the former Chairman and his colleagues had been deeply appreciated by the Juridical Committee.

(iii) *The format of the annual report was much improved. In particular there should be noted the correspondence between the OAS working agenda and the agenda of the Juridical Committee.*

Appreciated the comment on the agenda. We had tried to clear it up and make it more useful. The view of the Juridical Committee was that “*nuestra agenda es su agenda.*”

(iv) *Need more work on democracy in the inter-American system.*

Agreed with this, and expressed the hope that we could compose a concrete report and recommendations as the matter remained on our agenda.

(v) *Liked our report on corruption.*

Again, we were delighted to provide whatever information and advice that we could relative to the provisions of a *Ley Modelo* on both *suborno transnacional* and *enricimiento illicito*.

(vi) *What further work is planned on the fight against corruption?*

This phase of the work of the Juridical Committee has been terminated, pending any further requests for advice or clarification from OAS organs, with which we would of course be eager to comply.

(vii) *We should comment on the Center of Justice of the Americas, raised in the Second Summit of the Americas; although this has no site, it possesses a research component and a teaching component; the Juridical Committee could usefully make suggestions as to its agenda and content of its work.*

This is an excellent idea that I would forward to the Juridical Committee for its consideration in August. [N.B. to the Members of the Committee and the Legal Secretariat: it would be useful if the Secretariat could provide the Juridical Committee with background materials on the Center of Justice of the Americas, so that we could study this and—assuming that there are no specific questions now to be raised by the Permanent Council or, in June, at the General Assembly meeting in Guatemala—whether the Juridical Committee could not take hold of this concept and at least proffer a few recommendations to the Legal and Political Affairs Subcommittee based on this request].

(viii) Strong support offered on our budgetary concerns; Juridical Committee was to be commended for staying within it.

The support of Member States in permitting the Juridical Committee to maintain a workable and businesslike budget was much appreciated by the Juridical Committee and by the Legal Secretariat. [N.B. to the Members of the Committee and the Legal Secretariat: I had a conversation with General Harding at the meeting on the following day between the OAS and the Inter-American Development Bank (see my attached memorandum, third paragraph on page 2)].

(ix) In general, very pleased about our work: please to pass along the compliments of the Venezuelan delegation.

These compliments were accepted with pleasure, and I agreed to pass them along to the Juridical Committee, which I am now doing.

8. Brazil¹

(i) What is the position concerning the offer of permanent space for the Juridical Committee's offices in Itamaraty Palace, since a revised counter-proposal was made to the OAS by the Brazilian Government in October 1998?

The matter was under active study and the Juridical Committee was certainly grateful for the care and thoughtfulness that had gone into the deliberations and the counter-proposal. We had inspected the space available at the beginning of our August 1998 meetings, and now awaited a recommendation from the Legal Secretariat and operational personnel of the Organization to determine what course should be decided on by the Juridical Committee.

(ii) The suggestion of the Chairman that more questions to the Juridical Committee be formulated, and in narrower and more juridical terms, was appealing. Perhaps the Juridical Committee's work could be translated more promptly into Portuguese.

Expressed gratitude for this support in relation to the forward-looking work of the Juridical Committee. The translation effort was a fine idea but was more properly the concern of the Organization, which would, I thought, be considering this request most seriously.

9. Uruguay

(i) Expressed thanks to me and to the Juridical Committee and the Legal Secretariat for the written report. The format was much improved over past years and was more readable and practical.

We are most pleased that the Annual Report has been made more useful to the Comisión and the Member States of the Organization.

(ii) Likes the emphasis being placed on the legal expertise and juridical nature of the Juridical Committee.

Delighted; there are many ways in which the Juridical Committee could be of greater use to the Organization, and we are always at their service to assist in juridical and legal problem-solving.

(iii) Would be interested in any further work by the Juridical Committee on the legal aspects of integration (referred to page 103 of the Spanish text of the 1998 Annual Report).

Any specific requests or assignments that would be desirable for the Organization would be complied with gratefully by the Juridical Committee, since this general field was one spelled out in the *Charter* as being our peculiar responsibility.

(iv) Thought that it was an excellent idea for the Juridical Committee to be able to be

¹ The Brazilian delegation was represented by the son of Ambassador Baena Soares, and after I was told this I took pains to tell the Comisión how much the Juridical Committee had enjoyed his father's visit to the Juridical Committee and his report on the activities of the International Law Commission.

consulted during negotiations, e.g. to review the proposals on the table; to isolate the legal elements and questions implied thereby; and to give to the Parties guidance on the juridical issues presented in those proposals and the directions that could be taken to minimize problems. An example of this might be, e.g., the most-favored-nation clause in bilateral treaties.

We would be most pleased to provide whatever assistance we can on the juridical plane, as long as our work enhances and improves the efficiency and effectiveness of the Organization and meets the needs of its Member States, and provided of course that our role is permissible under the Charter and practically feasible. Again, we would be a *sus ordenes*.

This was the concluding intervention by a member, and after appropriate civilities addressed to the Chairman and to the Legal Secretariat I was excused from further attendance at the meeting.

During its fifty-fifth regular period of sessions, the Inter-American Juridical Committee also approved the agenda for its fifty-sixth regular period of sessions, which appears in resolution CJI/RES.12/LV/99 below:

**AGENDA FOR THE
56th REGULAR PERIOD OF SESSIONS
OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

A. Priority topics

1. Juridical aspects of hemispheric security
Rapporteurs: Drs. Sergio González Gálvez, Luis Marchand Stens
and Eduardo Vío Grossi
2. Improving the administration of justice in the Americas
Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard, Luis Marchand Stens
and Gerardo Trejos Salas
3. Juridical aspects of integration and international trade
Rapporteur: Dr. Jonathan T. Fried
4. International removal and retention of children by one of their parents
Rapporteurs: Drs. João Grandino Rodas and Eduardo Vío Grossi

B. Other topics

1. Right to information: access to and protection of personal information and data
Rapporteur: Dr. Jonathan T. Fried
2. Preparation of a report on human rights and biomedicine or on the protection of the human body
Rapporteur: Dr. Gerardo Trejos Salas
3. The application of the United Nations Convention on the Law of the Sea by the States of the Hemisphere
Rapporteur: Dr. Keith Highet

C. Topics under observation

1. Inter-American cooperation against terrorism
Rapporteurs: Drs. Luis Marchand Stens and Luis Herrera Marcano

2. Convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)
Rapporteurs: Drs. Brynmor T. Pollard and João Grandino Rodas
3. Study of the system for the promotion and protection of human rights at the inter-American level
Rapporteur: Dr. Gerardo Trejos Salas
4. The struggle against tobacco: need and advisability for combating smoking
Rapporteur: Dr. Gerardo Trejos Salas
5. Democracy in the Inter-American System
Rapporteur: Dr. Eduardo Vío Grossi

This resolution was unanimously adopted at the session of August 19, 1999, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Eduardo Vío Grossi, and Gerardo Trejos Salas.

CHAPTER II

Topics discussed by the Inter-American Juridical Committee at its regular period of sessions for 1999

The Inter-American Juridical Committee held two regular period of sessions in 1999. Both were in Rio de Janeiro: the first in January and the second in August. The following topics appeared on the agendas of both meetings: transnational bribery; preparation of model legislation on illicit enrichment and transnational bribery; the enhancement of the administration of justice in the Americas; inter-American cooperation against terrorism; the legal dimension of integration and international trade; freedom of information: access to personal information and the protection thereof; juridical aspects of hemispheric security; study of the system for the promotion and protection of human rights in the inter-American sphere; convocation of the Sixth Inter-American Specialized Conference on Private International Law; preparation of a report on human rights and biomedicine and on the protection of the human body; application of the United Nations Convention on the Law of the Sea by the States of the Hemisphere; the fight against tobacco: the necessity and advisability of combating the tobacco habit; commemoration of the Centennial of the 1899 International Peace Conference; and international abduction of minors by a parent.

Each of these topics is discussed at greater length below. As necessary, the documents that the Inter-American Juridical Committee prepared and approved on the matter in question are included.

1. Freedom of information: access to personal information and the protection thereof

Through resolution *Freedom of information: access to personal information and the protection thereof* (CJI/RES.15/LIII/98), approved at its fifty-third regular period of sessions (Rio de Janeiro, August 1998), the Inter-American Juridical Committee asked the OAS General Secretariat, through its Secretariat for Legal Affairs, to request information from the member States concerning their domestic laws, regulations and government standards in this matter so that the Inter-American Juridical Committee might have that information at hand to use at its next regular period of sessions.

By note of December 8, 1998, the General Secretariat's Department of International Law requested that the permanent missions to the OAS provide the information in question. As of the date of preparation of this document, replies had been received from the governments of Argentina, Guatemala and Paraguay.

The Inter-American Juridical Committee did not take up this topic at its fifty-fourth regular period of sessions (Rio de Janeiro, January 1999) because the rapporteur for the topic, Dr. Jonathan T. Fried, was not present.

At the Juridical Committee's fifty-fifth regular period of sessions (Rio de Janeiro, August 1999), Dr. Jonathan T. Fried introduced document CJI/doc.45/99, titled *Right to information: access to personal information and the protection thereof*, which appears below (because of its size, the appendix to that document appears as one of the appendices to this *Annual Report*). The Inter-American Juridical Committee congratulated the rapporteur for his presentation and suggested some ideas for the Committee's future discussions on this subject.

RIGHT TO INFORMATION: access to and protection of information and personal data

(presented by Dr. Jonathan T. Fried)

BACKGROUND

The right to information has been on the agenda of the Inter-American Juridical Committee in one form or another since 1980. A comprehensive review of the earlier work of the Juridical Committee was prepared by the previous rapporteur, Dr. Olmedo Sanjur G., and presented in his 1998 report (OEA/Ser.Q CJI/doc.5/98), and thus will not be repeated in this report.

At its twenty-sixth regular session in Panama city in June, 1996, the General Assembly requested the Inter-American Juridical Committee to give special attention to matters concerning access to information and the protection of personal data entered in mail and computerized electronic transmission systems [AG/RES.1395 (XXVI-O/96)]. From 1996 to 1998, the Juridical Committee's deliberations focused on the 1981 *Strasbourg Convention* for the Protection of Individuals with Regard to Automatic Processing of Personal Data, and on a possible draft *Inter-American convention on self-determination* with respect to Information.

At its 53rd regular period of sessions in August, 1998, having reviewed a preliminary draft of an Inter-American Convention in comparison to the *Strasbourg Convention*, the Juridical Committee recognized that a person's right of access to and protection of personal data raises juridical issues under *both* domestic and international law. With a view to providing a comprehensive basis for

further consideration of the subject, the Juridical Committee therefore requested the Secretariat for Legal Affairs to solicit information from OAS member States on existing domestic legislation, regulations, and policies governing:

- a) freedom of, or a person's right to access, information in the possession or control of governments;
- b) the protection of personal data against unauthorized use in the possession or control of governments;
- c) freedom of, or a person's right to access, information in the possession or control of private entities (for example, utilities, banks or credit agencies);
- d) the protection of personal data against unauthorized use in the possession or control of private entities;
- e) transborder or international dimensions of the foregoing; and

any other domestic legislation, regulations or policies addressing personal data or information in electronic or machine-readable form not otherwise included in [a] through [e] above (OEA/Ser.Q CJI/RES.15/LIII/98).

The General Secretariat requested this information in Note N [OEA/2.2/39/98] on December 8, 1998. Only six member States provided information in response to the request: Costa Rica, Ecuador, Guatemala, Paraguay, Peru and Mexico. This report is based on this information, as well as on research and independent sources of information on Argentina, Brazil, Canada, Chile, Colombia, the United States and Uruguay. Relevant information concerning other member States was not obtainable prior to the preparation of this report.

This report was prepared with the invaluable assistance of Ms. Laura Belloni (LL.M., University of Ottawa, member of the Argentine bar) and Mr. Daniel Daley, currently Canadian Ambassador to Panama and formerly the Access to Information Coordinator of Canada's Department of Foreign Affairs and International Trade. Any errors or omissions remain the responsibility of the rapporteur alone, however, for which he takes full responsibility.

OVERVIEW

Access to information and protecting personal information and data, are both essential elements of good governance in democratic societies. But they also constitute two sides of the same coin, and must be balanced to ensure respect for individual rights, including the right to privacy.

In democratic societies, it is logical to consider that government information ought to be publicly available wherever possible. In the view of those countries that have adopted access to information or freedom of information regimes, public access to government documents promotes accountability and helps citizens understand how governments make decisions about public policy.

But particularly with the advance of technology, governments generally maintain massive amounts of personal information on their citizens: income tax returns, property tax files, security assessments, social assistance files, immigration and employment records, to name a few. Public access to such records in the name of ensuring freedom of government information may deprive individuals of their ability to protect their privacy.

The objectives of access to information and of protection of personal information are potentially opposed. On the one hand, "access to information" guarantees the inhabitants of a democratic society access to information held by governments, thereby respecting one of the principles of a democratic form of government -- the publicity of the acts of government -- and permitting persons to exercise control of these acts through the effective exercise of this right. On

the other hand, the protection of personal information and data guarantees the access to one's personal information and at the same time provides for the correction and protection of this information, establishing a shield against public disclosure and preventing access by non-authorized persons.

In a democratic society, the law should protect the privacy of individuals with respect to their personal information held by government institutions and should provide individuals with a right of access to such information. Recognizing that the collection and use of personal information are essential to the administration of many government activities and programs, individuals should nonetheless have the right to a reasonable expectation of privacy, including a basic right to exercise control over their own personal information, a right to know why their information is collected by the government, how it will be used, how long it will be kept and who will have access to it, and a right of access to all of their personal information held by government institutions, subject only to limited and specific exemptions. Viewed in this light, protection of personal information and data is not opposed to principles of accountable government. Public confidence in a government's management of personal information is essential for public trust in, and support of, government programs and actions.

This report therefore analyzes domestic legal regimes on both access to and protection of information in the hemisphere. While a review of available information suggests an ongoing movement towards the enactment of legislation in this field, Canada and the United States have by far the most advanced and well-developed legal regimes, each having been in place for nearly two decades. On the basis of this North American experience, as well as more recent developments in other member States, this report sets out suggested basic principles on access to information and protection of personal information and data (Part I), highlights various features of domestic legislation in the light of the principles (Part II), discusses the desirability of promoting adherence to the *Strasbourg Convention* or of developing an inter-American instrument in this field (Part III), provides a preliminary analysis of the challenge of personal information in private hands (Part IV), and makes recommendations in the form of a draft resolution for the consideration of the Juridical Committee.

PART I

BASIC PRINCIPLES

A. Protection of and access to personal information and data

Collection of Personal Information

The collection of personal information plays an essential role in government administration of various programs and activities. Collection of personal data should be prohibited unless it relates directly to a specific government program or activity. Law or policy should require that institutions have administrative controls in place to ensure that they do not collect any more personal information than is necessary for the related programs or activities. This means that institutions must have appropriate legal authority for the relevant program or activity, and a demonstrable need for each piece of personal information collected to carry out the program or activity.

Wherever possible, this information should be collected directly from the person to whom it relates. Collection from other sources should be permitted in cases where the individual is unable to provide the information (for example, an individual who is deceased, incapacitated or who cannot be located despite reasonable efforts) or where direct collection might defeat the purpose or prejudice the use for which the information is collected (as, for example, in criminal investigations) or where information is already in the hands of another government institution authorized to disclose the information, thereby avoiding an unnecessary burden of response by the individual.

Each government institution collecting information should inform an individual of the purpose for which the institution is collecting the individual's personal information. (An exception could be

provided for circumstances where informing the individual would result in the collection of inaccurate or misleading information.) This requirement would recognize the individual's right to know and to understand the purpose for which the individual's information is being collected, and how it will be used. In circumstances where the individual is not under an obligation to supply the information, such knowledge and understanding would permit the individual to make an informed decision about whether to respond.

This principle could properly be extended to indirect collections of personal information as well. This would mean that every individual asked to provide personal information (whether the information was about himself or herself or about someone else) would have to be informed of the purpose of the collection, whether response is voluntary or required by law, any possible consequences of refusing to respond, and that the individual to whom the information pertains has rights of access to and protection of the personal information.

Again, an exception might be made available where so informing the respondent might result in the collection of inaccurate information, or defeat the purpose or prejudice the use for which the information would be collected (for example, where informing the respondent would jeopardize a criminal investigation, or in a survey where informing the respondents of its purpose would jeopardize the validity of the survey results). The application of such an exception could be approved during the collection approval process.

Government institutions should take all reasonable steps to ensure that personal information used for an administrative purpose is as accurate, up-to-date and complete as possible. This requirement would be intended to minimize the possibility that a decision affecting an individual would be made on the basis of inaccurate, obsolete or incomplete information.

Retention and disposal of personal information

Personal information that has been used by a government institution for an administrative purpose should be retained by that government institution for a minimum period of time (for example, two years) following the last use of the information, unless the subject individual consents to its earlier disposal. The law should also require that where a request for access to personal information has been received,² the institution should retain the information until such time as the individual has had the opportunity to exercise all rights under the law. Similarly, where a request for disclosure of personal information to law enforcement authorities has been made, any information disclosed in response to the request should be retained for a minimum period of time following the date the request was received by the disclosing institution.

There are, inevitably, exceptions to the principle of retention. For example, where an emergency exists at a diplomatic or consular mission abroad, the officer in charge could be authorized to order the destruction of personal information to prevent the removal of the information from the control of the institution. As well, the disposal of personal information prior to the expiration of the minimum retention period could be allowed with the written consent of the individual. This might occur, for example, if the information were determined to be incorrect and if the most appropriate means of correction were disposal, or if the information were no longer required.

Rules for the retention and disposal of personal information by government institutions could properly provide for earlier disposal if the information was collected without respect for the principle of relevant collection and thus is not directly related to an operating program or activity of the institution, where further retention of personal information might unfairly prejudice the interests of the individual to whom the information relates, or where personal information is no longer required for the purpose for which it was obtained or compiled by the institution.

² See "Right of Access to One's Personal Information", below.

Personal information may, however, have archival or historical value. Procedures should be established to ensure retention and transfer to appropriate archival authorities prior to disposal.

Use of personal information

Consistent with principles of collection, government institutions should use personal information only for the purpose for which the information was obtained or compiled, for uses consistent³ with that purpose, or for the purposes for which information may be disclosed to them under specific exemption or disclosure provisions.⁴

Disclosure of personal information

Similarly, absent the consent of the subject individual, government institutions should disclose personal information only for the purpose for which the information was obtained or compiled, for uses consistent with that purpose, or for the purposes for which information may be disclosed to them under specific exemption or disclosure provisions.

Governments should require their institutions to have administrative controls in place to ensure that personal information is not disclosed to anyone who is not permitted access under the law.

Consent

Consent should allow government institutions to use or disclose personal information for any purpose consented to by the individual. In other words, the consent of the individual would remove the need to rely on a specific exemption or disclosure provision. Consent by an individual to the use or disclosure of personal information could be sought either at the time of collection of the information or subsequently, when a specific need arises.

If consent for additional use or disclosure is sought at the time that the personal information is collected, government institutions should provide sufficient information concerning the intended use or disclosure to allow the individual to make an informed decision to consent or refuse. Such information should include a description of the specific information involved, the use or disclosure for which consent is being sought, and a statement that refusal to consent to such use or disclosure will not prejudice the individual in any way or result in any adverse consequences for the individual in connection with the primary administrative purpose being served by the information collection.

Consent for use or disclosure subsequent to collection should be obtained in writing. This would normally take the form of a signed consent from the individual or authorized representative, specifying the permitted use or disclosure.

Permissible disclosures of personal information without consent

Privacy demands that government protect personal information and data in its possession or control from disclosure. Various circumstances may, however, demand disclosure without the consent of the individual. Such circumstances should be prescribed by law. Some of the basic grounds for non-consensual disclosure include the following:

³ For a use or disclosure to be consistent, it should have a reasonable and direct connection to the original purpose for which the information was obtained or compiled. A test of whether a proposed use or disclosure is "consistent" is whether it would be reasonable for the individual who provided the information to expect that it would be used in the proposed manner.

⁴ See "Permissible Disclosures of Personal Information Without Consent", below.

1. Disclosure for the original purpose and for a consistent use

Personal information may be disclosed for the purpose for which the information was obtained or compiled by the institution or for a use consistent with that purpose. This would give government institutions the discretion to disclose personal information where this is necessary to accomplish the purpose for which the information was obtained or compiled, or for a use consistent with that purpose.

2. Subpoenas, warrants, court orders and rules of procedure of the courts of law

Personal information may be disclosed for the purpose of complying with a subpoena or a warrant issued or an order made by a court of law or a person or a body with jurisdiction to compel the production of information, or for the purpose of complying with the rules of a court relating to the production of information.

3. Disclosure to the chief legal officer of the government for use in legal proceedings

Personal information may be disclosed to the chief legal officer of the government for use in legal proceedings involving the government. This would cover those circumstances where personal information is required by the chief legal officer for the conduct of a case before the courts (or a quasi-judicial body) to which the government is a party or in which it is implicated.

4. Disclosure to government investigative bodies

Personal information may be disclosed to an investigative body specified in the law, on the written request of the body, for the purpose of enforcing any law or carrying out a lawful investigation. The request should specify the purpose for the request and describe the information to be disclosed. Such a provision would not normally grant investigative bodies a right of access to personal information. Rather, it would leave the disclosure decision to the discretion of the institution, once the relevant criteria had been satisfied.

Governments might wish to restrict to senior officials the authority to disclose information under this provision. Moreover, in view of the serious impact that a disclosure under this provision could have on personal privacy, governments might require their institutions to establish internal directives governing the disclosure of personal information pursuant to such a request. These internal directives could distinguish among the various types of personal information (for example, non-sensitive biographical data versus sensitive medical information) and establish guidelines governing the circumstances for disclosure of each type of personal information to investigative bodies.

5. Disclosure to foreign States and international bodies

Personal information may be disclosed under an agreement or arrangement between: 1) the government (or an institution thereof) and 2) the government of a foreign state (or an institution thereof) or an international organization of states (or other similar international organization), for the purpose of administering or enforcing any law or carrying out a lawful investigation.

This provision would accommodate practices whereby personal information is exchanged between police, security and investigative bodies and their international counterparts. Such disclosures aid in effective law enforcement and investigative activities.

6. Disclosure to members of the legislature

Governments may wish to provide that personal information may be disclosed to a member of the legislature for the purpose of assisting the individual to whom the information relates in resolving a problem. Such a provision would be intended for use when a constituent has asked his or her

representative in the legislature for assistance, but may not have specifically provided consent for release of his or her personal information. One possible example would be where consular assistance has been sought from the government.

7. Disclosure for audit, archival, research or statistical purposes

Governments would no doubt wish to ensure that the privacy law provides for disclosure of personal information to specified persons or bodies for audit purposes.⁵ It would be important to provide that personal information may be disclosed pursuant to this provision for audit purposes only and not as part of any decision-making process concerning the individual to whom the information relates.

A provision authorizing disclosure for archival purposes would also be important. "Disclosure for archival purposes" should be defined to include not only the actual transfer of personal information to the control of the national archives for archival and historical purposes, but also the examination by staff of the national archives of personal information held within government institutions to determine whether or not the information qualifies as an archival record and to establish appropriate retention and disposal standards for the information.

Similarly, a provision could authorize a government institution to disclose personal information to any person or body for research or statistical purposes, if the entity is satisfied that the purpose for which the information is to be disclosed cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates, and obtains from the person or body a written undertaking that no subsequent disclosure of the information will be made in a form that could reasonably be expected to identify the individual to whom it relates.

8. Disclosure in the public interest

As a supplement to the specific disclosure provisions described above, a government might wish to include in its law an authorization along the following lines: personal information may be disclosed for any purpose where, in the opinion of the head of an institution, (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or (ii) disclosure would clearly benefit the individual to whom the information relates.

This provision would allow the government to deal with situations that either cannot be readily foreseen or are so particular that they cannot suitably be covered in specific terms elsewhere in the provisions authorizing disclosure. The provision would have to be used with a great deal of restraint, and its use would have to be recorded carefully.

Examples of situations in which there could be a public interest that outweighs the potential invasion of privacy in disclosure include:

- a) health or medical emergencies, accidents, natural disasters or hostile or terrorist acts where one or more individual's lives and well-being depend on the disclosure;
- b) the disclosure of information to carry out an order of a court (for example, the enforcement of a custody order); and
- c) the disclosure of information either to substantiate or to correct a statement made publicly by the individual concerned. In these circumstances, the individual would first have made public the information being substantiated or corrected.

⁵ Audit purposes would normally include the conducting of an independent review and appraisal of the management practices and controls and of the financial accountability of particular operations and programs.

9. Disclosure to benefit the individual to whom the information relates

The law should grant to a government institution the discretion to ensure that personal information is not withheld from disclosure where the individual would clearly benefit from its release. Examples of situations where personal information could be released on these grounds are:

- a) disclosure to a doctor or hospital of an individual's blood type in an emergency when a transfusion is needed;
- b) notification of next of kin in case of an accident or disaster (or disclosure to an airline of information to locate passengers' next of kin where an accident has occurred); and
- c) disclosure of information to assist in determining the owner of lost or stolen property;
- d) disclosure of information about an individual to immediate family members or an authorized representative of the individual such as a lawyer, under compassionate circumstances (for example, information as to whether or not an individual has been arrested in another country).

Again, this provision would have to be used with considerable restraint, and its use would have to be accounted for.

Right of access to one's personal information

An individual's right of access to government-held information about him or herself, within a specified time limit, is an essential element of accountable government, as noted above. Access to one's own personal information may, however, be subject to broader public interests. Following are examples of exemptions often found in privacy laws:

1. Cabinet confidences

In a cabinet system of government, confidences of the cabinet⁶ are generally outside the application of the privacy law. The exclusion of such information is considered necessary for the preservation of the confidentiality of deliberations essential to the effective functioning of this system of government.

2. Information received in confidence

The privacy law would normally provide that a government institution shall refuse to disclose any personal information that was obtained in confidence⁷ from the government of a foreign state or an institution thereof, or an international organization of states or an institution thereof. The government institution should, however, be given the discretion to disclose personal information obtained in confidence from another government or an international organization if the government or organization from which the information was obtained consents to the disclosure or makes the information public.

⁶ Cabinet confidences would generally include: documents that present proposals or recommendations to the cabinet; agenda of cabinet or records recording deliberations or decisions of cabinet; records of communications or discussions between cabinet ministers on matters relating to the making of government decisions or the formulation of government policy; documents to brief ministers in relation to cabinet business; and draft legislation.

⁷ In this context, the term "in confidence" means that the supplier of the information does not wish it to be disseminated beyond the institution to which it has been supplied. Wherever feasible, it is advisable that government institutions enter into agreements with those other governments, international organizations or their institutions with which they will be exchanging information, stipulating the information that is being exchanged in confidence.

3. International affairs and defence

Governments would, no doubt, wish to include in law provision to permit a government institution to refuse to disclose any personal information the disclosure of which could reasonably be expected to be injurious to the conduct of international affairs, the defence of the state or any state allied or associated with the state, or the detection, prevention or suppression of subversive or hostile activities.⁸

To prevent the exemption from being used to circumvent the privacy law or otherwise to undermine its effectiveness, the government would doubtless wish to ensure (as with the other exceptions to the disciplines of the privacy law) that there are effective provisions for the review by an independent body (preferably a court of law) of decisions by government institutions to invoke this exemption, as discussed below.

4. Law enforcement, investigations and penal institutions

As with international affairs and defence, governments may wish to ensure that the law gives discretion to a government institution to refuse to provide access to personal information to the extent necessary for effective law enforcement, including criminal law enforcement, the integrity and effectiveness of other types of investigative activities (for example, investigations in regulatory areas and air accident investigations), or the security of penal institutions.

5. Safety of individuals

A government institution may refuse to disclose any personal information the disclosure of which could reasonably be expected to threaten the safety of individuals. This exemption would normally apply to information by or about informants. It could include individuals who provide information concerning criminal, subversive or hostile activities, but it would not necessarily be limited to such individuals.

6. Information about another individual

Privacy law embodies the principle that an individual has a right of access only to information about himself or herself. This principle is clearly applicable where personal information about one individual is combined inseparably with information about another individual (for example, information about a husband and wife in an immigration file). When this occurs, such information should not be disclosed unless some discretion to disclose the information is specifically granted in the law.

7. Lawyer-client privilege

Communications between lawyer and client are treated as privileged in virtually all jurisdictions. Consistent with the special status accorded to these communications, the law should provide that a government institution may refuse to disclose any personal information that is subject to lawyer-client privilege. This provision would normally allow the government institution to claim the

⁸ To avoid overly-broad interpretations or abuse of such exemptions, "subversive or hostile activities" could be defined as: a) espionage against the state or any state allied with or associated with the state; b) sabotage; c) activities directed toward the commission of terrorist acts, including hijacking, in or against the state or foreign states; d) activities directed toward accomplishing government change within the state or foreign states by the use of or encouragement of the use of force, violence or any criminal means; e) activities directed toward gathering information used for intelligence purposes that relates to the state or any state allied with or associated with the state; and f) activities directed toward threatening the safety of nationals of the state, employees of the government of the state or property of the government of the state outside the state.

same protection for communications with its lawyers as is allowed in the private sector. The exemption would be intended to be used when the disclosure of information could circumvent the normal procedures (such as the process of "discovery") in cases before the courts, prejudice the government's legal position in present or future litigation or negotiations, or impair the ability of government institutions to communicate fully and frankly with their legal advisers.

Corrections and notations

As a basic complement to an individual's right of access to his or her personal information that is held by a government institution, every individual should protect the right of an individual to ensure the accuracy of the information gathered and to request correction of the information where there is an error or omission. Accordingly, where a correction is accepted by the government institution, the institution should, within a specified time, notify both the individual and any person or body to whom the information has been disclosed.

Where a request for correction is refused in whole or in part, the government institution should, within a specified time, attach a notation to the personal information reflecting that a correction was requested but was refused in whole or in part, notify the individual that the request for correction has been refused in whole or in part and give the reasons for the refusal, and notify any person or body to whom the personal information was disclosed that the request for correction was received and that a notation has been attached to the personal information.

The corrections and notations should be stored in a manner that will ensure that they are retrieved and used whenever the original personal information is used for an administrative purpose.

Independent review of decisions

For the effective administration of law for the protection of personal information and data, there should be an independent review available with respect to decisions taken under the law. This would mean that, at a minimum, an ombudsperson who is independent of the government should be empowered to review the following matters, at the instance of the affected individuals:

- the use or disclosure of personal information otherwise than in accordance with the privacy law;
- the denial of a request by an individual for access to his or her personal information;
- the failure by an institution to accord rights relating to the correction or notation of personal information, or to notify other institutions of such corrections or notations;
- the extension of time limits for response to a request for access to one's personal information; and
- any other matter relating to the collection, retention and disposal; use or disclosure; or requesting or obtaining access to personal information under the control of government institutions.

Judicial review

Governments should also consider establishing a right of appeal to the courts (either by the affected individual or by the ombudsperson), at least with respect to the denial by a government institution of a request for access to one's personal information.

B. Access to information held by governments

As noted in the *Overview*, citizens should have the right of access to information held by their government. While it may be argued that this access should be guaranteed to any person, requiring certain conditions pertaining to citizenship or permanent residency may be considered as justified on the basis of to whom governments are accountable.

Access should be guaranteed for all the information held by governments, including information under the possession or control of government. Public access should not be frustrated except under clear grounds, so that in case of doubt as to disclosure of information, it would be resolved in favour of disclosure. Therefore, the right of access should be the rule, and the exceptions to this principle should be specific and limited to certain circumstances. The law should also establish the definition what is to be considered a government institution, such as the federal government, departments, or agencies. The trend is to extend coverage of access to all the organizations that deliver public services or fulfill statutory functions even where these organizations are private institutions.

Exemptions to the right of access to information

As suggested above, the basic principle of access to information should be disclosure. Exceptions to this right should be limited and specific. Some circumstances demand automatic denial of disclosure, for example in respect of personal information or commercially confidential information, such as trade secrets or other third-party information. Other circumstances may require a determination of a risk or harm or injury that might be provoked by the disclosure, such as possible effect on the conduct of international affairs.

Independent review of decisions on disclosure

As is the case for decisions respecting personal information or data, where the government institution to which a request for disclosure of information is made refuses access, the individual should have the right to order the revision of this decision before an independent body. Here, disclosure may not only be expressly denied but also implicitly denied where the government institution is silent or takes an unreasonable amount of time in responding to an individual's request. In these cases, an independent office or ombudsperson should be authorized to review these decisions or situations.

This office could play the role of mediator prior to judicial review to bring the government institution and the individual to an arrangement or understanding. The office could also usefully be authorized to self-initiate reviews. The office may or may not have the power to enforce decisions, but should at a minimum be give authority to make a recommendation to the government institution to proceed with disclosure.

Judicial review

Where the independent office does not recommend disclosure or having recommended disclosure the government institution does not follow the independent body's recommendations, the requester should be authorized to seek judicial review of the administrative action (or inaction). Judicial review of decisions should be authorized especially in cases where no independent administrative review is available or provided.

As mentioned above, accountability demands a presumption in favour of disclosure, so the burden of proof should rest on the party resisting disclosure, whether it be the government, corporation or individual. Where an independent office is established by law, the latter should be able to present itself as a party before the court, whether it supports disclosure or denial of disclosure.

The court should be empowered to order disclosure.

Third party procedures

Where the information that is to be disclosed pertains to a third party, that party's right to resist disclosure should be guaranteed by law. Such procedures are generally available for the protection of business information and not for personal information, which is considered to be confidential. However, as in the case of government institutions, the burden of proof with regard to

the decision to disclose or not should rest with the third party that resists disclosure.

Procedure to access to information

The right of access to information held by government institutions should be guaranteed by procedures, thereby respecting the principle of due process. These procedures should be initiated by written application by the individual interested in the disclosure of information. This written application may take several forms. The government institution should be granted a limited period of time (days) to respond to the request for information, subject to exceptional circumstances provided by law. Moreover, where third party information is to be released, the government institution should give notice to this party in order to allow him or her to demonstrate why the information should not be disclosed. The government institution that refuses to disclose the information should always cite the statutory ground for its refusal.

PART II

COMPARATIVE ANALYSIS OF LEGAL PROVISIONS REGARDING ACCESS TO INFORMATION AND PROTECTION OF PERSONAL INFORMATION AND DATA IN THE AMERICAS⁹

Protection of and access to personal information and data

Collection of personal information

The collection of personal information is regulated in detail by the Canadian, Chilean and U.S. laws, each respecting the basic principles set out in Part I.

The Canadian *Privacy Act* states in its Section 4 that government shall not collect personal information unless it is relevant for a government program or activity. This personal information is to be obtained directly from the person to whom it pertains unless the individual consents to otherwise (Section 5(1)) or another government institution is authorized to disclose information to other

⁹ The documentation reviewed includes the following (in alphabetical order):

- Argentina: National Constitution (1994) provisions and Law no. 104 enacted by the City of Buenos Aires in 1998 (illustrative purposes);
- Brazil: Federative Constitution (1988);
- Canada: Privacy Act (1985), R.S.C., ch. P-21 (as amended); Access to Information Act (1985), R.S.C., ch. A-1 (as amended);
- Chile: Chilean Constitution and the recent Protection of Privacy Act (*Boletín* no.00896-07);
- Colombia: Colombian Constitution (articles 15 and 20);
- Costa Rica: Constitutional Jurisdiction Act Reform introduced by Law 7135 (1997), Political Constitution 1949 and Law 7425;
- Ecuador: National Constitution (1998);
- Guatemala: National Constitution (1985) and Criminal Code;
- Mexico: Human Rights Commission Act (1992), Mexican Constitution (1917) and Criminal Code;
- Paraguay: National Constitution (1992) and Criminal Code;
- Peru: National Constitution (1993) and Criminal Code;
- United States: Privacy Act of 1974 5 U.S.C., 552a. (as amended), Freedom of Information Act of 1966 5 U.S.C., 552 (as amended);
- Uruguay: National Constitution.

government institutions (Section 8(2)). The individual must also be informed of the purpose for which the information is being collected (Section 5(2)). Section 5 (1) and (2) do not apply where the information obtained is inaccurate or defeats the purpose of or prejudices the use for which the collection of information is being made.¹⁰ Once the information is properly obtained, the government institution must take all reasonable steps to guarantee the information remains complete, accurate and up-to-date.¹¹

Chilean law does not prescribe the necessity of a government program or activity in order to allow the latter to collect information. However, section 9 of the *Protection of Privacy Act* provides that where the collection is performed from registries, records, bulletins or through other means of public circulation authorized by law, the individual to whom the information pertains should be notified of the circumstances surrounding the collection and keeping of the personal information, within 30 days of these circumstances. Also, article 19 of the Chilean *Constitution*, provides for the respect and protection of privacy, the home and all forms of private communication. The law shall establish exceptions to these rules.

Pursuant to U.S. law, paragraph e) of the *Privacy Act* states that personal information is to be collected directly from the individual to whom it pertains to the extent possible unless where the information results in adverse determination about the individual.¹² Moreover, the government institution must inform the individual of the purpose and use of collection, whether disclosure is mandatory or voluntary and the effects on the individual, if any, of not giving the required information.¹³

Other OAS member States appear to provide broad guarantees of privacy in general. Many constitutions or criminal codes regulate the inviolability of privacy unless the law prescribes otherwise, establishing, in some cases, punishment where violation of these dispositions is proven. Not all are specific, however, in relating this right to protection of personal information and data.

The Argentine *Constitution* states that the domicile, written correspondence and private papers may not be violated unless otherwise determined by law.¹⁴

The Brazilian Federative *Constitution* determines in its article 5 that privacy, honour and image of persons are inviolable and ensures the right of compensation where these rights are violated.¹⁵ Further, the home and dwelling are also inviolable except in case of *flagrante delicto*, disaster or court order.¹⁶ Correspondence and communications are inviolable unless a court order dictates otherwise for the purpose of criminal investigations.¹⁷

The Colombian Constitution provides in Section 15 that the process of collection, management and circulation of information shall respect the rights and freedoms guaranteed by the Constitution, and as well, that correspondence and all forms of private communications are inviolable and may only be intercepted or recorded by way of a court order or under the authority and conditions established by law.

In Costa Rica, Law 7425 regulates the conditions in which the government may enter into the private lives of its inhabitants, establishing that registries, records, private documents examinations

¹⁰ Section 5 (3) of the Canadian *Privacy Act*.

¹¹ Section 6 (2) of the Canadian *Privacy Act*

¹² Paragraph e (2).

¹³ Paragraph e (3) A, B, C, and D.

¹⁴ Article 18 of Argentinean *National Constitution* (1994)

¹⁵ Article 5 (10) Brazilian *Constitution* (1988)

¹⁶ Article 5 (11) Brazilian *Constitution* (1988)

¹⁷ Article 5 (12) Brazilian *Constitution* (1988)

and communication interventions may take place where it is ordered by a court in case of criminal investigations.

With respect to Ecuador, its 1998 Constitution states that personal correspondence, mail or any other means of communication are secret unless otherwise prescribed by law.¹⁸

Article 31 of the Guatemalan Constitution delineates a limit on collection by establishing that political affiliation records shall only be kept by electoral authorities and political parties. Also, article 24 provides for the secrecy of correspondence, telephone, radio or any other means of communication, books and documents which can only be examined in conformity with the law.¹⁹

Article 16 of the Mexican Constitution²⁰ states that one's person, family, home, papers or possessions are not to be disturbed. Exceptions to this rule have to be based on and motivated by proceedings prescribed by law.

The Paraguayan Constitution regulates that only in cases prescribed by law and through a court order may documentary patrimony be examined.²¹

The Peruvian Criminal Code establishes a punishment for every person who collects or discloses illicitly information regarding political or religious convictions or any other aspect of privacy. The punishment is aggravated if the act is committed by a public officer.

Accordingly, Argentina, Brazil, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Paraguay and Peru possess provisions that guarantee the right to privacy (including the home, communications or correspondence), which is to be respected by other individuals and the government. The government may only have access to this sphere of private life where the law permits it to do so and through proceedings that the law prescribes. However, it appears from the information submitted that the basic principles of collection, this is to say, the limit of relevance, the manner in which information is gathered, the communication of the purpose for which it is collected, and so on, are not specifically regulated by law.

Retention and disposal

Only three out of the thirteen countries surveyed possess provisions with respect to the retention and disposal of personal information. Canada, Costa Rica and the United States regulate the disposal of personal information in a similar manner. However, Canada is the only one that regulates the retention of the information after it is used for a given period of time to ensure that the individual to whom it pertains has a reasonable opportunity to obtain access to it.²² Section 6(2) states that government institutions shall dispose of personal information in accordance with guidelines or directives issued by their respective responsible minister.

Costa Rican legislation²³ provides for the immediate disposal of information where the collection was performed with no legitimate purpose to use or disclose or with the purpose of disclosing it to non-legitimate persons. Also, this information may be disposed of when it is no longer required for the purpose for which it was collected or it was obtained in violation of the law.²⁴

¹⁸ Article 23 (13) of the Ecuadorean *Constitution*.

¹⁹ Guatemalan *Constitution*, Articles 24 and 31

²⁰ 1917 Mexican *Constitution*

²¹ Article 36. Documentary patrimony includes mail, telephone communications, collection, reproduction and others.

²² Section 6 (1) of the Canadian Privacy Act.

²³ Article 78 of the Constitution Jurisdiction Act

²⁴ Violation of the law means: criminal action, abuse of power, fault or negligence, violation of due process or where the source of information is illegal.

Paragraph e (1) of the U.S. Privacy Act states that only the information that is relevant for conformity with a purpose shall be maintained in government records. Hence, we may infer that where information is no longer relevant for complying with a given purpose, government agencies shall eliminate the data from their records.

Use of personal information

Canadian and Chilean law regulate the manner by which the use has to be carried out. Both countries' legislation emphasize the consent required to allow government institutions to use personal information. Section 7 of the Canadian Privacy Act provides that without this authorization, the information may only be used for the purpose for which it was obtained or for uses consistent with this purpose.²⁵ Section 10 of the Canadian *Privacy Act* establishes that personal information may only be used or disclosed for the purposes permitted by law or with the consent of the individual to whom the information relates. The Colombian Constitution provides in Section 15 that the management and circulation of information shall respect the rights and freedoms guaranteed by the Constitution.

On the other hand, Ecuador and Paraguay provide for possible consequences of an illegal or illicit use of personal information. Pursuant to the Ecuadorian Constitution, Sections 94 (2) and (3) state that every person has an action for damages when he or she is affected by the illegal use of his or her personal information. The Paraguayan Criminal Code regulates by way of several different criminal infractions related to the illicit use of personal information.²⁶

Disclosure of personal information

Canada, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Peru and the United States incorporate legislation concerning the disclosure of personal information.

Section 8 of the Canadian Privacy Act states that without the consent of the individual to whom the information pertains, his or her information can be disclosed for the purpose for which it was collected or for uses consistent with this purpose. Other exceptions are described under "Permissible Disclosure of Personal Information".

Section 10 of the Chilean Protection of Privacy Act states that "the databank manager that legally and legitimately processes personal information may only use and disclose this information for the purposes permitted by law or with the consent of the individual whose information is being used or disclosed." The Colombian Constitution only establishes in Section 15 that the circulation of information must respect the rights and freedoms guaranteed by the Constitution.

The Costa Rican Constitutional Jurisdiction Act of 1989²⁷ provides for the disclosure of personal information to third parties only where a legitimate interest is determined. The handling of information must not jeopardize the intimacy, information self-determination and exercise of rights and freedoms, except for statistical purposes. Also, disclosure may be impeded where information is held to be confidential, sensitive, harmful or erroneous.²⁸

The Ecuadorean Constitution prohibits the disclosure of personal information concerning religious beliefs, health or sexual orientation or political affiliation subject only to the necessity of medical treatment.²⁹

²⁵ Permissible used without consent is analyzed below.

²⁶ Criminal Code: Section 174: Alteration of data, Section 175: Computer Sabotage, Section 188: Fraudulent Computer Operation, Section 248: Alteration of information used for evidence purposes and Section 250: Production of public documents containing false information.

²⁷ Section 71 of the Costa Rican *Constitutional Jurisdiction Act*.

²⁸ Section 78 of the Costa Rican *Constitutional Jurisdiction Act*.

²⁹ Section 23 (21) of the Ecuadorian *Constitution*

Guatemala and Mexico create criminal acts in their respective criminal codes regarding the disclosure of confidential or secret personal information. In both cases, there are penalties, fines or imprisonment sentences, for persons who reveal this information.³⁰ The Guatemalan Criminal Code also states in article 96 that where a public officer or employee of the Tax Administration reveals facts, files or documents that must remain confidential, they shall receive administrative sanctions.

The Peruvian Constitution regulates the disclosure of personal information in a distinct manner, stating that every person has the right to prevent disclosure of his or her personal information. It is not clear whether all personal information might be disclosed subject to the person to whom it pertains otherwise objecting, or whether information must not be disclosed without obtaining prior consent.³¹

U.S. law provides for the disclosure of personal information only where the individual to whom it relates consents. Paragraph (b) of the U.S. Privacy Act regulates the exceptions under which personal information may be disclosed without an individual's consent.³²

A bill was introduced in Brazilian Senate in 1996, including a disposition stating that no personal information shall be disclosed without the consent of the individual to whom it relates except for uses consistent with the purpose for which it was gathered or obtained.

Consent

The element of consent is prescribed in the laws of only three member States and the Brazilian bill. Canada, Chile, and the United States require prior consent of the individual to use or disclose the information to whom it relates. Sections 7 and 8 of the Canadian *Privacy Act* establish that, as a rule for the use or disclosure of the information, consent is needed. Use or disclosure without consent are regulated as exceptions to this rule. Chilean law provides in Section 10 that consent of the individual has to be given to permit a data bank manager to use or disclose the information. Moreover, section 18 regulates that consent to disclosure must not be presumed; it must be done in writing and be limited in time as well as being restricted to a particular and concrete facts. Consent is null where the authorization granting it is of a general or indefinite nature.

Similarly, the U.S. Privacy Act states that no information shall be disclosed "...except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains...". The rule of written consent establishes that without this consent, information may only be disclosed if it corresponds to one of the exceptions regulated in the same paragraph (b). On the other hand, the Brazilian bill provides that no personal information may be disclosed without express authorization of the owner. Exceptions to this rule are regulated in a similar fashion by all these countries, as discussed in the following section.

Permissible disclosure of personal information without consent

Canada, the United States and more recently Chile have elaborated regimes governing disclosure of a person's information without that individual's consent. The particular circumstances explicitly specified are exceptions to the paramount principle that no information shall be disclosed without the consent of the person to whom it relates.

Section 8 (1) of Canadian Privacy Act generally precludes disclosure of information relating to others without their consent. Hence, disclosure pursuant to the Privacy Act must be done in accordance with Section 8 (2) of the Privacy Act, which enumerates thirteen specific situations or

³⁰ Article 422 of Guatemalan Criminal Code and Article 210 and 214 of Mexican Criminal Code.

³¹ Section 2(6) of the Peruvian Constitution

³² Exceptions are discussed below under "Permissible disclosure of Personal Information".

circumstances where personal information may otherwise be disclosed. These situations and circumstances include:

- disclosure permitted by law or regulation (Section 8 (2) b);
- compliance with subpoenas, warrants, court orders and rules of procedures (Section 8 (2) c);
- disclosure to Attorney General of Canada for use in legal proceedings, (Section 8 (2) d);
- disclosure to public investigative bodies (Section 8 (2) e);
- disclosure to foreign states and international organizations (Section 8 (2) f);
- disclosure to a member of Parliament for assistance purposes (Section 8 (2) g);
- disclosure for audit purposes (Section 8 (2) h);
- disclosure for archival purposes (Section 8 (2) i);
- disclosure for statistical purposes (Section 8 (2) j);
- disclosure for purposes of research and validation of aboriginal land claims, disputes or grievances (Section 8 (2) k);
- disclosure for purposes of debt owing to or owed by Her Majesty, in right of Canada (Section 8 (2) l);
- disclosure for public interest (Section 8 (2) m) i);
- disclosure to benefit the persons to whom the information relates (Section 8 (2) m) ii).

The U.S. Privacy Act also prohibits the disclosure of information related to an individual to whom a record pertains, without the prior written consent of that individual. Nevertheless, Section 552 of the *Privacy Act* provides for specific grounds allowing for the communication or disclosure of information without that person's consent. These exemptions and conditions of disclosure include:

- disclosure to officers and employees of an agency which maintains the information, Section b) 1);
- disclosure required by law or regulation, Section b) 2);
- disclosure for routine use, Section b) 3);
- disclosure to the Bureau of Census, Section b) 4);
- disclosure for statistical purposes, Section b) 5);
- disclosure for archival purposes, Section b) 6);
- disclosure for law enforcement purposes, Section b) 7);
- disclosure for health or safety of an individual, Section b) 8);
- disclosure to the House of Congress, Section b) 9);
- disclosure for audit purposes to the Comptroller General, Section b) 10);
- disclosure pursuant to a court order, Section b) 11);
- disclosure to a consumer reporting agency, Section b) 12).

Chilean law provides in Section 10 of its privacy legislation that use or disclosure without consent is only authorized for the purposes permitted by law and in the cases prescribed by law.

Brazil has pending legislation that would preclude communication of personal information "without express authorization of the owner, except in case of a court order, and for purposes of criminal investigation or legal proceedings". The introduction of this provision into Brazilian law would comply with the principles detailed Part I.

Right of access to one's personal information

The right of access to one's personal information is expressly guaranteed by all but one of the countries surveyed (Uruguay) by way of constitutional or legislative provisions.

For its part, Argentina guarantees the right of access pursuant to Section 43 of the 1994 Argentine Constitution, which states that an individual may file an action to obtain information on data collected about his or herself and the purpose for which this information is gathered by public or private databases.

The 1988 Brazilian Constitution provides for a new *habeas data* procedure to facilitate and ensure access to information contained in records or databanks of government or public agencies.

Also, the privacy of personal data bill, which would govern both private and public sectors and introduced in 1996, calls for the security of the right of access to personal data contained in data banks, at no charge. The individual must also be informed of the existence of data regarding his person, by data base managers.

Section 12 (1) of the Canadian Privacy Act provides a requester the right to be given access to any personal information recorded in personal information data banks or under the control of a government institution to which that individual is able to specify the location of this information. Where a requester is not a Canadian citizen or resident, the Governor in Council may give access to a non-resident under certain conditions established by the Governor in Council.³³

Nevertheless, the Privacy Act subjects the right of access to one's personal information to certain exceptions including:

- personal information obtained under confidentiality (Section 19);
- information with regards to federal provincial affairs (Section 20);
- information regarding international relations and defence matters (Section 21);
- information relating to investigative matters (Section 22);
- information relating to security clearances (Section 23);
- information concerning individuals sentenced for an offence (Section 24);
- information threatening the safety of individuals (Section 25);
- information about another individual (Section 26);
- information protected by the solicitor-client privilege (Section 27);
- information relating to medical records (Section 28).

Chile has recently enacted a comprehensive law covering both the public and private sectors. Section 11 establishes that any individual may request a copy of the information concerning his or her person held by a data bank manager as well as the source, means of collection, authorized use and destination of the information, within 5 working days of the request. Where the individual does not clearly understand the information, a written detailed explanation must be provided to the requester.

The Colombian *Constitution* states that every person has the right to the protection of his or her personal privacy as well as his or her good name, and the State shall respect those rights and enforce them.³⁴

Costa Rica, by way of the writ of *habeas data* and pursuant to Section 71 of the *Constitutional Jurisdiction Act*, guarantees access to information regarding a person or, his or her property, contained in a data base.

Section 94 of the Ecuadorean *Constitution* also guarantees the right to access to an individual's personal information records under the control of either private or public institutions, which would include the right to know the purpose and use for which it was gathered. However, no provisions preclude or limit the right of access to personal information.

The *Constitution of Guatemala* contains a right of access to any personal information bank, as well as the right to know the use and purpose for which the information was collected.³⁵ Again, no exceptions preclude this right of access.

Section 135 of the Paraguayan Constitution includes similar rights regarding information of a public nature. Again, no exceptions have been provided for by the Constitution.

³³ Section 12 (3) of the Canadian Privacy Act.

³⁴ Section 15 of the Colombian Constitution

³⁵ Section 31 of the Guatemalan Constitution.

Peru only guarantees, under Section 2 (5) of the 1993 *Constitution*, the right of access to any information held by a government authority.

The U.S. *Privacy Act* protects the right of a person to review records containing information pertaining to that individual³⁶. The *Act* also provides the following exemptions to the right of access:

- information held by the CIA (Section d) 1);
- information pertaining to enforcement of criminal laws (Section d) 2);
- information regarding investigatory material (Sections d) K (2) 3), 4), 5) 6) and 7).

For its part, Uruguay does not specifically include the right of access information, although it may be inferred from other constitutional and legislative provisions (e.g., sections 7, 72 and 332 of the Uruguayan Constitution).

Corrections and notations

The right of access to one's information entitles an individual to request the correction of that information where the individual believes there the information held contains an error or omission. Pursuant to this right to correction, an administrative correction process or scheme has been adopted by only Canada and the United States, whereby the government agency holding one's personal information has certain legal duties as to delays, notice and the adding of notations.

Section 43 (3) of the 1994 Argentinean *Constitution* allows anyone to discover information the government has about a plaintiff in its data banks and to rectify, suppress, update or seal that data if it is incorrect.

Section 5 LXXII b) of the Brazilian Federative *Constitution* also provides for a similar remedy (*habeas data*) whereby a plaintiff may request the correction of the data held in records or data banks of governmental or public entities except "when it is preferable to do so through confidential judicial or administrative proceedings".

The Colombian *Constitution* states in section 15 that the person to whom the right of access to his or her personal information is guaranteed has the right to know, update and correct the information collected about his or her person, regardless of whether the data bank's records are kept by public or private entities.

The Costa Rican *Constitutional Jurisdiction Act* also requires that information be immediately rectified, updated, included, sealed or annulled if it is so required by the individual whose information is being stored in government databanks (section 71).

As per sections 94 (2) and (3) of the *Constitution of Ecuador*, the right to correction of one's personal information is provided where an individual believes that an error or omission has been included or when the information contained illegally affects that individual's rights.

The Guatemalan situation reveals that Section 31 of the *Constitution* specifically includes the right to request the correction, rectification or updating of the information contained in public databases.

Paraguay's *Constitution* provides for the right to correction of one's personal information where an individual believes that the information contained is erroneous or when the information contained may illegally affect one's individual rights.

The Chilean *Privacy Act* provides in Section 12 that any individual has a right to request rectification, completion and updating of his or her personal information by the data bank manager, where this information is incorrect, incomplete or obsolete. Also, that individual may request the suppression of this information where it is obsolete or where it was collected, kept, used or

³⁶ Section d)1) of the US Privacy Act.

disclosed in cases other than those provided by law or consented to by the requester. The data bank manager shall therefore provide a copy of the modified information on request.

As mentioned previously, Canada has enacted a system whereby the right to corrections and notations must follow a stricter process encompassing certain legal obligations that an information manager must follow when a request for a correction or notation has been made. Following this procedure, the government authority that controls the information must notify the requester of the acceptance or refusal to correct or add a notation to the information contained in the person's record. Where the administrative body refuses the correction, then it must include a notation in the record reflecting that request, as well as notify any other party who received disclosure of the information two years prior to the correction or notation.

The USA, for its part, possesses a similar system whereby an individual's personal information is amended upon request where it is found to be inaccurate, irrelevant, untimely or incomplete. The supervising agency must acknowledge receipt of the request, make the corrections, and in the case of a refusal to amend the information, the agency must then inform the requester of the refusal and the reasons for this refusal, as well as his or her right to ask for a review of that decision. (Section d) (2) A) b) i) and ii) of the U.S. *Privacy Act*).

Independent review of decisions under the privacy law

As previously stated, to ensure the proper administration of the right of access to information, privacy laws should include a comprehensive right of appeal to an independent body empowered to review decisions taken by government regarding the right of access to information. Few countries have adopted this type of regime and the review systems that have been adopted are not specialized bodies. Only Canada it seems, for now, has created a specialized organ.

Argentina, pursuant to section 86 of the *National Constitution*, has created an autonomous body called *Defensor del Pueblo* (Public Defender) for the defence and protection of human or any other rights guaranteed by laws and the *Constitution*, as well as the control of government action and administrative functions. The *Defensor del Pueblo* is chosen by Congress and possesses the same privileges and immunities of a legislator. The *Defensor* has a mandate of not more than five years with the possibility of renewing the mandate for one more term.

Mexican legislation also has a more general procedure before the Human Rights Commission, which is empowered to make recommendations to the public authorities that have violated a human right. (See the Mexican Human Rights Commission Law)

The Canadian *Privacy Act*, under Section 53, creates the office of the Privacy Commissioner who is appointed by the Governor in Council after the approval of the appointment by both Houses of Parliament. The Privacy Commissioner, pursuant to Section 29 of the *Privacy Act*, has the power to receive and investigate complaints regarding personal information held by government institutions, its use or disclosure as well as the requesting and or obtaining of personal information under Section 12 of the *Privacy Act*.

Judicial review

Privacy Law should also include the right of appeal to courts of justice, either by the affected individual or the body in charge of reviewing right of access violations. Most of the countries surveyed provide for this type of judicial review either through constitutional or legislative provisions.³⁷

³⁷ Argentina (section 43 National Constitution); Brazil (sections 5 LXXVII, 102, 105, 108 and 109 of the Federative Constitution); Canada (section 41 of the Privacy Act); Chile (section 20 of the Constitution and sections 13 and 24 of

Access to Information

Brazil, Canada, Colombia, Costa Rica, Ecuador, Guatemala, Mexico, Paraguay and the United States regulate in different pieces of legislation the right of access to information held by the government.

Article 5 XXXIII of the Brazilian Federative *Constitution* establishes that persons have the right to receive information from government in the manner and delays determined by law.

The Canadian Access to Information Act states that all Canadian citizens or residents³⁸ have the right of access to any government information or any information controlled by government³⁹ in accordance with the principle that government information should be public and transparent.

Section 20 of the Colombian Constitution establishes that every person is guaranteed the freedom of expression and the right to be informed and receive true and impartial information.

The Costa Rican Constitution guarantees the right of petition and the right to receive a prompt response pursuant to this right before any public officer.⁴⁰ Also, Section 30 guarantees the freedom of access to government information concerning public interests. Further, in Section 72 of the Constitutional Jurisdiction Act, a remedy of an improper *habeas data* is introduced. The *habeas data* generally relates to information pertaining the requester. However, through the improper *habeas data*, individuals have access to information relating to a third party or to the government.

Section 27 (15) of the Ecuadorian *Constitution* states that "... parties to legal proceedings have the right of access to information regarding these proceedings in order to guarantee the right of due process."

The Guatemalan *Constitution* states that administrative acts or procedures are public and that interested parties have the right to obtain access to them.⁴¹

The Mexican *Constitution* provides for the respect of the exercise of the right of petition, requiring that only Mexican citizens be able to make a request where the petition is related to political matters. The request must be answered, in writing, promptly and with a respectful and peaceful attitude.⁴²

The Paraguayan *Constitution* states that every individual has a right to access public sources and receive information in a responsible mode respecting the delays and formalities established by the law.⁴³

The U.S. *Freedom of Information Act* (as amended) enumerates in paragraphs 3 (1) and (2) the records that should be made available to the public. Where the information is not included within the enumeration of these two subsections, paragraph 3 (A) also provides for access, establishing that each agency should respond to the requests promptly. The requester must describe the records to be located and respect certain rules stating time, place, fees and procedures to be followed.

Argentina does not possess a national law governing the access to public information. However, last year, a law was enacted by the City of Buenos Aires where almost one third of the

the Law on the protection of Privacy); Costa Rica (section 71 of the Constitution); Ecuador (sections 94(2) and (3) of the Constitution); Paraguay (section 135 of the Constitution); United States (section g)(1) of the Privacy Act).

³⁸ The Governor in Council may extend the right to be given access to include persons not referred to in this subsection.

³⁹ Section 2 and Section 4 of the Canadian Access to Information Act.

⁴⁰ Section 27 of the Costa Rican Constitution.

⁴¹ Section 30 of the Guatemalan Constitution.

⁴² Section 8 of 1917 Mexican Constitution.

⁴³ Section 28 of 1992 Paraguayan Constitution.

Argentine population resides. This law provides for the access to municipal public information in accordance with the principle of transparency of public acts of government.⁴⁴

Exemptions to the right of access to information

As noted in Part I, the right of access to information is not an absolute one. Legislation often establishes exceptions, which should be limited and specified in accordance with the principles set out in Part I.

The Brazilian *Constitution* in Section 5, XXXIII, maintains that no access shall be given to information "... whose secrecy is vital to the security of society and of the State". Similarly, the Costa Rican Constitution determines that access is guaranteed unless "...the information relates to State secrets".⁴⁵ Also, the Guatemalan *Constitution* exempts the right of access the information where this information concerns military and diplomatic matters relating national security. Further, Guatemala establishes that access will not be given to information that was given under a guarantee of confidentiality.⁴⁶

Canadian and U.S. provisions provide for a more exhaustive list of exempted information. Canada's Access to Information Act regulates that no access to information shall be given where information is related to one of the following issues:

- information obtained in confidence (Section 13);
- federal-provincial affairs (Section 14);
- international affairs and defence (Section 15);
- law enforcement and investigations. Security. Policing services for provinces or municipalities (Section 16);
- safety of individuals (Section 17);
- economic Interest of Canada (Section 18);
- personal Information (Section 19);
- third Party Information (Section 20);
- testing procedures, tests and audits (Section 22);
- solicitor-Client Privilege (Section 23);
- statutory prohibitions against disclosure (Section 24).

Paragraph b) of the U.S. *Freedom of Information Act* states that the provisions regulating access to information will not apply to matters that are:

- specifically authorized under criteria established by an executive order;
- related solely to the internal personnel rules and practices of an agency;
- specifically exempted from disclosure by statute;
- trade secrets and commercial or financial information;
- inter-agency or inter-agency memorandums;
- personnel and medical files;
- records or information compiled for law enforcement purposes;
- information contained in or related to examination, operation, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- geological and geophysical information and data concerning wells.

⁴⁴ Article 1 and 2 of Law n.104 which introduced in this analysis as mere illustration.

⁴⁵ Section 30 of Costa Rican *Constitution*.

⁴⁶ Section 30 of Guatemalan *Constitution*.

Also, it states that any reasonable segregable portion of a given record shall be provided once deletion of the exempted portions has been completed.

The city of Buenos Aires law provides that no information shall be submitted where it affects the intimacy of a person, obtained from third parties confidentially, affects the result of legal proceedings, violates professional privileges, is part of Cabinet privileges, or is specifically exempted pursuant to law. Where part of the information is not considered exempted it shall be disclosed.⁴⁷

Independent review of decisions on disclosure

Canada is presently the only country that has established an independent agency to review decisions on disclosure. The Canadian Access to Information Act regulates the functions of the Information Commissioner, who may receive or initiate complaints from persons: whose access has been refused; or that consider that the fees charged are unreasonable; or that believe that the time limits given to respond have been extended in an unreasonable manner; or who have not been given access to the information in the official language requested by the individual; or that have been given access in an alternative format pursuant to the format requested; or for any other matter relating to the request for access to records under the Act.

Judicial procedures

Canada, Costa Rica and the USA regulate judicial procedures where access to information has been denied, expressly or implicitly. Canada provides for a judicial review procedure once the complaint has been made before the Information Commissioner. The United States has not created an independent review body, and therefore the judicial review procedure is the first stage to contest the refusal of action.

Section 41 of the Canadian *Access to Information Act* states that any person who has been refused access to the information requested and has made a complaint before the Information Commissioner may apply to the Court for review of the matter in the first forty-five days after the Information Commissioner has pronounced himself or herself on the dispute. The Court may, upon motion, extend this time period.

Section 75 of the Costa Rican *Constitutional Jurisdiction Act* states that access to information must be given through the writ of *habeas data*, which has priority over the writ of injunction and must be resolved in a period of no more than 8 days. The procedure is initiated before the Constitutional Jurisdiction Court of the Supreme Court of Costa Rica.

The U.S. *Freedom of Information Act* paragraph 4 (b) indicates that upon receipt of a grievance, the district court of the United States has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. Paragraph 4 (c) states that “the defendant must answer the request or otherwise plea to any complaint within thirty days”, unless the court orders otherwise.

Third party procedures

The Canadian *Access to Information Act* prevents the disclosure of third party information where this information relates to trade secrets, financial, commercial, scientific or technical information that is confidentially supplied to a government institution, as well as where this information could result in a material or financial loss or gain or prejudice the competitive position of a third party.⁴⁸ Where the intention of the government institution is to disclose this information, it has

⁴⁷ Section 3 and Section 4 of the Law 104 of the City of Buenos Aires.

⁴⁸ Section 20 (1) of the Access to Information Act.

to notify the third party to whom the information relates and this third party has 20 days to object to the disclosure as well and give reasons why the information must not be disclosed.⁴⁹

Procedure for obtaining access to information

Canada, Costa Rica and the United States are the only countries that provide for a detailed process enabling access to the information requested by an individual. The Brazilian *Constitution* only states that the information has to be received in conformity with the delays established by the law. However, at present time, there is no specific law that regulates the access to information.

Canada administers the petition by requiring that it be made in writing providing sufficient detail to facilitate location of the information.⁵⁰ Also, the law establishes that the requester should pay application fees ,which will not exceed twenty-five dollars plus possible reproduction costs that have to be charged or where the conversion to another format has been requested.⁵¹

The Costa Rican *Jurisdictional Act* states in Section 73 that the process has priority over the writ of injunction and must be resolved in no more than 8 days. The action may be presented by a natural person, his or her heirs, a legal person, the ombudsman or associations against discrimination,⁵² specifying their name and address, identifying the information requested clearly. Where the claim includes damages, the reasons relating to the claim must be alleged in the petition.⁵³

Paragraph 4 (A) of the U.S. *Freedom of information Act* states that “each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced...”. Such agency regulations shall provide that i) fees shall be limited to reasonable standard charges for document search, duplication, and review, when records are requested for commercial use; ii) fees shall be limited to reasonable standard charges. iii) documents shall be furnished without any charge or at a charge reduced below the fees established under clause ii if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester; and iv) fee schedulers shall provide for recovery only the direct costs of search, duplication, or review”. Paragraph (6) A provides for an additional 20 day delayed period within which the government agency must respond.

PART III

AN INTERNATIONAL INSTRUMENT FOR THE AMERICAS?

A former rapporteur, Dr. Mauricio Gutiérrez Castro, presented a report to the Juridical Committee in August 1996, entitled *Right of information: access to information and protection of personal information and data* (CJI/SO/I/doc.9/96 rev.1). The report surveyed the history of this topic in the Juridical Committee and the development of the protection of personal data in the Americas, and analyzed several Constitutions that provide for the *habeas data*. It highlighted the fact that recent constitutions in the Americas do not possess a finite enumeration of the fundamental rights, thus making it possible to infer from them rights that are not specifically enumerated.

⁴⁹ Section 27 (1) of the Access to Information Act.

⁵⁰ Section 6 of the Access to Information Act.

⁵¹ Section 11 (1) of the Access to Information Act.

⁵² Section 74 of the Constitutional Jurisdiction Act.

⁵³ Section 75 of the Constitutional Jurisdiction Act.

In August 1997, Dr. Gutiérrez Castro presented another report entitled *Right of information: access to and protection of personal data and information (Part Three)*, which proposed that a draft convention on the protection of personal data as the next step that the Juridical Committee should take. For this purpose, Dr. Gutiérrez Castro used the Convention on the *Protection of persons with respect to the automated processing of personal data* (1981), known as the *Strasbourg Convention*, as a key reference and starting point for drafting an inter-American convention.

Some special provisions were introduced in relation to the unequal level of development of Latin American countries. In drafting the proposed convention, Dr. Gutiérrez Castro took into account the fact that several Latin American nations sign treaties and do not enact proper laws to implement them. The proposed solution to this legal vacuum was the introduction in the convention of minimum standards that would enable its application, using the Spanish 1992 *Automated Processing of Personal Data Act* as a model.

Dr. Olmedo Sanjur was appointed as co-rapporteur of Dr. Gutiérrez Castro for the purpose of concluding the mandate given by the General Assembly to the Juridical Committee with respect to the right of information.⁵⁴ Dr. Sanjur recommended focussing efforts on the preparation of a draft convention.

The Juridical Committee adopted a resolution⁵⁵ through which it invited the members of the Juridical Committee to study both conventions with a view to determining whether it was convenient to adopt the *Strasbourg Convention* or undertake the preparation of an inter-American convention. Pursuant to this request, Dr. Olmedo Sanjur presented a report entitled *Right to information: some observations concerning the provisional draft for the American convention on informational self-determination*,⁵⁶ comprising a comparative analysis between the *Strasbourg Convention* and the draft convention as presented by Dr. Gutiérrez Castro.

In general terms, the draft convention follows the *Strasbourg Convention*. Differences are found with respect to the coverage, with the draft convention providing for protection of manually processed data. Also, the protection of the draft convention is broader, covering not only physical but legal persons. The draft provides a more complete treatment of aspects such as the collection of information⁵⁷, consent of the individual to whom the information pertains⁵⁸, quality of information⁵⁹ and security of personal data.⁶⁰ The legal guarantees that individual possesses to seek a simple and rapid remedy are set out in a more precise manner than in the *Strasbourg Convention*.⁶¹ Moreover, the *Provisional Draft* stipulates that each member State may create an independent agency for the protection of personal information and data, going further than the *Strasbourg Convention* with respect to this issue. Omissions of the *Provisional Draft* as compared to the *Strasbourg Convention* are the establishment of a consultative committee in charge of handling matters concerning the application of the convention⁶², the provisions related to costs and procedures for assistance⁶³ or refusal of request for assistance.⁶⁴

⁵⁴ CJI/doc.50/97 rev.1.

⁵⁵ CJI/RES.4/LII/98.

⁵⁶ OEA/Ser.Q CJI/doc.52/98).

⁵⁷ Article 5 of the Provisional Draft for the American convention on informational self-determination.

⁵⁸ Article 6, Article 5 of the Provisional Draft for the American convention on informational self-determination.

⁵⁹ *Ibid.*, Article 7.

⁶⁰ *Ibid.*, Article 9.

⁶¹ *Ibid.*, Article 12.

⁶² Chapter V of the *Strasbourg Convention*.

⁶³ *Ibid.*, article 17.

⁶⁴ *Ibid.*, article 16.

The reasons explaining why the *Provisional draft* convention regulates these issues in a more detailed manner may be found in the final comments written by Dr. Gutiérrez Castro, who considered that Latin American countries take longer to accede to and approve this type of convention and that once they are approved, national legislation and regulations are seldom enacted.

This study suggests that the question of whether it is convenient to accede to the *Strasbourg Convention*⁶⁵ or to promote the signature of an hemispheric convention is beside the point. The underlying objective of either approach is to enshrine effective means for access to and protection of personal information and data. The survey of the previous section suggests that domestic measures are lacking in a number of member States with the result that basic principles for access and protection are not widely respected in the hemisphere.

Accepting treaty obligations still depends on implementation and administration of relevant provisions by national organs, be they an administrative department to which the information is requested, or be an independent agency or tribunal. The various ways in which information is collected, responsibility for responding to requests, notice to third parties who may be concerned, the exceptions to the right of access rule or cases where disclosure or use can be pursued without the consent of the individual are aspects that should be regulated at the national level, particularly to guarantee the effective and efficient respect of these rights.

In sum, pursuit of a convention or accession to *Strasbourg* would not appear to be logical without accompanying domestic measures.

A survey of domestic laws, as requested by the Secretariat for Legal Affairs, led to only six of³⁴ countries responding. Some had an overwhelming task in trying to gather this information from different sources, such as criminal codes, civil codes, constitutions, special laws, etc.. The right of information and in particular the right of access to information and the protection of personal information and data is not unified under a single law in very many countries.

In sum, efforts to pursue a convention may be fruitless where countries do not possess national laws regulating in detail the rights of access to information and protection of personal information and data. The effectiveness of any convention on the subject could be jeopardized where countries do not enact national laws relating to access to information and protection of personal information and data to make its application feasible or practicable.

PART IV

PERSONAL INFORMATION HELD BY PRIVATE ORGANIZATIONS

Traditionally, legislators concerned with the protection of privacy have sought to address the fact that governments hold a great deal of information about individuals. This has prompted legislative action, as described above, to put limits on the uses to which government-held information can be put and to provide individuals with the right to have access to their personal information and to request the correction of that information.

Of late, there is an additional privacy concern: the private sector is now a major collector and user of personal information, both in the marketplace and in the third-party delivery of government services. It is important, in the light of this trend, that privacy legislation provide common guidelines for the handling and treatment of personal information in the private sector.

⁶⁵ Article 23 (1) of the Strasbourg Convention provides for the accession of other non-Member States to the Council of Europe. However, up until June 23, 1999 no non-member states have yet signed it.

It is noteworthy as well that a country's ability to provide effective protection for personal information may have an impact on its competitiveness in the global information economy. For example, it may affect the exchange of data with European Union member states. In 1995, the Council of Ministers of the European Union adopted a Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data⁶⁶ for the purpose, *inter alia*, of harmonizing data protection⁶⁷ practices within the European Union.

The Directive requires member States to adopt laws to protect personal information in both the public and private sectors. Chapter IV of the Directive deals with the "Transfer of Personal Data to Third Countries". It states that the data protection laws of EU members must include a provision to block transfers of information to non-member States that do not provide an "adequate" level of protection. Article 25 of the Directive is set out in part below:

1. The member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.
2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.
3. Where the Commission finds that a third country does not ensure an adequate level of protection within the meaning of paragraph 2 of this Article, Member States shall take the measures necessary to prevent any transfer of data of the same type to the third country in question.
4. At the appropriate time, the Commission shall enter into negotiations with a view to remedying the situation resulting from the finding made pursuant to paragraph 4.

Thus, a failure to provide adequate protection for personal information could put a country at risk of having "data flows" from the European Union impeded.⁶⁸ In countries that do not have legislation to protect personal information in the private sector, individual businesses (or industry associations) may be forced to undertake negotiations with the Commission with a view to demonstrating their compliance with the European Union rules. The uncertainties, cost and delays inherent in this process could well have a negative impact on the affected businesses.

⁶⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995, *Official Journal* of the European Communities of 23 November 1995 No L. 281 p. 31.

⁶⁷ The European Union tends to use the term "data protection" where Canada would use "privacy protection".

⁶⁸ The *General Agreement on Trade in Services* (GATS) would appear to anticipate measures for this purpose. Article XIV of the GATS, which sets out the "General Exceptions", provides in part: Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: ... (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: ... (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

Fortunately, governments wishing to develop laws in this area have the benefit of a considerable body of national-level and international precedents, of which one of the earliest was the Council of Europe *Convention for the protection of individuals with regard to automatic processing of personal data*.⁶⁹ Also notable in this regard are *Guidelines on the protection of privacy and transborder flows of personal data*⁷⁰ issued by the Organization for Economic Cooperation and Development (OECD) in 1981. The *Guidelines* have influenced the development of laws to protect personal information in both the public and private sectors in a number of jurisdictions, including Canada.

In the early 1990s, the Canadian Standards Association (CSA) prepared a *Model code for the protection of personal information* as a set of principles for the protection of personal information in the private sector. The *Model code* was based on the OECD *Guidelines*, but further refined the principles that the *Guidelines* embodied. It addressed two broad concerns:

- the way in which private organizations collect, use, disclose and protect personal information; and
- the right of individuals to have access to personal information about themselves that is held by private organizations, and to have the information corrected if necessary.

The Parliament of Canada is now considering a draft *Personal information protection and electronic documents Act*⁷¹ that would give legal force to the principles elaborated in the CSA *Model Code*. Those principles form the basis for the following list of provisions that governments might wish to examine as possible elements of a privacy law applying to the private sector.

Accountability

1. An organization⁷² is responsible for personal information under its control and shall designate an individual or individuals who are accountable for the organization's compliance with the following principles.

Accountability for the organization's compliance with these "fair information principles" would rest with the designated individual(s), even though other individuals within the organization might be responsible for the day-to-day collection and processing of personal information. In addition, other individuals within the organization may be delegated to act on behalf of the designated individual(s).

2. The identity of the individual(s) designated by the organization to oversee the organization's compliance with the principles shall be made known upon request.
3. An organization is responsible for personal information in its possession or custody, including information that has been transferred to a third party for processing. The organization shall use contractual or other means to provide a comparable level of protection while the information is being processed by a third party.
4. Organizations shall implement policies and practices to give effect to the principles, including:
 - a) implementing procedures to protect personal information;
 - b) establishing procedures to receive and respond to complaints and inquiries;

⁶⁹ Opened for signature January 28, 1981, No. 108.

⁷⁰ Paris: OECD, 1981, adopted by the governments of OECD member countries on 11 April 1985.

⁷¹ The draft legislation, termed Bill C-54, received its first reading in the House of Commons on October 1, 1998.

⁷² In this Part, "organization" includes an association, a partnership, a person (natural or juridical) and a trade union.

- c) training staff and communicating to staff information about the organization's policies and practices; and
- d) developing information to explain the organization's policies and procedures.

Identifying purposes

1. The purposes for which personal information is collected shall be identified by the organization at or before the time the information is collected.
2. The organization shall document the purposes for which personal information is collected, to comply with the Openness principle [set out below] and the Individual Access principle [below].

Identifying the purposes for which personal information is collected at or before the time of collection allows organizations to determine the information they need to collect to fulfil these purposes. The Limiting Collection principle (below) requires an organization to collect only that information necessary for the purposes that have been identified.

3. The identified purposes should⁷³ be specified at or before the time of collection to the individual from whom the personal information is collected.

Depending upon the way in which the information is collected, this could be done orally or in writing. An application form, for example, may give notice of the purposes.

4. When personal information that has been collected is to be used for a purpose not previously identified, the new purpose shall be identified prior to use. Unless the new purpose is required by law, the consent of the individual is required before information can be used for that purpose.
5. Persons collecting personal information should be able to explain to individuals the purposes for which the information is being collected.

Consent

1. The knowledge and consent of the individual are required for the collection, use, or disclosure of personal information,⁷⁴ except where it would be inappropriate to require that consent be obtained.⁷⁵

⁷³ In this Part, the word "should" indicates that the privacy law would make a recommendation rather than imposing an obligation. The word "shall", by contrast, indicates that there would be an obligation.

⁷⁴ In obtaining consent, the reasonable expectations of the individual are relevant. For example, an individual would not reasonably expect that personal information given to a health care professional would be given to a company selling health care products, unless consent were obtained.

⁷⁵ As discussed in Part I, in certain circumstances personal information can be collected, used, or disclosed without the knowledge and consent of the individual. For example, legal, medical, or security reasons may make it impossible or impractical to seek consent. When information is being collected for the detection and prevention of fraud or for law enforcement, seeking the consent of the individual might defeat the purpose of collecting the information. Seeking consent may also be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated. In addition, organizations that do not have a direct relationship with the individual may not always be able to seek consent. (For example, seeking consent may be impractical for a firm that wishes to acquire a mailing list. In this case, the organization providing the list would be expected to obtain consent before disclosing personal information.)

Consent is required for the collection of personal information and the subsequent use or disclosure of the information. Typically, an organization will seek consent for the use or disclosure of the information at the time of collection. In certain circumstances, however, consent with respect to use or disclosure may be sought after the information has been collected but before use (for example, when an organization wants to use information for a purpose not previously identified).

2. Organizations shall make a reasonable effort to ensure that the individual is advised of the purposes for which the information will be used. To make the consent meaningful, the purposes must be stated in such a manner that the individual can reasonably understand how the information will be used or disclosed.
3. An organization shall not, as a condition of the supply of a product or service, require an individual to consent to the collection, use, or disclosure of information beyond that required to fulfill the explicitly specified, and legitimate purposes.
4. The form of the consent sought by the organization may vary, depending upon the circumstances and the type of information. In determining the form of consent to use, organizations shall take into account the sensitivity of the information. Although some information (for example, medical records and income records) is almost always considered to be sensitive, any information can be sensitive, depending on the context.
5. Consent shall not be obtained through deception.
6. The way in which an organization seeks consent may vary, depending on the circumstances and the type of information collected. An organization should generally seek express consent when the information is likely to be considered sensitive. Implied consent would generally be appropriate when the information is less sensitive. Consent may also be given by an authorized representative (such as a legal guardian or a person having power of attorney).⁷⁶
7. An individual may withdraw consent at any time, subject to legal or contractual restrictions and reasonable notice. The organization shall inform the individual of the implications of such withdrawal.

Limiting collection

1. The collection of personal information shall be limited to that which is necessary for the purposes identified by the organization. Information shall be collected by fair and lawful means.⁷⁷

⁷⁶ Individuals can give consent in a number of ways. For example:

- a) an application form may be used to seek consent, collect information, and inform the individual of the use that will be made of the information. By completing and signing the form, the individual consents to the collection and the specified uses;
- b) a checkoff box may be used to allow individuals to request that their names and addresses not be given to other organizations. Individuals who do not check the box are assumed to consent to the transfer of this information to third parties;
- c) consent may be given orally when information is collected over the telephone; or
- d) consent may be given at the time that individuals use a product or service.

⁷⁷ The requirement that personal information be collected by fair and lawful means is intended to prevent organizations from collecting information by misleading or deceiving individuals about the purpose for which information is being collected. (That is, consent with respect to collection must not be obtained through deception.)

2. Organizations shall not collect personal information indiscriminately. Both the amount and the type of information collected shall be limited to that which is necessary to fulfill the purposes identified. Organizations shall specify the type of information collected as part of their information-handling policies and practices, in accordance with the Openness principle [below].

Limiting use, disclosure, and retention

1. Personal information shall not be used or disclosed for purposes other than those for which it was collected, except with the consent of the individual or as required by law. Personal information shall be retained only as long as necessary for the fulfillment of those purposes.
2. Organizations using personal information for a new purpose shall document this purpose.⁷⁸
3. Organizations should develop guidelines and implement procedures with respect to the retention of personal information. These guidelines should include minimum and maximum retention periods. Personal information that has been used to take a decision about an individual shall be retained long enough to allow the individual access to the information after the decision has been taken.
4. Personal information that is no longer required to fulfil the identified purposes should be destroyed, erased, or made anonymous. Organizations shall develop guidelines and implement procedures to govern the destruction of personal information.

Accuracy

1. Personal information shall be as accurate, complete, and up-to-date as is necessary for the purposes for which it is to be used.
2. The extent to which personal information shall be accurate, complete, and up-to-date will depend upon the use of the information, taking into account the interests of the individual. Information shall be sufficiently accurate, complete, and up-to-date to minimize the possibility that inappropriate information may be used to make a decision about the individual.
3. An organization shall not routinely update personal information, unless such a process is necessary to fulfil the purposes for which the information was collected.
4. Personal information that is used on an ongoing basis, including information that is disclosed to third parties, should generally be accurate and up-to-date, unless limits to the requirement for accuracy are clearly set out.

Safeguards

1. Personal information shall be protected by security safeguards appropriate to the sensitivity of the information.
2. The security safeguards shall protect personal information against loss or theft, as well as unauthorized access, disclosure, copying, use, or modification. Organizations shall protect personal information regardless of the form in which it is held.

⁷⁸ See the Identifying Purposes principle, above.

The nature of the safeguards will vary depending on the sensitivity⁷⁹ of the information that has been collected, the amount, distribution, and format of the information, and the method of storage. More sensitive information should be safeguarded by a higher level of protection.

3. The methods of protection should include
 - a) physical measures, for example, locked filing cabinets and restricted access to offices;
 - b) organizational measures (for example, security clearances and limiting access on a "need-to-know" basis); and
 - c) technological measures (for example, the use of passwords and encryption).
4. Organizations shall make their employees aware of the importance of maintaining the confidentiality of personal information.
5. Care shall be used in the disposal or destruction of personal information, to prevent unauthorized parties from gaining access to the information.⁸⁰

Openness

1. An organization shall make readily available to individuals specific information about its policies and practices relating to the management of personal information.
2. Organizations shall be open about their policies and practices with respect to the management of personal information. Individuals shall be able to acquire information about an organization's policies and practices without unreasonable effort. This information shall be made available in a form that is generally understandable.
3. The information made available shall include:
 - a) the name or title, and the address, of the person who is accountable for the organization's policies and practices and to whom complaints or inquiries can be forwarded;
 - b) the means of gaining access to personal information held by the organization;
 - c) a description of the type of personal information held by the organization, including a general account of its use;
 - d) a copy of any brochures or other information that explain the organization's policies, standards, or codes; and
 - e) what personal information is made available to related organizations (for example, subsidiaries).

An organization may make information on its policies and practices available in a variety of ways. The method chosen depends on the nature of its business and other considerations. For example, an organization may choose to make brochures available in its place of business, mail information to its customers, provide online access, or establish a toll-free telephone number.

⁷⁹ The concept of sensitivity is discussed under the Consent principle, above.

⁸⁰ See the Limiting Use, Disclosure and Retention principle, above.

Individual access

1. Upon request, an individual shall be informed of the existence, use, and disclosure of his or her personal information and shall be given access to that information.⁸¹ An individual shall be able to challenge the accuracy and completeness of the information and have it amended as appropriate.
2. Upon request, an organization shall inform an individual whether or not the organization holds personal information about the individual. Organizations are encouraged to indicate the source of this information. The organization shall allow the individual access to this information.⁸² In addition, the organization shall provide an account of the use that has been made or is being made of this information and an account of the third parties to which it has been disclosed.
3. An individual may be required to provide sufficient information to permit an organization to provide an account of the existence, use, and disclosure of personal information. The information provided shall only be used for this purpose.
4. In providing an account of third parties to which it has disclosed personal information about an individual, an organization should attempt to be as specific as possible. When it is not possible to provide a list of the organizations to which it has actually disclosed information about an individual, the organization shall provide a list of organizations to which it may have disclosed information about the individual.
5. An organization shall respond to an individual's request within a reasonable time and at minimal or no cost to the individual. The requested information shall be provided or made available in a form that is generally understandable. For example, if the organization uses abbreviations or codes to record information, an explanation shall be provided.
6. When an individual demonstrates the inaccuracy or incompleteness of personal information, the organization shall amend the information as required. Depending upon the nature of the information challenged, amendment involves the correction, deletion, or addition of information. Where appropriate, the amended information shall be transmitted to third parties having access to the information in question.
7. When a challenge is not resolved to the satisfaction of the individual, the substance of the unresolved challenge shall be recorded by the organization. Where appropriate, the existence of the unresolved challenge shall be transmitted to third parties having access to the information in question.

Challenging an Organization's compliance with the principles

1. An individual shall be able to address a challenge concerning compliance with the above principles to the designated individual or individuals accountable for the organization's compliance.⁸³

⁸¹ In certain situations, an organization may not be able to provide access to all the personal information it holds about an individual. Exceptions to the right of access should, however, be limited and specific. The reasons for denying access should be provided to the individual upon request. (Exceptions may include information that is prohibitively costly to provide, information that contains references to other individuals, information that cannot be disclosed for legal, security, or commercial proprietary reasons, and information that is subject to lawyer-client privilege.)

⁸² The organization may, however, choose to make sensitive medical information available through a medical practitioner.

⁸³ The individual accountable for an organization's compliance is discussed under the Accountability principle, above.

2. Organizations shall put procedures in place to receive and respond to complaints or inquiries about their policies and practices relating to the handling of personal information. The complaint procedures should be easily accessible and simple to use.
3. Organizations shall inform individuals who make inquiries or lodge complaints of the existence of relevant complaint procedures.
4. An organization shall investigate all complaints. If a complaint is found to be justified, the organization shall take appropriate measures, including, if necessary, amending its policies and practices.

As well, similar to the proposal in Part I, the law concerning the protection of personal information in the private sector should provide for an independent review of complaints concerning the compliance by organizations with the principles in this Part. This would mean, as a minimum, the appointment of an independent ombudsperson.

As appropriate, governments should also consider establishing a right (on the part of the affected individual and the ombudsperson) to apply to the courts with respect to the compliance of organizations. The privacy law might authorize the following judicial remedies, among others:

- an order that an organization correct its practices to comply with the principles set out in this Part;
- an order that an organization publish a notice of any action taken to correct its practices; and
- an award of damages to the complainant.

CONCLUSION

The limitations of this report rest in part on the insufficient amount of information submitted by member States in response to the request of the Secretariat for Legal Affairs. An informed judgement on the desirability of endorsing or preparing an international instrument depends in large measure on the extent to which national legal systems provide the foundation for, and procedures regarding, access to and protection of personal information and data. The attached draft resolution therefore recommends that another effort be made to obtain information regarding the situation in other member States, before the Juridical Committee decides to pursue either model laws or principles, or further examination of current or proposed international conventions.

The Inter-American Juridical Committee then approved resolution CJI/RES.9/LV/99, *Right to information: access to and protection of personal information and data*. In that resolution, the Juridical Committee resolved to continue its consideration of the topic with a view to determining how best to proceed with the study of this matter, including, if need be, the development of basic principles, standards and a model law or draft international instrument in this area. The text of the approved resolution is as follows:

RIGHT TO INFORMATION:

access to and protection of personal information and data

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

In democratic societies, the right to privacy entails the need to protect personal information and data from unauthorized use or disclosure, and the accountability of government to its citizens to provide the public with access to information in the possession or control of the government;

The General Assembly, in its resolution AG/RES.1395 (XXVI-O/96), requested the Inter-American Juridical Committee to give special attention to matters concerning access to personal information and the protection of personal data;

The Inter-American Juridical Committee has completed an analysis of the *Convention for the protection of individuals with regard to automatic processing of personal data* or the *Strasbourg Convention* in comparison to a preliminary draft of an inter-American convention on informative self-determination (OEA/Ser.Q CJI/doc.52/98);

Effective guarantees for access to and protection of personal information and data depend in the first instance on the adoption and implementation of comprehensive norms and legal procedures in domestic law;

Some member States have recently adopted relevant measures that can act as a useful reference for other States that are considering similar reforms;

Only six member States have responded to date to the request of the Secretariat for Legal Affairs (OEA/Ser.Q CJI/RES.15/LIII/98) to submit information on existing domestic laws and procedures concerning access to and protection of personal information and data;

Developments in technology suggest the need to ensure that domestic laws and procedures are adequate to provide access to and protection of data entered into electronic mail and computerized electronic transmission systems, whether in the possession or control of governments or private entities;

The rapporteur's latest report (OEA/Ser.Q CJI/doc.45/99) on the subject highlights the need to adopt internal measures on this matter,

RESOLVES:

1. To thank Dr. Jonathan T. Fried for his analysis of the basic principles for access to and protection of personal information and data and the review of domestic laws and regulations in member States in this field.

2. To request the General Secretariat, through the Secretariat for Legal Affairs, to reiterate its request for information from member States prior to the next regular session of the Inter-American Juridical Committee on existing domestic legislation, regulations and policies governing access to and protection of personal information and data, and to forward the rapporteur's report to the member States to assist them in responding to the request.

To determine the way to proceed with the study of the subject, including, whether or not, the developing of basic principles, guidelines, model laws or the drafting of an international instrument in this field.

This resolution was unanimously adopted during the 18 August 1999 session, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi and Gerardo Trejos Salas.

2. Inter-American cooperation against terrorism

At the fifty-fourth regular period of sessions of the Inter-American Juridical Committee (Rio de Janeiro, January 1999), Dr. Luis Marchand, co-rapporteur for the topic, introduced the following document, titled *Report of the observer of the Inter-American Juridical Committee to the Second Inter-American Specialized Conference on Terrorism* (CJI/doc.5/99 rev.1), held in Mar del Plata, Argentina, November 23 and 24, 1998:

**REPORT OF THE OBSERVER OF THE
INTER-AMERICAN JURIDICAL COMMITTEE TO THE
SECOND INTER-AMERICAN SPECIALIZED CONFERENCE ON TERRORISM,**

(Mar del Plata, Argentina, on November 23-24, 1998)

(presented by Dr. Luis Marchand Stens)

I. BACKGROUND

The Second Inter-American Specialized Conference on Terrorism was held in Mar del Plata, Argentina, on 23 - 24 November 1998. This Conference originated in the *Plan of Action* prepared by the Second Summit of the Americas (Santiago, Chile, April, 1998), where the Heads of State and Government expressed their wish to convene the Second Inter-American Specialized Conference on Terrorism under the aegis of the Organization of American States, in order to evaluate the progress achieved and define future courses of action for the prevention, combat and elimination of terrorism.

To this end, during the XXVIII regular period of sessions (Caracas, Venezuela, June, 1998), through resolution AG/RES.1553 (XXVIII-O/98), the General Assembly commissioned the Permanent Council to undertake the preparatory work for the Second Inter-American Specialized Conference on Terrorism, with a view to the convocation thereof.

Through resolution CP/RES.725 (1165/98) dated 5 August 1998, the Permanent Council accepted the offer of the Government of the Republic of Argentina to host this Conference. During the session held on 10 September this same year, its Commission on Juridical and Political Affairs thus analyzed and approved the suggestion put forward by the Argentine Delegation to set the date for this event as 23-24 November 1998, at Mar del Plata, Argentina.

As part of the preparatory work, through resolution CP/RES.727 (1167/98) the Permanent Council requested the Inter-American Juridical Committee to issue an updated report on the most relevant juridical aspects, in order to fine-tune measures for preventing, combating and eliminating terrorism. As the co-rapporteur for this topic, during the LIII regular period of sessions of the Inter-American Juridical Committee held in Rio de Janeiro in August 1998, I presented the report entitled *Inter-American cooperation to confront terrorism: partial report* (CJI/doc.55/98 rev.2), which was taken under consideration by this Entity and forwarded to the Chairman of the Permanent Council, together with resolution CJI/RES.16/LIII/98. This report was included in the list of documents for the above-mentioned Specialized Conference and appeared on the Agenda for the meeting.

II. SECOND INTER-AMERICAN SPECIALIZED CONFERENCE ON TERRORISM

The Second Inter-American Specialized Conference on Terrorism opened on 23 November at the Hotel Costa Galena. It consisted of four plenary sessions held over two days, at which general presentations were given by the various delegations on the following issues:

- a) National actions to prevent, combat and eliminate terrorist acts, under which heading the classification of terrorist acts as serious common crimes was discussed, as well as the adoption of anti-terrorist legislation compatible with the protection of human rights and civil freedoms, universal adhesion to international conventions on terrorism, and effective transborder security measures (travel documentation, safety standards for aviation and at international entry and exit points);
- b) Bilateral cooperation actions to prevent, combat and eliminate terrorism;
- c) Multilateral cooperation actions to prevent, combat and eliminate terrorism, under which heading the exchange of information was discussed, as well as judicial cooperation, regular and technical training for functionaries implementing the struggle against terrorism, cooperation in drawing up contingency plans for the management of crises related to terrorism, measures to prevent the use of diplomatic privileges as a way of promoting terrorism, measures to protect diplomatic staff and facilities against terrorist activities, measures to combat the rising danger of nuclear, chemical and biological terrorism, and avoiding access by terrorist groups to all other types of weapons, measures to prevent production and illegal trade in firearms, ammunition and explosive materials, and methods for dealing with technological innovations in the rising threat of computer-based terrorism. The Conference thus took under consideration the above-mentioned *Partial report* of the Inter-American Juridical Committee.

III. PRESENTATION BY THE OBSERVER OF THE INTER-AMERICAN JURIDICAL COMMITTEE

During the Conference, I took the floor to stress that my opinions were presented on a personal basis, and that they thus did not in any way commit the Inter-American Juridical Committee as a whole, as there had been no opportunity to check the bases of this presentation in advance with all the members of this Entity. I first congratulated the Chairman and Deputy Chairman of the Conference for their election as the authorities thereof, as well as for the excellent conduct of the work during these days. I then began my presentation, underscoring the background to this topic within the Inter-American Juridical Committee. I also mentioned the importance of the First Inter-American Specialized Conference on Terrorism held at Lima, Peru, in April 1996 and the decisions adopted thereby, namely: the *Declaration of Lima* and the *Plan of action on Hemisphere-wide cooperation to prevent, combat and eliminate terrorism*.

I also emphasized important but fruitless attempts to define the phenomenon of terrorism at the universal level. I stated that such attempts certainly did not hamper progress, bearing in mind that the necessary doctrinal convergence had not been achieved, and explained why such attempts were not necessary to outline measures for hemisphere-wide cooperation. I also mentioned that international terrorism had held the attention of the United Nations for several years, reflected in numerous resolutions issued by the General Assembly, and that the conceptual scope of these resolutions had recently expanded due to the unchallenged juridical and political wisdom of extending its pronouncements to domestic terrorism.

I then noted that, as a result of its constant concern with the threat of terrorism, since 1963 the United Nations had adopted various pacts of a specific nature, focused particularly on specific fields: against attacks on aircraft and the safety of civil aviation; against jeopardizing the safety of shipping; against threats to internationally protected persons; against taking hostages; against the illegal use of plastic explosives and bomb attacks; and offshore rigs moored on the continental shelf.

In explanation, I added that, out of respect for the valuable time of this Conference, I had wanted to omit repeated references by the General Assembly of the Organization of American States, which established that, in the light of the existing international instruments, a study should be undertaken of the convenience and need for a new inter-American convention against terrorism.

With regard to this comment from the General Assembly of the OAS, I stated that, in my view, these were methodological paths that were complementary and not necessarily exclusive, with one at the global scale and the other at the regional level, designed for the same purpose: effectively combating and eradicating terrorism. That of the United Nations is designed to cover specific important areas ranging from the safety of civil aviation and shipping through to bomb attacks. I added that new instruments would certainly be agreed in the future against the rising danger of nuclear, chemical and biological terrorism.

Continuing on with this line of thought, I added that the path of the OAS could well be viewed as complementary in function of the situation in the Hemisphere, meaning stepping up its actions through a binding legal framework, whose operational foundations should be based on inter-American cooperation grounded solidly in judicial cooperation.

Within this context, I stressed that should the OAS decide to launch a drive to designed to draw up a new juridical framework for judicial cooperation against terrorism, it would need to focus on a cripplingly complex juridical and political factor that appears with some frequency in both extradition processes as well as requests for asylum: the classification of a terrorist crime as a political act.⁸⁴

The report presented to the Committee noted that in 1970, both the Permanent Council and the General Assembly of the OAS adopted resolutions, declaring that terrorist attacks constitute serious common crimes. In 1977, another resolution issued by the General Assembly included this statement among its considerations.

I then referred to the *Declaration of Lima* and the *Plan of Action* adopted at the I Conference in 1996, which urged the member States to classify terrorism as a common crime in their respective legal systems, reflecting valuable progress and obviously extending to the *Commitment of Mar del Plata*, maintaining its juridical direction.

Before commenting briefly on the document produced at Mar del Plata, it should be noted that in paragraph (xxi), the Inter-American Juridical Committee is recommended to undertake studies on “the strengthening of juridical and judicial cooperation, including extradition, as a form of combating terrorism, and that it collaborate with CICTE in devising norms on this subject”.

It also recommends the General Assembly to “entrust the Permanent Council with continuing to study the need and advisability of a new inter-American convention on terrorism, in the light of the existing international instruments”. This recommendation simply reiterates the provisions of the resolutions adopted by the General Assembly of the OAS in 1997 and 1998, in accordance with the *Plan of Action* of Lima, adopted by the First Specialized Inter-American Conference on Terrorism, April 1996.

As a general comment on the Mar del Plata Conference, and as may easily be seen from a reading of the core document, it would need to lean strongly towards the establishment of the Inter-American Committee Against Terrorism (CICTE), for which purpose paragraph (vii) of the *Commitment* recommends to the General Assembly that it should take steps to establish an appropriate institutional framework during its XXIX regular period of sessions. This Committee will consist of the competent national authorities of the member States of the OAS, set up for the purpose of fostering cooperation designed to prevent, combat and eliminate terrorist acts and

⁸⁴ Paragraph 3 of Annex II of the Commitment of Mar del Plata: guidelines for inter-american cooperation regarding terrorist acts and activities, states the following: “Pursuant to inter-American norms on the subject, each state has the exclusive right to determine the nature of occurrences that could qualify as terrorist acts and activities. The states shall cooperate closely as regards extradition in accordance with their domestic laws and the extradition treaties in force, without prejudice to the right of states to grant asylum under the appropriate circumstances.”

activities. This paragraph (vii) adds that the CICTE will hold at last one annual period of sessions.

The *Commitment of Mar del Plata* includes three Annexes linked to this Committee. The first covers its nature, duties, responsibilities and functions. The second contains the guidelines for inter-American cooperation against terrorism that should be complied with by the CICTE. The third proposes measures to eliminate the uptake of funding for terrorism.

Finally, as a summing-up, I stated to the Plenary of the Conference that, in my opinion, the point put forward by the General Assembly of the OAS regarding the need to determine the convenience of and need for a new inter-American convention against terrorism in the light of the existing international pacts, was essentially a political decision for the Organization, taking into account the comments on this matter in the preceding paragraphs.

I also recalled that the above-mentioned report noted that any possible future efforts should be shaped by agreement on a general juridical framework grounded basically on inter-American judicial cooperation against terrorism.

In order to provide the members of the Committee with as much information as possible, this Report is accompanied by a copy of the "Commitments of Mar del Plata" adopted by the Second Inter-American Specialized Conference on Terrorism, dated 24 November 1998.

In closing, I feel it is important to place on the record the fact that the Inter-American Juridical Committee received respectful consideration from the Chairman of this event, in the person of its observer, scheduling the presentation by the undersigned for the final plenary session, just before discussions were opened for the adoption of the "*Commitment of Mar del Plata*". I thanked the Chairman of the Conference in an appropriate manner on behalf of the Committee for his kind consideration and deference.

Dr. Luis Marchand also gave an oral account of his participation in that Conference, explaining that the meeting was held pursuant to a mandate from the Second Summit of the Americas. He pointed out that various ministers of OAS member States had been in attendance at the Conference, and a number of permanent-observer countries were represented there.

Dr. Marchand described that meeting's agenda for the other members of the Juridical Committee. He said that the partial report (CJI/doc.55/98 rev.2) he had presented to the Juridical Committee during the previous regular period of sessions, held in August 1998, had also been discussed at that meeting. He also pointed to item 21 of the *Commitment of Mar del Plata*, a document approved at that Conference, where it is recommended that the Inter-American Juridical Committee undertake studies on strengthening juridical and judicial cooperation, including extradition, as one means of combating terrorism, and that it collaborate with the CICTE (Inter-American Committee against Terrorism) in devising norms on this subject. As to the future work of the Inter-American Juridical Committee, Dr. Marchand advised in favor of studying the present status of terrorism under the region's juridical system.

The Juridical Committee approved resolution CJI/RES.3/LIV/99, *Inter-American cooperation against terrorism*, wherein it resolved to instruct the rapporteurs for the topic to present, at the Committee's next regular period of sessions, a report on the present standing of terrorism in the international law applicable in the Americas, with particular reference to the real opportunities or alternatives available for effective prosecution of the study and development of international legal norms to govern inter-American cooperation against terrorism. The Juridical Committee suggested that the report commissioned in this resolution take into account the political resolve underpinning and shaping the norms in question, so as to be able to determine, to the extent possible, what the member States of the inter-American system wanted to achieve in the near term in this area. The text of the resolution reads as follows:

INTER-AMERICAN COOPERATION AGAINST TERRORISM

THE INTER-AMERICAN JURIDICAL COMMITTEE,

NOTING that, as stated in its agenda, it has been addressing since August 1994 the topic of international juridical aspects involved in the prevention, control and eradication of terrorism in the hemisphere and, in particular, inter-American juridical cooperation to fight terrorism;

HAVING CONSIDERED the report presented by Dr. Luis Marchand Stens on the Second Specialized Inter-American Conference on Terrorism, held in the city of Mar del Plata, Argentine Republic, on November 23 and 24, 1998, in which he represented the Inter-American Juridical Committee;

ALSO CONSIDERING that the document entitled *Commitment of Mar del Plata*, unanimously approved by the aforementioned Conference, recommends in item XXI that the Inter-American Juridical Committee develop "...studies on the enhancement of the juridical and judicial cooperation, including extradition, to cope with terrorism", and that the Committee collaborate in the drafting of legal rules, with the Inter-American Committee against Terrorism (IAAT), whose creation, proposed by the mentioned Conference, will be decided by the General Assembly of the Organization of American States; and

TAKING INTO ACCOUNT the progress achieved by International Law in the Americas regarding inter-American cooperation against terrorism, as evidenced by, among other background materials, the reports that the Inter-American Juridical Committee has issued on the matter and the conclusions of the two Inter-American Specialized Conferences on Terrorism,

RESOLVES:

1. To express their gratitude to Dr. Luis Marchand Stens for the report submitted during the regular period of sessions on the Second Inter-American Specialized Conference on Terrorism (OEA/Ser.Q CJI/doc.5/99 rev.1).

2. To request that the rapporteurs on the topic of Inter-American Cooperation to Cope with Terrorism present, in the next regular period of sessions, a report on the current situation of terrorism in light of International Law applicable to the Americas, special mention being made of the actual possibilities or alternatives for the efficient continuation of the study and the development of international legal rules concerning the inter-American cooperation against terrorism.

3. To suggest that the rapporteurs on the aforementioned topic bear in mind the political will that moves and guides such rules, so as to determine, as far as possible, what the States of the Inter-American System wish to achieve in this area in the near future.

4. To ask the Secretariat of Legal Affairs of the Organization of American States to continue cooperating with the rapporteurs in the updating of their reports, in compliance with their mandate, and in particular in the report requested herein.

5. To express from the start their willingness to cooperate, pursuant to the mandates of the General Assembly and the Permanent Council, in the final review of the terms of the mandate of the Inter-American Committee against Terrorism, in light of the provisions of the OAS Charter.

This resolution was unanimously approved during the 29 January 1999 session, in the presence of the following members: Drs. João Grandino Rodas, Kenneth O. Rattray, Eduardo Vío Grossi, Sergio González Gálvez, Orlando R. Rebagliati, Brynmor T. Pollard, Gerardo Trejos Salas, and Luis Herrera Marcano.

For its part, in resolution AG/RES.1616 (XXIX-O/99), adopted at its twenty-ninth regular period of sessions (Guatemala City, June 1999), the OAS General Assembly asked the Inter-American Juridical Committee to continue its studies on inter-American cooperation against terrorism, particularly with regard to the enhancement of legal and judicial cooperation, including extradition, to cope with terrorism, and to collaborate with the Inter-American Committee on Terrorism (CICTE) in devising norms on this subject, taking into account the decisions reached by the OAS member States on the occasion of the Inter-American Specialized Conference on Terrorism (Lima, Peru, April 1996); the conclusions of the Meeting of Government Experts on Cooperation to Prevent, Combat and Eliminate Terrorism (Washington, D.C., May 1997); and the decisions reached at the Second Inter-American Specialized Conference on Terrorism (Mar del Plata, Argentina, November 1998).

At the fifty-fifth regular period of session of the Inter-American Juridical Committee (Rio de Janeiro, August 1999), Dr. Luis Marchand introduced a three-part document, CJI/doc.25/99 rev.1, titled *Inter-American cooperation against terrorism*. The first part was on the background of the topic, the second on the present status of terrorism in the inter-American legal system, while the third section contained the rapporteur's final observations.

Dr. Marchand noted that this report should be taken in the context of the four earlier reports he had presented. He also made reference to resolution CJI/RES.3/LIV/99, *Inter-American cooperation against terrorism*, and then to the background of the issue. He cited a number of legal instruments that appear in the document he presented.

The rapporteur spoke of the General Assembly's mandate to study the necessity and advisability of an inter-American convention on terrorism in the light of the existing international instruments which, he said, concerned very specific, particular matters.

As for the future development of this subject within the Organization, Dr. Marchand made reference to the final observations in this report.

Some members of the Inter-American Juridical Committee were not in favor of adoption of an inter-American convention on terrorism if it allowed for multinational operations. The approach that the OAS should take, they contended, should be topic-specific, in keeping with the international trend thus far.

The following is the text of the report:

INTER-AMERICAN COOPERATION AGAINST TERRORISM

(presented by Dr. Luis Marchand Stens)

I. Background

1. In the reports presented in August 1997, March and August 1998 and January 1999, the development of the process of the theme of terrorism was dealt with by the Juridical Committee and the OAS. Different aspects were touched upon that were inherent to the juridical-political problem surrounding the treatment of the matter.

2. In this regard, and to remind you of this process since 1994, when the theme returned to the agenda of the Juridical Committee, it is advisable to briefly review the more remarkable aspects of the topic.

During the regular period of sessions in 1995 (CJI/RES.II-19/95), the original title of the theme *Inter-American cooperation against international terrorism* was changed to *Inter-American cooperation against terrorism*.

3. Under this new designation, the issue was considered by the General Assembly at its XXV regular period of sessions, and by the Committee on Juridical and Political Affairs of the Permanent Council, which created a Working Group. Based on the progress made by the Permanent Council through this Working Group, in June 1995 the General Assembly called a Specialized Conference that was held in Lima on 23-26 April 1996.

4. Bearing in mind the opinions expressed at the sessions of that Working Group, the then rapporteur of the theme, Dr. Miguel Ángel Espeche Gil, prepared a document entitled *Inter-American cooperation to confront terrorism* (CJI/SO/I/doc.5/96), accompanied by *Annex I: Draft modifications proposed by the rapporteur to the wording of the draft inter-American convention for the prevention and elimination of terrorism*. This document was presented before the Juridical Committee in January 1996.

5. During the 51st regular period of sessions held in August 1997, the members of the Juridical Committee considered that it would be useful for the continuity of the studies to hear a general exchange of views. It was decided that the *Draft Convention* would only be considered as an illustrative element.

6. It is important to remember that in the course of the opinions expressed on that occasion, it was mentioned that the conceptual definition of terrorism was complex, thus there was no appropriate framework for doctrinal convergence.

By way of example, it was added that it was difficult to distinguish actual acts of terrorism from certain acts that may be made within the ambit of the principle of free determination (internal rebellions, civil wars and so on), where one could invoke the principles of non-persecution and non-extradition for political reasons. It was also mentioned that the subject is comprised of two dimensions: a) juridical cooperation, and b) police cooperation, which should not be the Juridical Committee's subject of study.

7. It is likewise important to remember that some members questioned the political viability of a draft convention, pointing out that the General Assembly had not asked for draft contractual instrument to be prepared. It was also said that this did not prevent the Juridical Committee from pursuing its work on the matter, since this was a topic that featured on the agenda.

8. It was advisable to make this brief review, in order to see certain trends and interpretations of the subject reported within the Juridical Committee since it was returned to the agenda.

II. Present position of terrorism in the inter-American juridical system

9. In order to develop in as orderly a manner as possible the core part of this report, it is advisable to determine the major juridical references, such as: a) the resolutions adopted by the Permanent Council at the General Assembly in 1970; b) the *Convention to prevent and punish acts of terrorism taking the form of crimes against persons and related extortion that are of international significance*, adopted in Washington, D.C. in 1971; c) the *Inter-American convention on extradition*, signed in Caracas in February 1981, and the *Inter-American convention on mutual assistance in criminal matters*, adopted in Nassau, Bahamas, in May 1992; d) the *Declaration* and the *Plan for Action* signed in Lima and approved by the First Specialized Inter-American Conference on Terrorism in April 1996; e) the *Commitment of Mar del Plata*, adopted by the Second Inter-American Specialized Conference on Terrorism, in November 1998, in which it is proposed that the Inter-American Committee against Terrorism be set up; f) certain resolutions of the General Assembly relating to the theme of terrorism; and g) the *Inter-American convention on forced disappearance of people*, signed on 9 June 1994, and the *Inter-American convention to prevent and punish torture*, signed on 9 December 1985.

a) The resolutions adopted by the Permanent Council and the General Assembly in 1970

10. In June 1970, the General Assembly of the OAS approved the resolution *Action and general*

policy of the Organization as regards acts of terrorism and especially the kidnapping of people and extortion connected with this crime, which condemned acts of terrorism and declared that “such acts constitute serious common crimes characterized by flagrant breach of the most fundamental principles of individual and collective security” [AG/RES.4 (I-E/70); first and third resolution paragraphs]. In the considerative part, the resolution repudiates such acts for constituting “serious violations of the fundamental rights and freedom of man”. This document of the General Assembly restated the resolution adopted earlier by the Permanent Council on 15 May 1970.

In the years following, the resolutions of the Supreme Organ made no declarations of principle but rather encouraged the continuation of the study on terrorism, with the exception of resolution AG/RES.317 (XXVII-E/97), which in its considerative part recalled the paragraphs of the afore-mentioned resolution AG/RES.4 (I-E/70).

- b) *The Convention to prevent and punish acts of terrorism taking the form of crimes against persons and related extortion that are of international significance*

11. In 1971, the Washington Convention on crimes against people and extortion connected with such crimes when they are of international dimension was adopted. This instrument proved inoperative, due in particular to the lack of specificity as regards the people to whom the State should grant special protection, under International Law, and also because of its limited scope, since only an act against them would make the act a crime of international dimension.

- c) *The Inter-American convention on extradition*, adopted in Caracas in February 1981, and the *Inter-American convention on mutual assistance in criminal matters*, adopted in Nassau in May 1992

12. In 1981, the *Inter-American convention on extradition* was adopted in Caracas and later, in May 1992, the *Inter-American convention on mutual assistance in criminal matters* was adopted in Nassau, Bahamas [AG/RES.1168 (XXII-0/92)].

13. As regards the first multilateral instrument mentioned, it should be pointed out that although it allows for an extradition order for crimes of a terrorist nature, the qualification of the imputed act is the jurisdiction of the requested State. In fact, the pertinent article states: “No provision of this Convention may be interpreted as a limitation on the right of asylum when its exercise is appropriate” (article 6). The scope of this type of clause generally gives rise to the complex and often paralyzing juridical-political convergence that arises both in extradition cases and in how asylum functions: the qualification of the terrorist crime as an act of a political nature.

It should be noted that Latin-American nations have maintained this power in several regional instruments as protection for people when it is considered that they may fall victim to political contingencies, and also for reasons that derive from their own internal fronts.

14. In respect to the *Inter-American convention on mutual assistance in criminal matters*, it is noted that with the lending of assistance on penal matters could be implied the lending of certain judicial collaboration in the case of terrorist acts (article 7, clauses i and j). We should bear in mind that this instrument has not aimed specifically at terrorism, but at other criminal acts such as money-laundering. It should therefore be stressed that article 5 eliminates the penal barrier of double criminality by the following statement: “The assistance shall be rendered even if the act that gives rise to it is not punishable under the legislation of the requested State.”

15. It is equally interesting to underline that clauses b and c of article 9 allow the requesting State to deny assistance when the investigation was initiated for the purpose of punishing or discriminating against any person or group of persons for reasons of sex, race, religion or ideology. This is also the case, if the request refers to a political or politically-connected crime, or to a common crime prosecuted for a political reason. Nor is assistance forthcoming if the request comes from a special or an *ad hoc* tribunal (inc. d).

- d) The *Declaration of Lima and Plan for Action*, approved by the First Specialized Inter-American Conference on Terrorism in April 1996

16. In 1955, as a result of the First Summit of the Americas, the General Assembly held in Montrouis, Haiti, revived the theme and convoked the First Specialized Inter-American Conference on Terrorism, which took place in Lima, Peru, from 23 to 26 April 1996. This meeting adopted both documents: a *Declaration* and a *Plan for Action on hemispheric cooperation to prevent, combat and eliminate terrorism*. The first signs that terrorism constitutes a “systematic and deliberate violation of individual rights and an assault on democracy itself” and that such acts “no matter who the agents, manifestations, methods, motivations or place where perpetrated may be, constitute serious common crimes”. The second document exhorts the States to classify terrorist acts as common crimes in their respective legislation.

- e) The *Commitment of Mar del Plata*, adopted by the Second Specialized Inter-American Conference on Terrorism in November 1998⁸⁵

17. The Second Summit of the Americas held in Santiago de Chile in April 1998 convoked the Second Specialized Inter-American Conference on Terrorism, which took place in Mar del Plata on 23 November 1998. The meeting adopted a document entitled *Commitment of Mar del Plata*, whose main purpose was to set up within the framework of the OAS an entity with technical autonomy called the Inter-American Committee against Terrorism (CICTE). To this effect, the Conference recommended the General Assembly to consider creating the Committee and adopting the relevant decision at its twenty-ninth regular period of sessions in June 1999 (paragraph (vii)).

Before dealing briefly with the scope of this entity, it should be mentioned that the final document of the Conference restates the objectives and actions of the *Declaration of Lima and Plan for Action* and, in accordance with them, affirms that it recognizes terrorist acts “as serious common crimes” (paragraph (iii)).

18. Likewise, mention should be made that paragraph (xxi) recommends that the “Inter-American Juridical Committee study the strengthening of juridical and judicial cooperation, including extradition, to combat terrorism, as well as collaborating with the CICTE in drawing up rules on the issue.”

19. The General Assembly is also recommended “to exhort the Permanent Council to proceed with studies on the need for and advisability of a new inter-American convention on terrorism in the light of existing international instruments.” This recommendation simply reiterates both what is set out in the *Lima Plan for Action* and in the pertinent resolutions adopted by the General Assembly in 1997 and 1998, but it specifically mentions the Permanent Council.⁸⁶

20. The Inter-American Committee against Terrorism (CICTE), as proposed by the *Commitment of Mar del Plata*, would be a technically autonomous entity set up in accordance with article 53 of the *Charter of the OAS*, its functions being regulated by article 91, clause f of the *Charter*.

⁸⁵ At its twenty-ninth regular period of sessions, the General Assembly approved on 7 June of this year Resolution AG/RES.1650 (XXIX-O/99), whose dispositive paragraphs subscribe the decisions and recommendations included in the *Mar del Plata Commitment* and in three annexes adopted by the Second Specialized Inter-American Conference on Terrorism; reiterate the validity and importance of the *Declaration of Lima and Plan for Action* adopted by the First Specialized Inter-American Conference on Terrorism held in April 1996; establish the “Inter-American Committee against Terrorism” (CICTE); and approve the Statute of the CICTE, which includes this resolution as an appendix. As a result, the comments made on the *Mar del Plata Commitment* and the CICTE in this report, prepared in May of this year, are still valid.

⁸⁶ The contents of this paragraph, including the reference to the Permanent Council, was reiterated by Resolution AG/Res.1650, approved by the General Assembly on 7 June 1999.

The entity was to be integrated by the national authorities of all the Member States, its purpose being essentially to lend assistance to the States of the Organization to prevent, combat and eliminate terrorism, and to foster the exchange of experiences and information on the activities of persons, groups, organizations and movements linked to terrorist acts, as well as in relation to the methods, sources of financing and entities which offer protection and support, either directly or indirectly.

21. The future work program (contained in Annex I) envisages, among other activities, the creation of a regional network to compile and transmit data through the competent national authorities, and the creation of a data base. Thus, legislative and regulatory rules, bilateral agreements and multilateral treaties would all be collected. Furthermore, mechanisms would be available to coordinate with other international entities competent in the area, such as INTERPOL.

Besides Annex I, the *Commitment of Mar del Plata* contains another two annexes. One of them is dedicated to the guidelines for regional cooperation to be developed by the CICTE, whereas the other proposes that the Member States adopt measures to eliminate fund-raising for terrorism.

22. As can be inferred from a reading of the *Mar del Plata* document and from the significant presence of so many Ministers of the Interior leading the participating delegations, the conception, functional structure and program outline of the CICTE were planned with operative intelligence to promote broad informative inter-American interaction on the level of "Competent National Authorities." It may be supposed that these authorities will come from the Ministries of the Interior, including the police departments.

23. This is unquestionably a political decision adopted by the countries of the Organization according to the criterion that the danger of terrorism at the moment calls for swift and expeditious means of action both to prevent, combat and wipe out this social scourge.

As noted earlier, the *Commitment of Mar del Plata* expressly recommends that studies be carried on the strengthening of juridical and judicial cooperation, as provided for in paragraphs (xviii) and (xxi) of the *Commitment* and in the pertinent items in point 5 of the above-mentioned Annex I.

- f) Certain resolutions approved by the General Assembly of the OAS on the theme of terrorism

24. In respect to certain resolutions adopted by the General Assembly on terrorism, it should be emphasized that in point a) item II of this report, reference was made to resolution AG/RES.4 (I-E/70) adopted by the General Assembly in 1970, classifying terrorist acts as "serious common crimes." Thus it is unnecessary to repeat it at this juncture.

On the other hand, the report presented in August 1998 contained an analysis of the most important resolutions of the OAS. It also described the scope of certain resolutions taken by the United Nations aimed at promoting a global view of regional resolution proceedings *vis-à-vis* the universal proceedings mechanism.

25. In any case, it is advisable to remember that the General Assembly, in a resolution adopted in 1997, recommended that the Juridical Committee proceed with studies on the topic of *Inter-American cooperation to combat terrorism*.

26. This same resolution, just like the one approved in 1998, contains in its considerative section a recommendation of the First Specialized Inter-American Conference on Terrorism that "studies should begin, within the OAS and in light of the evaluation of existing international instruments, on the need for and advisability of a new inter-American convention on terrorism."

Regarding this specific point, it bears repeating that paragraph (xviii) of the *Commitment of Mar del Plata* recommends the General Assembly "to exhort the Permanent Council to proceed with its studies", as referred to above.

27. As a result, at some time the Permanent Council will send the corresponding decision that could consist of certain alternatives, among them being to refer the study to its Committee on Juridical and Political Affairs, or else to entrust the Juridical Committee with the task.

It is important to note that in the report presented to the Juridical Committee in January 1999, some general considerations are formulated on the topic referred to in paragraph (xviii) of the *Mar del Plata* document.

- g) The *Inter-American convention on forced disappearance of persons*, signed on 9 June 1994, and the *Inter-American convention to prevent and punish torture*, signed on 9 December 1985

28. As mentioned in earlier reports, there is a frequently invoked doctrine that classifies terrorist acts according to their territorial scope, as follows:

- i. internal terrorism, perpetrated by individuals or groups operating inside the national territory, in addition to state terrorism committed by elements that depend on the State;
- ii. international terrorism, perpetrated by individuals or groups outside the territory of a country and controlled by a certain government;
- iii. transnational terrorism, practiced by non-state agents with cross-border effects.

29. The two Conventions referred to are intended to repress actions inherent in state terrorism, which is mentioned in the last part of paragraph (i).

30. In a general sense, both instruments limit criminal responsibility to the public officials and agents of the State, and to persons or groups of persons acting with the authorization, support and acquiescence of the State.

31. The two instruments therefore contain specific rules on the procedure for extradition and the juridical basis for such a procedure in cases where there is no treaty on the matter.

32. The *Inter-American convention on forced disappearance of persons* stipulates that this type of crime will not be considered as a political crime for the purposes of extradition (article V), and that the criminal prosecution and penalty judicially imposed on its perpetrator shall not be subject to statutes of limitation (article VII).

33. It also states that no privileges, immunities or special dispensations will be admitted in such trials, but it does stress the following reservation: "... without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations" (article IX).

34. It is interesting to note that the Convention determines that "obedience to superior orders or instructions" will not be admitted as exemptions (article VIII). In addition, "acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties" (article IX).

35. The Convention on Torture contains analogous provisions to the *Inter-American convention on forced disappearance of persons*, regarding extradition; obedience to superiors; obligation of the requested State to submit the accused to its courts in cases where it rejects extradition; and formalities for it to be enforced.

36. Similar to the *Inter-American convention on extradition* and the *Inter-American convention on mutual assistance in criminal matters*, this multilateral instrument implicitly maintains the rule of criminal classification with the following statement: "no provision in this Convention may be interpreted as limiting the right of asylum, when appropriate ..." (article 15).

37. As noted above, the two Conventions were agreed to with the common purpose of preventing, repressing and punishing those responsible for practicing state terrorism, are in force.

38. By way of illustration, it is noted that the *Inter-American convention on torture* has its roots in the *Convention against torture and other forms of treatment or cruel, inhuman or degrading forms of treatment or penalties*, adopted by the United Nations and in effect since June 1987.

III. Final remarks

- i. The problem of terrorism will continue to occupy the attention of many countries in the international community, and consequently also the competent international organizations such as the United Nations and the Organization of American States, aiming at strengthening inter-governmental cooperation, promoting harmonization of efficacious multipartite instruments, and furthering enhancement of national codes.
- ii. Through the Specialized Inter-American Conferences on Terrorism and the pertinent resolutions of the General Assembly, the countries that make up the OAS have shown their political will to achieve inter-governmental instruments and mechanisms for cooperation and joint action against this social scourge.
- iii. This political will was particularly manifested in the *Commitment of Mar del Plata*, where the General Assembly was requested at its regular period of sessions of June 1999 to establish the Inter-American Committee against Terrorism (CICTE) as a technically autonomous entity within the context of the OAS.
- iv. As mentioned in the preceding pages, the decision taken by the Second Specialized Inter-American Conference on Terrorism and the formalization of its functions, which the General Assembly will surely conclude in June 1999 by creating the CICTE, translates a political trend toward creating functioning mechanisms of hemispheric interaction, with rapid systems, preferably computerized and with police action.
- v. As also mentioned earlier, this political decision will at some moment require the necessary juridical complement based on studies as to judicial cooperation, as noted in paragraphs (xviii) and (xxi) of the *Commitment* and in the pertinent items of point 5, Annex I of the *Mar del Plata* document. Paragraph (xxi) expressly requests the assistance of the Juridical Committee.
- vi. It is difficult to predict, within such a range of possibilities, what "is desired to be achieved in the near future on this matter," the governments of the system - given the fluid nature of political decisions motivated in general by situations or facts that often arise unexpectedly. For now, the direction that can be envisaged is that they will on the one hand try to accentuate inter-governmental cooperation through fast and operative mechanisms such as the future CICTE, and on the other hand, endow the systems with a juridical framework to support such mechanisms.
- vii. On several occasions, the Juridical Committee has seen that the dynamics of the international agenda may short-term declarations on topics that have been pending for some time. This thought arises from the request made by the Mar del Plata Conference to the Permanent Council, which –as has already been pointed out– may refer the respective study to its Committee on Juridical and Political Affairs. Under this hypothesis, one may anticipate some future request from the CICTE for the Juridical Committee to lend its assistance on a certain juridical issue, based on item (xxi) of the *Commitment of Mar del Plata*.
- viii. Bearing in mind that the theme of terrorism was re-introduced into the agenda of the Juridical Committee in 1994, and that the theme returns year after year on the agenda

of the General Assembly, and that this Organ recommended that the Permanent Council should proceed to study the matter, it would be wise to keep the question on our agenda.⁸⁷

- ix. In considering this report, it would be advisable to take into account the reports presented in August 1997, March and August 1998 and in January 1999, which are referred to in certain paragraphs.

Finally, the Inter-American Juridical Committee approved resolution CJI/RES.8/LV/99, *Inter-American cooperation against terrorism*, whereby it resolved to keep this item on its agenda.

INTER-AMERICAN COOPERATION AGAINST TERRORISM

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that since August 1994 the Inter-American Juridical Committee has been dealing with the question concerning the international juridical aspects with regard to the prevention, control and eradication of terrorism in the hemisphere and, in particular, inter-American juridical cooperation to combat terrorism;

BEARING IN MIND the report presented by the rapporteur of the topic, Dr. Luis Marchand Stens, *Inter-American cooperation to combat terrorism* (OEA/Ser.Q CJI/doc.25/99 rev.1), as well as his earlier partial reports;

CONSIDERING that at the XXIX regular period of sessions held in Guatemala City in June 1999 the General Assembly requested the Inter-American Juridical Committee by resolution AG/RES. 1616 (XXIX-O/99) to proceed with its studies on inter-American cooperation against terrorism, particularly with regard to strengthening juridical and judicial cooperation to combat terrorism, including extradition, and to collaborate with the Inter-American Committee against Terrorism (CICTE) in drawing up rules on the matter, bearing in mind the decisions agreed upon by the member States of the Organization on the occasion of the Inter-American Specialized Conference on Terrorism held in Lima, Peru in April 1996, the results of the Meeting of Government Experts on Cooperation to Prevent, Combat and Eradicate Terrorism held in Washington, D.C. in May 1997, and the decisions agreed upon at the Second Inter-American Specialized Conference on Terrorism held in Mar del Plata, Argentina in November 1998;

TAKING INTO ACCOUNT the development achieved by international law in the Americas as to inter-American cooperation against terrorism, as mentioned in documents and reports of the Inter-American Juridical Committee and the instruments adopted at the two Inter-American Specialized Conferences on Terrorism,

RESOLVES:

1. To express its gratitude to Dr. Luis Marchand Stens for the report presented at this regular period of sessions on *Inter-American cooperation against terrorism* (OEA/Ser.Q CJI/doc.25/99 rev.1).

⁸⁷ Resolution AG/RES.1616(XXIX-O/99) adopted by the General Assembly on 7 June 1999, reiterates this recommendation.

2. To include the topic in its agenda again, in accordance with the requirements that may arise, in the terms of resolution AG/RES.1616 (XXIX-O/99).

3. To manifest its willingness to collaborate, in accordance with the mandate of the General Assembly, with the Inter-American Committee against Terrorism (CICTE) in whatever is required to prepare rules aimed at strengthening juridical and judicial cooperation to combat terrorism.

This resolution was unanimously adopted during the 18 August 1999 session, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi, and Gerardo Trejos Salas.

3. Application of the United Nations Convention on the Law of the Sea by the States of this Hemisphere

The Inter-American Juridical Committee did not examine this topic at its fifty-fourth and fifty-fifth regular period of sessions (Rio de Janeiro, January and August 1999) owing to the absence of the rapporteur for the subject, Dr. Keith Highet. However, the rapporteur sent document CJI/doc.48/99 *Rights and duties of the States under the 1982 Law of the Sea Convention*. That document appears below.

RIGHTS AND DUTIES OF STATES UNDER THE 1982 LAW OF THE SEA CONVENTION

(presented by Dr. Keith Highet)

INTRODUCTION

This study aims to provide member States of the Organization of American States with guidance as to their specific duties, obligations, and responsibilities under the 1982 United Nations Convention on the Law of the Sea (the “1982 Convention” or “Convention”). The task has taken on growing significance in the wake of the entry into force of the Convention on 16 November 1994, the culmination of a decades-long effort to formalize the rules that bind States in their international relations concerning maritime matters that originally began in Geneva in 1958 at the first United Nations Conference on the Law of the Sea and eventually involved over 150 countries from all regions of the world.

With its entry into force, the Convention has unquestionably become the primary source of law regarding the public international law of the sea for Parties and non-Parties alike.⁸⁸ As such, it is fundamentally important that there be a common and widespread understanding and recognition of States’ duties (and opportunities) thereunder. The goal of this study is to assist in that process, as it is a matter of some difficulty to extrapolate useful reminders of those duties and rights from the bulky text of the Convention merely by itself.

The primary focus of this study, as of the Convention itself, is on the obligations borne by *coastal* States that are parties to the Convention.⁸⁹ The main purpose of the study is to provide detailed guidance to those States, which, for obvious reasons, enjoy most of the rights and bear most of the responsibilities under the Convention. The study does, however, also detail the duties borne by non-coastal States under the Convention, including, for instance, the *erga omnes* duties concerning the use of the high seas under Part VII of the Convention and concerning the protection and preservation of the marine environment under its Part XII.

The study is also organized to emphasize and highlight the different incidence and type of duties the Convention imposes on States based on their particular circumstances. States bear

⁸⁸ In this Report, we refer to States party to the Convention in the same manner as the Convention, i.e. as “States Parties” (which in the French and Spanish official texts is “Etats Parties” and “Estados Partes”). Article 2.1 of the Convention reads as follows: “ ‘States Parties’ means States which have consented to be bound by this Convention and for which this Convention is in force.”

⁸⁹ “Coastal States” include all States other than land-locked States (Bolivia and Paraguay, in the Americas)—including “geographically disadvantaged” States—and States bordering semi-enclosed seas.

widely different obligations under the Convention depending on their geographical circumstances and activities, and this study is written to reflect and illuminate those differences. Specifically, it details the different duties of: (i) all States; (ii) coastal States; (iii) coastal States in certain geographic circumstances; and (iv) coastal States with certain claims and factual contexts. This structure is intended to assist member States of the OAS in better determining their obligations under the Convention by virtue of their immutable characteristics and mutable activities.

In addition, this study seeks to distinguish among the different types of obligations placed on States. In particular, the Convention establishes three primary types of obligations: “hard” duties, “soft” duties, and “defensive” duties.

1) The “hard” duties under the Convention are perhaps the easiest to identify. They include specific directives to States to take particular action (e.g., give publicity) or to refrain from taking particular action (e.g., impeding innocent passage). Compliance with these duties usually simply involves following the specific commands of the Convention.

2) By contrast, the “soft” duties, such as to “study” or to “take into consideration” certain conditions, require States to take action, but the extent and form of the action is not clearly specified in the Convention. Most pervasive among the “soft” duties in the Convention is the requirement that States Parties cooperate with other States either directly or through appropriate international organizations to achieve various goals.⁹⁰ Such “soft” duties can generally be fulfilled by a good faith effort to achieve the specified objective of the provision. For example, a State Party could satisfy the repeated “cooperation” requirement by setting up a consultative office in its legal adviser’s office concerning the general obligations of consultation and cooperation. The consultative office would then work directly with other States directly and indirectly through various international organizations (e.g., the International Civil Aviation Organization, the International Seabed Authority, or the International Maritime Organization).

3) Finally, the “defensive” duties established in the Convention require States to take particular actions in order to protect their rights under and to benefit fully from the Convention. Most notable among these “defensive” duties is the implied requirement that a State claim a territorial sea in order to have one, and claim one of up to 12 nautical miles in order to secure one of that extent. Absent such a declaration or if a State lets stand an earlier declaration of a less extensive territorial sea, the State will not have sovereignty over the full 12-mile territorial sea to which it is entitled under the Convention.⁹¹

Moreover, it is hoped that this study could be of value not only to States that are parties to the Convention, but also to non-party States that engage in maritime activities. Many aspects of the Convention have evolved directly out of longstanding historical State practice and widely accepted norms of international law. Moreover, the Convention has, as of this writing, been signed by 158

⁹⁰ See, e.g., Art. 41(5) of the Convention (“In respect of a strait where sea lanes or traffic separation schemes through the waters of two or more States bordering the strait are being proposed, the States concerned shall cooperate in formulating proposals in consultation with the competent international organization.”); Art. 61(2) (“The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.”); Art. 108(1) (“All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.”); Art. 197 (“States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.”).

⁹¹ See Art. 3. (All references to “Art.” numbers are to the articles of the Convention, with the paragraph numbers (if any) set forth in parentheses.)

States and ratified by 131, making the practices it prescribes or proscribes at least arguably general, uniform and pervasive. Consequently, many of the provisions of the Convention have come to be viewed, at least presumptively, as customary law.⁹² Consequently, those States in the Inter-American system that are not parties to the Convention (e.g., Venezuela and the United States) will be affected by the Convention indirectly by virtue of customary law, even though they may not be bound directly as a matter of conventional law.

Finally, it is important to note that this study seeks only to highlight specific, central, and recurrent duties and obligations borne by States under the Convention. The Convention, a composite multilateral agreement arrived at in fifteen separate substantive Parts and by consensus, contains a large number of undertakings, statements, and indications that may be read as impinging on the duties or rights of all States Parties (particularly coastal States Parties). A comprehensive catalogue of all the rights and responsibilities of States under the Convention would therefore be so lengthy as to be virtually unreadable and thus of little use, and would defeat any effort at improving the accessibility and broad understanding of the Convention. This study therefore seeks to set out only the most significant States' rights and duties under the Convention, with the understanding that there are numerous points of detail that cannot readily be included.

II. DUTIES OF ALL STATES PARTIES

All States Parties—whether land-locked or coastal States—are bound to perform the following duties under the Convention, as appropriate.

A. High seas

The high seas, which include “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”⁹³, are open to all States, regardless of whether they are coastal or land-locked.⁹⁴ The freedoms of the high seas are not entirely unlimited, however. They must be exercised with sufficient regard for the interests of other States and for the rights of States under the Convention.⁹⁵ In addition, all States must take, or cooperate with other States in taking, measures to conserve and manage the living resources of the high seas.⁹⁶

B. Protection and preservation of the marine environment

This important subject area is not generally understood or recognized as one of the most significant parts of the Convention as far as the obligations of all States Parties are concerned. Nonetheless, Part XII of the Convention deserves and will repay careful attention by legal advisers.

All States Parties are obligated to “protect and preserve the marine environment” under the Convention.⁹⁷ Not only are States obliged to act unilaterally to meet this goal, but they must also cooperate on a “global basis and, as appropriate, on a regional basis, directly or through competent international organizations”⁹⁸ to formulate rules, standards, and recommended practices for the

⁹² For more on the evolution of the Law of the Sea Convention and its interaction with customary law, see, e.g., R.R. CHURCHILL & A.V. LOWE, *The Law of the Sea* (1988); IAN BROWNLIE, *Principles of public international law*. p.180-257 (1990).

⁹³ Art. 86.

⁹⁴ Art. 87(1).

⁹⁵ Art. 87(2).

⁹⁶ Art. 117.

⁹⁷ Art. 192.

⁹⁸ The term “competent” or “relevant” “international organizations” is used throughout the Convention, but is not defined. The United Nations has recently published a bulletin that provides some guidance as to the proper interpretation of this

protection and preservation of the marine environment.⁹⁹ More specifically, States must individually or jointly take measures to prevent, reduce and control pollution of the marine environment,¹⁰⁰ and must monitor the risks or effects of pollution.¹⁰¹ States must also notify other States when the marine environment is in imminent danger of being damaged or has been damaged by pollution and, if they are located in the affected area, they must cooperate with other States in the area to address the damage.¹⁰² States must also cooperate with other States to promote information about pollution of the marine environment,¹⁰³ to establish appropriate scientific data for the creation of rules, standards and practices for reducing pollution,¹⁰⁴ and to promote scientific, educational, technical and other assistance to developing States for the protection and preservation of the marine environment and the control of marine pollution.¹⁰⁵

The Convention also includes specific directives regarding the laws and regulations that States must adopt to prevent, reduce and control pollution of the marine environment. Specifically, States must adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources,¹⁰⁶ from or through the atmosphere,¹⁰⁷ and through dumping.¹⁰⁸ States that have vessels, installations, structures or other devices flying their flag engaging in activities in the Area (of the high seas) are required to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from those activities.¹⁰⁹ States with vessels flying their flag must also adopt laws and regulations to prevent, reduce, and control pollution of the marine environment from those vessels.¹¹⁰ Finally, coastal States that engage in sea-bed activities must adopt laws and regulations to prevent, reduce and control pollution of the marine environment by those activities.¹¹¹

C. Development and transfer of marine scientific research and marine technology

All States are required to promote and facilitate the development and conduct of marine scientific research, both unilaterally and in concert with other States.¹¹² Specifically, States are required to promote international cooperation in marine scientific research for peaceful purposes and to provide other States with a reasonable opportunity to obtain from them information necessary to prevent and control damage to the health and safety of persons and to the marine environment.¹¹³

All States must also cooperate in accordance with their capabilities to promote the development and transfer of marine technology on fair and reasonable terms and conditions.¹¹⁴ In addition, States must promote the establishment of generally accepted guidelines, criteria and standards for the transfer of marine technology on a bilateral or multilateral basis¹¹⁵ and co-operate to encourage and facilitate the transfer skills and technology in this area to developing States.¹¹⁶ (No definition of “developing State” is contained in the Convention.)

term in the various contexts in which it is used in the Convention. See BULLETIN. *Law of the Sea*. United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, n.31, 1996, p.79-96.

⁹⁹ Art. 197.

¹⁰⁰ Art. 194.

¹⁰¹ Art. 204.

¹⁰² Art. 198.

¹⁰³ Art. 200.

¹⁰⁴ Art. 201.

¹⁰⁵ Art. 202.

¹⁰⁶ Art. 207.

¹⁰⁷ Art. 212.

¹⁰⁸ Art. 210.

¹⁰⁹ Art. 209.

¹¹⁰ Art. 211.

¹¹¹ Art. 208.

¹¹² Art. 239; Art. 242.

¹¹³ Art. 242.

¹¹⁴ Art. 266.

¹¹⁵ Art. 271.

¹¹⁶ Art. 273.

D. The area

Part XI of the Convention governs the activities of States Parties in relation to the “Area”—the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.¹¹⁷ It has to a large extent been supplemented and superseded by the subsequent Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, which has been signed and ratified by a majority of the States Parties. Moreover, its provisions—and the rights and duties of States in relation to the Area—are still being determined in conjunction with the Authority¹¹⁸ and will doubtless be the subject of much additional regulation as the global economics of deep seabed mining improve. It is nonetheless useful to briefly review the provisions of the Convention as they currently stand.

Under the Convention, no State may claim or exercise sovereignty or sovereign rights over the Area or its resources.¹¹⁹ States are of course specifically bound to act in relation to the Area in accordance with the relevant provisions of the Convention and the principles embodied in the Charter of the United Nations and other rules of international law.¹²⁰ All States Parties are responsible for ensuring compliance with the provisions of the Convention relating to the Area.¹²¹

In addition, States, both in their individual capacity and in their capacity as members of the Authority must cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area.¹²² Finally, all States Parties must provide contributions assessed by the Assembly and act in accordance with the Assembly’s decisions regarding the equitable sharing of financial and other economic benefits derived from activities in the Area.¹²³

E. Dispute resolution provisions

Part XV of the Convention addresses the settlement of disputes. It is quite difficult to grasp its meaning in simple terms—but it is nonetheless possible to identify several specific requirements that it imposes on States Parties.

The first set of obligations concern the selection of a forum for resolution of any dispute under the Convention. States are of course obliged to settle any dispute between them by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations.¹²⁴ When a dispute arises between States Parties concerning the interpretation or application of the Convention, when a procedure for the settlement of such a dispute has been terminated without a settlement, or when a settlement has been reached and the circumstances require consultation regarding the manner of implementation, the parties to the dispute must engage in an exchange of views in an effort to promote its settlement by negotiation or other peaceful means.¹²⁵

Additionally, a State Party that is a party to a dispute concerning the interpretation of the Convention may invite the other party or parties to submit the dispute to conciliation.¹²⁶ If the parties agree to conciliation, the proceedings may only be terminated in accordance with the agreed

¹¹⁷ Art.1(1)(1).

¹¹⁸ Art. 1(1)(1) (“‘Authority’ means the International Sea-Bed Authority”). All parties to the Convention are members of the Authority. Art. 156(2).

¹¹⁹ Art. 137.

¹²⁰ Art. 138.

¹²¹ Art. 139.

¹²² Art. 144.

¹²³ Art. 160.

¹²⁴ Art. 279.

¹²⁵ Art. 283.

¹²⁶ Art. 284.

conciliation procedure.¹²⁷ If no settlement is reached in a dispute concerning the interpretation or application of the Convention by means of peaceful settlement or conciliation, the dispute may then be submitted at the request of a party to a court or tribunal having jurisdiction, as determined under the procedures outlined in Section 2 of Part XV of the Convention.¹²⁸

Under the procedures outlined in Section 2, States are encouraged to precommit to a means for the settlement of disputes involving the interpretation or application of the Convention. A State Party may select, by means of a written declaration deposited with the Secretary-General of the United Nations, one of several means for the resolution of disputes concerning the interpretation of the Convention.¹²⁹ That decision is then binding unless and until the State files a new declaration or a notice of revocation.¹³⁰ (However, a new declaration, notice, or the expiry of a declaration will not affect pending proceedings unless the parties otherwise agree.¹³¹)

If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it must then be submitted to arbitration in accordance with Annex VII of the Convention unless the parties agree to do otherwise.¹³² In other words, there is herein contained a universal compromissory clause, by all States Parties, to an Annex VII arbitration proceeding *unless* some other means has been elected.

Once a dispute is resolved by any of the above means, States Parties who are parties to a dispute are required promptly to comply with any provisional measures that the court or tribunal considers appropriate.¹³³ States Parties are also specifically and irrevocably bound to accept any decision rendered by a court or tribunal having jurisdiction under the Convention as final, and must comply with such decision.¹³⁴

F. General provisions

The Convention provides for several generalized duties that apply to all States Parties as they exercise their rights and fulfill their responsibilities under the Convention. Thus States Parties are directed to fulfill in good faith the obligations assumed under the Convention¹³⁵ and to refrain from any threat or use of force against another State in exercising their rights and performing their duties under the Convention.¹³⁶ In addition, States that have or obtain possession of archaeological or historical objects found at sea are bound to protect them and to cooperate with other States for that purpose.¹³⁷

III. RIGHTS AND OPPORTUNITIES OF COASTAL STATES

Coastal States are granted numerous rights and opportunities under the Convention, many of which require specific action on the part of the State to enjoy.

¹²⁷ *Ibid.*

¹²⁸ Art. 286.

¹²⁹ Art. 287(1)

¹³⁰ Art. 287(6),(7).

¹³¹ Art. 287(7).

¹³² Art. 287(5).

¹³³ Art. 290.

¹³⁴ Art. 296.

¹³⁵ Art. 300.

¹³⁶ Art. 301.

¹³⁷ Art. 303.

A. Proclamation of maritime zones

First and foremost, every coastal State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles from the State's baselines.¹³⁸ A coastal State may exercise control over the zone contiguous to its territorial sea for specific enumerated purposes.¹³⁹ The contiguous zone may extend up to 24 nautical miles from the baselines from which the territorial sea is measured.¹⁴⁰

In addition, every coastal State may enjoy an exclusive economic zone beyond and adjacent to the territorial sea,¹⁴¹ but delimitation of the exclusive economic zone with States with opposite or adjacent coasts must be effected by agreement on the basis of international law.¹⁴² The coastal State is also permitted to establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the territorial sea is measured.¹⁴³ If a State fails to act on these rights, it may thereby forfeit them.

B. Baselines

States are granted some flexibility in the process of drawing the baselines from which the territorial sea is measured. For instance, where the coastline is deeply indented and cut into, or where there is a fringe of islands along the coast in the immediate vicinity, a State may employ the method of straight baselines joining appropriate points.¹⁴⁴ In drawing such straight baselines, States may take into account economic interests peculiar to the region concerned, as evidenced by long usage.¹⁴⁵

Similarly, where the coastline is highly unstable, a State may select appropriate points along the furthest seaward extent of the low-water line for the construction of straight baselines.¹⁴⁶ In addition, if a river flows directly into the sea, a State that uses straight baselines may draw a baseline across the mouth of the river between points on the low-water line of its banks.¹⁴⁷

Finally, a State with a bay on its coasts may draw a closing line across the bay where the distance between the low water marks of the natural entrance do not exceed 24 nautical miles.¹⁴⁸ Where the distance of the low-water marks of the natural entrance to the bay does exceed 24 nautical miles and where a State is using a system of straight baselines, a straight baseline of 24 nautical miles may be drawn within the bay in such a manner as to enclose the maximum possible area of water.¹⁴⁹ (An indentation is not regarded as a "bay" for these purposes unless it belongs to a single State, is a well-marked indentation whose penetration is in proportion to the width of its mouth so as to contain land-locked waters and constitute more than a mere curvature of the coast, and the area is as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of the indentation.¹⁵⁰)

¹³⁸ Art. 3.

¹³⁹ Art. 33.

¹⁴⁰ *Ibid.*

¹⁴¹ Art. 55.

¹⁴² Art. 74.

¹⁴³ Art. 76(4).

¹⁴⁴ Art. 7(1).

¹⁴⁵ Art. 7(5).

¹⁴⁶ Art. 7(2).

¹⁴⁷ Art. 9.

¹⁴⁸ Art. 10 (4).

¹⁴⁹ Art. 10(5).

¹⁵⁰ Art. 10.

These provisions are not applicable to “historic” bays,¹⁵¹ but the term “historic bay” is not defined in the Convention. It is a logical inference that if a coastal State possesses a bay that cannot meet the tests just mentioned, it may if it wishes (and if legally justified) publicize its view that such a bay is, although not juridical, nonetheless an “historic” bay. (The legal consequences of such a proclamation are complex and not entirely clear, and are not clarified by the provisions of the Convention itself.)

In drawing straight baselines, States may not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the baselines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.¹⁵² States also may not draw straight baselines to and from low-tide elevations unless lighthouses or similar installations that are permanently above sea level have been built on them or unless the drawing of baselines from such points has received general international recognition.¹⁵³ Nor may they apply the system of straight baselines to cut off the territorial sea of another State from the high seas or from an exclusive economic zone.¹⁵⁴

C. Sovereignty and sovereign rights

The Convention grants coastal States, in particular, substantial sovereignty and sovereign rights over adjacent waters. The extent and quality of those rights over the waters vary significantly depending on their distance from the land. States possess sovereignty over their internal waters, which are the waters on the landward side of the baseline of the territorial sea.¹⁵⁵

The only exception to the State’s sovereign rights over its internal waters arises when the establishment of a straight baseline has the effect of enclosing as internal waters areas which had not previously been considered as such. In that case, a right of innocent passage remains in those waters.¹⁵⁶

Sovereignty of the coastal State also extends to its territorial sea, which may extend up to 12 nautical miles from the State’s baselines.¹⁵⁷ The extent of a State’s territorial sea may be less than the 12 nautical miles provided by the Convention, but may not be greater. States must proclaim a territorial sea; if no proclamation has been made by a State, there is an open question as to whether it has any territorial sea.

Immediately adjacent to and beyond the territorial sea, coastal States may establish a contiguous zone that extends up to 24 nautical miles from the baselines from which their territorial sea is measured.¹⁵⁸ In this zone, States may exercise the control necessary to prevent infringement of their customs, fiscal, immigration or sanitary laws and regulations within their territory or territorial sea, and punish infringement of the above laws and regulations committed within their territory or territorial sea.¹⁵⁹

Encompassing this contiguous zone and extending well beyond it, the “exclusive economic zone” of a coastal State carries with it significant sovereign rights. In the exclusive economic zone, which extends 200 nautical miles from the baselines from which the territorial sea is measured,¹⁶⁰

¹⁵¹ Art. 10(6).

¹⁵² Art. 7(3).

¹⁵³ Art. 7(4).

¹⁵⁴ Art. 7(6).

¹⁵⁵ Art. 2(2); Art. 8(1).

¹⁵⁶ Art. 8(2).

¹⁵⁷ Art. 2; Art. 3.

¹⁵⁸ Art. 33.

¹⁵⁹ Art. 33(1).

¹⁶⁰ Art. 57.

the coastal State has sovereign rights for the purposes of exploring and exploiting, conserving and managing the natural resources (whether living or non-living) of the waters superjacent to the seabed, as well as of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds.¹⁶¹ This broad definition of a State's rights over resources in its exclusive economic zone, as including those of the seabed and subsoil, thus encompasses rights to the resources of the continental shelf (for which see immediately below), and thus to this extent includes or incorporates the regime of the continental shelf as part of the exclusive economic zone. (This is a significant legal anomaly in the Convention.)

In its exclusive economic zone, a State may exercise jurisdiction over the establishment and use of artificial islands, installations, and structures, marine scientific research, and the protection and preservation of the marine environment.¹⁶²

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.¹⁶³ The continental shelf therefore encompasses at least the same 200 nautical mile areas as the exclusive economic zone and may, in certain circumstances, extend beyond it (perhaps as far as 350 nautical miles depending on geology and geomorphology). The coastal State exercises exclusive sovereign rights over the continental shelf for the purpose of exploring and exploiting its natural resources.¹⁶⁴ The Convention specifies that these rights do not depend on any express proclamation on the part of the coastal State.¹⁶⁵ (It should be noted that no similar provision exists with respect to the exclusive economic zone, thus raising a question whether (*inclusio unius est exclusio alterius*) such a proclamation is required for the exclusive economic zone).

In order for a State to exercise sovereign rights over the portion of the continental shelf extending *beyond* 200 nautical miles from its territorial sea, however, it must establish the outer edge of the continental margin as prescribed in the Convention.¹⁶⁶ The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space over those waters, and the coastal State's exercise of its rights may not infringe or interfere with navigation and other rights and freedoms of other States provided in the Convention.¹⁶⁷ Furthermore, where the State exploits the continental shelf beyond 200 nautical miles, it must make payments or contributions through Authority as provided for in the Convention.¹⁶⁸

The areas of the sea that are not included in the internal waters, territorial sea, exclusive economic zone, or archipelagic waters of a State constitute the high seas.¹⁶⁹ The high seas are open to all States and all are granted substantial freedom to use them.¹⁷⁰ No State may validly purport to subject any part of the high seas to its sovereignty.¹⁷¹

¹⁶¹ Art. 56(1)(a).

¹⁶² Art. 56(1)(b).

¹⁶³ Art. 76(1).

¹⁶⁴ Art. 77.

¹⁶⁵ Art. 77(3).

¹⁶⁶ Art. 76(4).

¹⁶⁷ Art. 78.

¹⁶⁸ Art. 82.

¹⁶⁹ Art. 86.

¹⁷⁰ Art. 87.

¹⁷¹ Art. 89.

However, a coastal State may exercise the right of hot pursuit of a foreign ship when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, archipelagic waters, territorial sea, or contiguous zone and it may be continued outside the territorial sea or contiguous zone only if the pursuit has not been interrupted. If the foreign ship is in the contiguous zone, pursuit may only be undertaken if there has been a violation of the rights which the coastal State is permitted to enforce in that zone.

The right of hot pursuit applies *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf of the laws of the coastal State applicable under the Convention to those areas. The provisions applying to pursuing ships also apply to aircraft. Hot pursuit may only be undertaken by warships or military aircraft or other ships or aircraft clearly marked and identifiable as being in government service.

The right of hot pursuit for both ships and aircraft ceases as soon as the foreign ship enters the territorial sea of its own State or of a third State. Where a ship has been stopped or arrested outside the territorial sea in circumstances that do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage suffered thereby.¹⁷²

IV. DUTIES OF COASTAL STATES

All coastal States Parties should note the following duties incumbent upon their enjoyment of rights under the Convention over their maritime areas.

A. Publicity

One of the principal mandatory duties for States under the Convention is to give due publicity to charts and geographical information specific to the State and, in some instances, to deposit copies of the same with the Secretary-General of the United Nations (the "Secretary General"). The term "due publicity" is not defined in the Convention.

Coastal States are required to give due publicity to charts and lists describing the geographical coordinates and limits of its baselines for measuring the breadth of the territorial sea, including closing lines across river mouths and bays.¹⁷³ Although the charts and lists of coordinates need not include the low-water line and low-tide elevations, these low-water line must be marked on "large-scale charts officially recognized by the coastal State."¹⁷⁴ A State must also publicize any sea lanes and traffic separations schemes that it establishes,¹⁷⁵ any danger to navigation of which it has knowledge,¹⁷⁶ and any temporary suspension of innocent passage through its territorial sea.¹⁷⁷

If a State constructs an artificial island, installation or structure in the exclusive economic zone, it must also publish notice of such construction (and of any removal).¹⁷⁸ Importantly, a coastal State must give due publicity to the geographical coordinates of its exclusive economic zone limits.¹⁷⁹ It must also publicize the outer limits of its continental shelf¹⁸⁰ and show them on charts (or lists of geographical coordinates), which it must deposit with the Secretary-General.¹⁸¹ Finally, if a

¹⁷² Art. 111.

¹⁷³ Art. 16.

¹⁷⁴ Art. 5.

¹⁷⁵ Art. 21(3); Art. 22(4).

¹⁷⁶ Art. 24(2).

¹⁷⁷ Art. 25(3).

¹⁷⁸ Art. 60(3).

¹⁷⁹ Art. 75(2).

¹⁸⁰ Art. 84(2).

¹⁸¹ *Ibid.*

State establishes requirements for the prevention, reduction and control of pollution in the marine environment, it must give them due publicity as well.¹⁸²

B. Right of passage

All States are required to permit innocent passage of ships through their territorial sea, except in limited circumstances expressly provided in the Convention.¹⁸³ In order for passage to be considered “innocent,” it must be “continuous and expeditious,” but can include stopping and anchoring when incidental to ordinary navigation or when rendered necessary by *force majeure* or distress.¹⁸⁴ Passage is innocent only so long as it does not prejudice the peace, good order, or security of the coastal State.¹⁸⁵ A State may implement laws and regulations regarding innocent passage for certain reasons specified in the Convention, including, for example, protecting the safety of navigation and conserving the living resources of the sea.¹⁸⁶ It may also designate sea lanes and traffic separation schemes,¹⁸⁷ may levy charges for services rendered on a foreign ship passing through its territorial waters,¹⁸⁸ and may suspend innocent passage of foreign ships temporarily in specified areas of its territorial sea when necessary for protection of its security.¹⁸⁹ Finally, the coastal State may exercise very limited criminal jurisdiction over foreign ships exercising the right of innocent passage through the territorial Sea.¹⁹⁰

C. Exclusive economic zone

As noted above, the exclusive economic zone is the area, beyond and adjacent to the territorial sea, which extends up to 200 nautical miles from the beginning of the territorial sea.¹⁹¹ The coastal State must observe certain restrictions in enjoying its enumerated rights over the zone.

First and foremost, the coastal State is responsible for the use, exploitation, and conservation of the natural resources in its exclusive economic zone. To this end, it must prevent overexploitation of its exclusive economic zone's living resources by means of imposition of proper conservation and management measures;¹⁹² it must also promote optimum use of the living resources in the exclusive economic zone,¹⁹³ cooperate with other coastal States to conserve and develop overlapping stocks,¹⁹⁴ cooperate with other States whose nationals fish for highly migratory species regarding the harvesting of those species,¹⁹⁵ cooperate to conserve marine mammals,¹⁹⁶ take responsibility for anadromous stocks that originate in the State's waters,¹⁹⁷ and take responsibility for the management, including harvesting, of catadromous species that spend the greater part of their life cycle in the State's waters.¹⁹⁸

¹⁸² Art. 211(3).

¹⁸³ Art. 17; Art. 24.

¹⁸⁴ Art. 18(2).

¹⁸⁵ Art. 19.

¹⁸⁶ Art. 21.

¹⁸⁷ Art. 22.

¹⁸⁸ Art. 26.

¹⁸⁹ Art. 25(3).

¹⁹⁰ Art. 27.

¹⁹¹ Art. 57.

¹⁹² Art. 61.

¹⁹³ Art. 62.

¹⁹⁴ Art. 63.

¹⁹⁵ Art. 64.

¹⁹⁶ Art. 65.

¹⁹⁷ Art. 66.

¹⁹⁸ Art. 67.

If a coastal State constructs artificial islands, installations, or structures in its exclusive economic zone, it must then give due notice of their construction, must remove any unused installations, and must give due notice of any safety zones established.¹⁹⁹

The coastal State must also permit other States to exercise rights of navigation and overflight, to lay submarine cables and pipelines in the zone, and to use the area in other internationally lawful ways associated with exercising their rights.²⁰⁰ Although the coastal State must permit other States to conduct pure research in its exclusive economic zone,²⁰¹ it need not permit resource-oriented research or research involving drilling or which involves the construction, operation and use of artificial islands, installations and structures.²⁰² The rights of a foreign State within the exclusive economic zone of a coastal State are contingent upon its compliance with the applicable laws and regulations adopted by the coastal State.²⁰³

D. Continental shelf

As mentioned above, the continental shelf of a coastal State is the sea-bed and subsoil of the submarine areas beyond its territorial sea to the outer edge of the continental margin or to 200 nautical miles from the baselines from which the territorial sea is measured, whichever is greater.²⁰⁴ Coastal States are obliged to reach agreement on any necessary delimitation of their respective continental shelves. If they cannot agree, they must resort to the measures provided in Part XV of the Convention.²⁰⁵ A coastal State must also delineate the outer limits of its continental shelf in instances where that shelf extends beyond 200 nautical miles from the State's baselines, and must submit this information to the Commission on the Limits of the Continental Shelf, an expert body established in accordance with the Convention to provide advice and recommendations on these matters. A coastal State must also deposit charts and relevant information describing its continental shelf to the Secretary-General of the United Nations.²⁰⁶

A coastal State must observe and respect the rights of other States in its continental shelf area. Specifically, it may not impede the laying of submarine cables or pipelines on its continental shelf by another State.²⁰⁷ If a coastal State constructs artificial islands, installations, or structures on the continental shelf, it must then give notice of their construction, must remove any unused installations, and must give notice of any safety zones established.²⁰⁸

Finally, if a coastal State exploits its continental shelf beyond 200 nautical miles, it is required to make payments or contributions in kind in respect of the exploitation to the States Parties through the International Sea-Bed Authority established under the Convention.²⁰⁹

E. High seas

The duties of coastal States with regard to the high seas are identical to those of other States, reviewed in detail in Part. II.A. above.

¹⁹⁹ Art. 60.

²⁰⁰ Art. 58.

²⁰¹ Art. 246(3).

²⁰² Art. 246(5).

²⁰³ Art. 58(3).

²⁰⁴ Art. 76.

²⁰⁵ Art. 83.

²⁰⁶ Art. 76; Art. 84.

²⁰⁷ Art. 79.

²⁰⁸ Art. 80.

²⁰⁹ Art. 82; Art. 156(1).

F. The area

The duties of coastal States with regard to the Area are identical to those of other States, reviewed in detail in Part II.D. above.

G. Marine technology

The duties of coastal States with regard to Marine Technology are identical to those of other States, reviewed in detail in Part. II.C. above.

H. Settlement of disputes

The duties of coastal States with regard to settlement of disputes is identical to those of other States, reviewed in detail in Part II.E. above.

V. ADDITIONAL RIGHTS AND OPPORTUNITIES FOR STATES PARTIES WITH SPECIFIC GEOGRAPHIC FEATURES

Rights or opportunities often attach to States under the Convention by virtue of their particular geographic features.

A. States with particular coastal configurations

The most evident of these geographic elements is of course that of coastal configuration. Thus, where appropriate, coastal States are permitted to use a system of straight baselines. This allows them some discretion in the treatment of various coastal features, including deep indentations, a fringe of islands along the coast, bays and rivers.²¹⁰

States bordering straits within territorial seas but which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone are also granted a host of unique rights. During “transit passage” (i.e., passage through those straits²¹¹) foreign ships, including marine scientific research and hydrographic survey ships, may not carry out any research or survey activities without the prior authorization of those States.²¹² States bordering straits may designate sea lanes and prescribe traffic separation schemes where necessary to promote the safe passage of ships.²¹³ They are also permitted to adopt laws and regulations concerning navigation, pollution, fishing vessels, and loading and unloading.²¹⁴ Notably, however, in contrast to other coastal States and in particular in contrast to the rules governing the territorial sea, straits States must permit aircraft the right of transit passage over the straits.²¹⁵

B. Archipelagic States

Archipelagic States—States constituted wholly by one or more archipelagos that may include other islands²¹⁶—are also granted some unique rights and opportunities under the Convention. An archipelagic State may, for example, draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago (provided that certain tests are

²¹⁰ See *supra* Part IV.B.

²¹¹ Art. 38(1).

²¹² Art. 40.

²¹³ Art. 41.

²¹⁴ Art. 42.

²¹⁵ Art. 38(1); Art. 39; Art. 17.

²¹⁶ Art. 46.

met). The baselines must include the main islands and an area in which the ratio of the area of water to land, including atolls, is between 1:1 and 9:1.²¹⁷

In addition, within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters.²¹⁸ Sovereignty of an archipelagic State extends to the water enclosed by the baselines regardless of its depth or distance from the coast—and to the air space over the archipelagic waters. It also extends to the seabed and subsoil under archipelagic waters and the resources contained therein.²¹⁹ Within and above the archipelagic waters and the adjacent territorial sea, an archipelagic State may, within certain specified limits,²²⁰ designate sea lanes and air routes suitable for the continuous and expeditious passage of foreign ships and aircraft,²²¹ as well as traffic separation schemes for the safe passage of ships.²²² If the archipelagic State fails to designate such lanes and routes, a right of “archipelagic sea lanes passage” may be exercised through routes normally used for international navigation.²²³

C. Geographically disadvantaged States

“Geographically disadvantaged” States possess a non-transferable right to participate in the exploitation of part of the surplus of the living resources of the exclusive economic zone of a coastal State in the same region or subregion (unless the coastal State’s economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone.)²²⁴

In addition, geographically disadvantaged States may request technical assistance from other States in developing their marine scientific and technological capacity.²²⁵ States Parties are required to try to cooperate in the effective transfer of marine technology.²²⁶ In addition, geographically disadvantaged States must be given an opportunity to participate in marine scientific research, and must be given information regarding the research when appropriate.²²⁷

D. Non-coastal States

The term “non-coastal State” is not defined by the Convention, but it is quite obviously a State that possesses no adjacent belt of sea, *i.e.*, it has no coasts and no adjacent waters and is thus a land-locked state. (Nor is the term “land-locked” defined in the Convention.²²⁸) Land-locked States are granted (*mutatis mutandis*) rights similar to those of developing States under the Convention. Land-locked States, just as developing States may do,²²⁹ may request technical assistance from other States in developing their marine scientific and technological capacity.²³⁰ States Parties are required to endeavor to cooperate in the effective transfer of marine technology to them.²³¹ In particular, land-locked States are permitted equitable non-transferable rights to participate in the surplus living resources of the exclusive economic zone of coastal States in the same region or subregion, unless the coastal State’s economy is overwhelmingly dependent on the exploitation of those resources.²³²

²¹⁷ Art. 47.

²¹⁸ Art. 50.

²¹⁹ Art. 49.

²²⁰ Art. 53.

²²¹ *Ibid.*

²²² Art. 53(6).

²²³ Art. 53(12).

²²⁴ Art. 69-72.

²²⁵ Art. 266.

²²⁶ Art. 269; Art. 272.

²²⁷ Art. 254.

²²⁸ *Cf.* Art. 87.

²²⁹ *See infra* Part VII.A.

²³⁰ Art. 266.

²³¹ Art. 269; Art. 272.

²³² *Ibid.*

Land-locked States are also granted the right of access to and from the sea for the purpose of exercising their rights under the Convention.²³³ They must, however, take appropriate steps to claim and ensure this right.²³⁴

VI. ADDITIONAL DUTIES FOR STATES PARTIES WITH SPECIFIC GEOGRAPHICAL FEATURES

Coastal States with certain special geographic features do not merely acquire rights or opportunities under the Convention, but also correlative duties and obligations.

A. States bordering straits

One example is that States bordering straits must grant the right of “transit passage” to ships and aircraft,²³⁵ may not hamper or suspend innocent or transit passage in the strait,²³⁶ and must give appropriate publicity to any danger to navigation or overflight of which they have knowledge. Such States may seek to designate or substitute sea lanes or traffic separation schemes, but must first refer their proposals to the competent international organization with a view to their adoption,²³⁷ and must clearly indicate all such sea lanes and traffic separation schemes on charts to which they must give due publicity.²³⁸

States bordering straits may issue laws and regulations relating to transit passage through the strait,²³⁹ but may not discriminate against foreign ships and must publicize such laws and regulations.²⁴⁰ Furthermore, States bordering Straits must seek to cooperate with user States to establish and maintain necessary navigational and safety aids in the straits and to prevent, reduce and control pollution from ships.²⁴¹

B. Archipelagic States

Archipelagic States also bear additional responsibilities under the Convention by virtue of their geographical features. If an archipelagic State chooses to use straight baselines, it must show its baselines on charts of a scale or scales adequate to ascertain their position, or assemble lists of geographical coordinates of points on the baselines and give due publicity to them.²⁴² An archipelagic State is specifically directed to respect existing agreements with other States, recognize traditional fishing rights and other legitimate activities of immediately adjacent neighboring States, and respect existing submarine cables laid by other States and passing through its archipelagic waters.²⁴³

Archipelagic States must permit innocent passage through archipelagic waters but—unlike States bordering straits—may temporarily suspend this right if necessary for security reasons.²⁴⁴ Archipelagic States may not, however, hamper “archipelagic sea lanes passage,” which is equated to transit passage under the Convention.²⁴⁵ Just as in the case of straits, when an archipelagic State

²³³ Art. 125.

²³⁴ Arts. 125-130, 132.

²³⁵ Art. 38.

²³⁶ Art. 44; Art. 45.

²³⁷ Art. 41.

²³⁸ *Ibid.*

²³⁹ Art. 42(1).

²⁴⁰ Art. 42.

²⁴¹ Art. 43.

²⁴² Art. 47.

²⁴³ Art. 51.

²⁴⁴ Art. 52.

²⁴⁵ Art. 54.

designates sea lanes, it must conform them to generally accepted international regulations, refer them to the competent international organization, and publicize them on charts to which it gives due publicity.²⁴⁶ And when an archipelagic State adopts laws and regulations relating to archipelagic sea lanes passage, it may not discriminate against foreign ships and must publicize such laws and regulations.²⁴⁷

C. States bordering enclosed or semi-enclosed seas

States bordering an enclosed or semi-enclosed sea—defined as “a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States”²⁴⁸—also bear an additional duty, even if of a most generalized nature. They are encouraged to cooperate with other States bordering the *same* enclosed or semi-enclosed sea in the exercise of their rights and the performance of their duties under the Convention, notably the conservation and management of living resources, protection of the marine environment, and coordination of scientific research policies.²⁴⁹

D. States bordering land-locked States

States bordering land-locked States are also obligated to provide a right of access to and from the sea to land-locked States for the purpose of exercising their rights under the Convention.²⁵⁰ Traffic in transit may not be subject to any customs duties or other taxes, and land-locked States and the States bordering them are required to agree as to the terms and modalities for exercising this freedom of transit.²⁵¹

VII. **ADDITIONAL RIGHTS AND DUTIES FOR STATES PARTIES WITH SPECIFIC FACTUAL CONTEXTS**

Just as certain States Parties acquired additional responsibilities under the Convention by virtue of their geographic configuration or location, so may States Parties have additional duties thereunder by virtue of a factual background—by something that happens, or some claim that is asserted.

A. Developing States

“Developing States” are permitted to request, and all States are required to provide, appropriate scientific and technical assistance for the reduction and minimization of pollution to the marine environment and the preparation of environmental assessments.²⁵² Developing States may also request technical assistance from other States in developing their marine scientific and technological capacity.²⁵³ States Parties are also required to endeavor to cooperate in the effective transfer of marine technology.²⁵⁴

In addition, upon request, developing States must be given an opportunity to participate in marine scientific research and must be given information regarding such research when

²⁴⁶ Art. 53.

²⁴⁷ Art. 42; Art. 54.

²⁴⁸ Art. 122.

²⁴⁹ Art. 123.

²⁵⁰ Arts. 125-32.

²⁵¹ Arts. 125, 127-132.

²⁵² Art. 202.

²⁵³ Art. 266.

²⁵⁴ Art. 269; Art. 272.

appropriate.²⁵⁵ A coastal State must grant to developing States in the same region or subregion a non-transferable right to participate in the exploitation of part of the surplus of the living resources of its exclusive economic zone unless the coastal State's economy is overwhelmingly dependent on the exploitation of those resources.²⁵⁶

B. Port States

An example of a "factual background" or context is of course the existence of a port on the coast of a State Party, which renders that State into a "port State." When a vessel is voluntarily within a port or at an off-shore terminal of a State, that State is permitted to undertake investigations and institute proceedings in respect of any discharge from that vessel outside the internal waters, territorial sea or exclusive economic zone of that State in violation of applicable international rules and standards established through the competent international organization or a general diplomatic conference.²⁵⁷ Similarly, when a State ascertains that a vessel within one of its ports or at one of its off-shore terminals is in violation of applicable international rules and standards relating to seaworthiness of vessels and thereby threatens damage to the marine environment, it is directed by the Convention to take administrative measures to prevent the vessel from sailing.²⁵⁸

In general, when a vessel is voluntarily within a port or at an off-shore terminal of a State, that State is permitted to institute proceedings in respect of any violation of its laws and regulations adopted in accordance with the Convention or applicable international rules and standards for the prevention, reduction and control of pollution from vessels when the violation has occurred within the territorial sea or the exclusive economic zone of that State.²⁵⁹ Any inspection of foreign vessels conducted consistent with the Convention may not delay the vessel longer than necessary and is strictly circumscribed by the Convention.²⁶⁰

C. Flag States

Every State (including a land-locked State) may grant its nationality to ships, but is required to fix the conditions for the grant of its nationality, and may issue nationality documents only to those ships that meet the conditions.²⁶¹ In common parlance, the State is known as the "flag State" of any ship to which it has granted nationality. Flag States must maintain a registry of all such ships and must exercise jurisdiction and control over them by, for example, taking measures to ensure their safety at sea.²⁶² Every State must also require the master of ships flying its flag to render assistance to any person found at sea in danger of being lost, to render assistance after a collision when reasonably possible, and to cooperate in the provision of a search and rescue service on and over the sea.²⁶³

Flag States also bear the duty of taking measures to prevent the transportation of slaves,²⁶⁴ to cooperate in the repression of piracy,²⁶⁵ to cooperate in the suppression of illicit traffic in narcotic drugs or psychotropic substances,²⁶⁶ and to cooperate in suppressing unauthorized broadcasting from the high seas.²⁶⁷

²⁵⁵ Art. 254.

²⁵⁶ Art. 69-72.

²⁵⁷ Art. 218.

²⁵⁸ Art. 219.

²⁵⁹ Art. 220.

²⁶⁰ Art. 226.

²⁶¹ Art. 91.

²⁶² Art. 94.

²⁶³ Art. 98.

²⁶⁴ Art. 99.

²⁶⁵ Art. 100.

²⁶⁶ Art. 108.

²⁶⁷ Art. 109.

Finally, since all States are permitted to lay submarine cables and pipelines on the bed of the high seas,²⁶⁸ they must adopt laws and regulations necessary to provide that the breaking or injury of such cables or pipelines by a ship or person subject to its jurisdiction is a punishable offense (unless the break or injury was caused by persons who acted with the legitimate object of saving their lives or their ships after having taken all necessary precautions to avoid it).²⁶⁹

D. Pipeline States

States that operate submarine cables or pipelines beneath the high seas or whose nationals operate cables or pipelines incur specific responsibilities under the Convention. In particular, they must adopt laws and regulations providing that those who cause a break in or injury to a cable or pipeline while laying or repairing a cable or pipeline shall bear the cost of the repairs,²⁷⁰ and that the owner of a cable or pipeline subject to the State's jurisdiction must indemnify any loss incurred by the owners of ships that can prove that they suffered a loss in order to avoid injuring a submarine cable or pipeline, provided that the shipowner took all reasonable precautions.²⁷¹

E. Researching States

States that undertake or whose nationals undertake marine scientific research incur specific duties under the Convention as a consequence. For instance, if a State undertakes marine scientific research in the exclusive economic zone or continental shelf of another State, it must provide that State with a full description of the project, including the nature and precise geographical areas to be explored and the length of the project.²⁷² It must also comply with several specific conditions,²⁷³ and must give notice to any neighboring land-locked and geographically disadvantaged States of the proposed research project and notify the coastal State thereof.²⁷⁴ (Coastal States are also expected to adopt reasonable rules, regulations and procedures to promote and facilitate marine scientific research beyond their territorial sea, to facilitate access to their harbors, and to promote assistance for marine scientific research vessels.²⁷⁵)

States that deploy or whose nationals deploy any type of scientific research installations or equipment in any areas of the marine environment must observe several specific requirements. First and foremost, they must honor the conditions prescribed in the Convention for the conduct of such research in any such area,²⁷⁶ and they must ensure that the installations and equipment bear identification markings indicating the State of registry or international organization to which they belong and must contain adequate warning signals to ensure safety of sea and air navigation.²⁷⁷ States must also not interfere with international shipping routes when deploying and using any type of scientific research installation or equipment²⁷⁸ and all States must ensure that their vessels respect any safety zones created around such installations.²⁷⁹

²⁶⁸ Art. 112.

²⁶⁹ Art. 113.

²⁷⁰ Art. 114.

²⁷¹ Art. 115.

²⁷² Art. 248.

²⁷³ Art. 249.

²⁷⁴ Art. 254.

²⁷⁵ Art. 255.

²⁷⁶ Art. 258.

²⁷⁷ Art. 262.

²⁷⁸ Art. 261.

²⁷⁹ Art. 260.

F. States with ice-covered areas

Since the presence of ice relates to both climate and geography, it is considered here as a factual element of differentiation rather than a purely geographical one. Coastal States with ice-covered areas within the limits of their exclusive economic zone are granted the right under the Convention to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in those ice-covered areas where particularly severe climactic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance.²⁸⁰ In passing such laws and regulations, States must pay due regard to navigation and the protection and preservation of the marine environment.²⁸¹

VIII. CONCLUSIONS

As is clear from the foregoing, the Convention establishes numerous rights and duties for States Parties. In order to ensure that a member State Party in the Inter-American system is prepared to take advantage of all rights and opportunities and to comply with all duties, it would be well advised to designate persons in its legal adviser's (or equivalent) office to become familiar with three central aspects of the Law of the Sea Convention: (1) the rights and opportunities that it establishes; (2) the duties and responsibilities that it creates; and (3) the proper methods for responding and reacting to maritime activities by other States and emergency maritime situations.

1) With regard to States' rights and opportunities under the Convention, several rights and opportunities are worth particular note. First and foremost, coastal States are permitted to proclaim maritime zones, establish straight baselines, and exercise sovereignty and sovereign rights over portions of the seas.²⁸² Developing and geographically disadvantaged States are permitted to request various forms of technical and research assistance and may participate in harvesting and using the resources of regional coastal States.²⁸³ Land-locked States may also obtain access to and from the sea for the purpose of exercising their rights under the Convention.²⁸⁴ Moreover, all States are permitted to participate in harvesting and using the resources of the Area of the high seas.²⁸⁵ All States may seek resolution of disputes.²⁸⁶ Finally, States possessing specific geographical features possess a series of particular rights and opportunities as a consequence.²⁸⁷

2) Similarly, there are numerous duties under the Convention as to which each member State should consider charging a legal officer with responsibility for monitoring and compliance. All States must observe the rights of other States in the high seas and the Area and must take measures to conserve and manage the living resources of the high seas and the Area.²⁸⁸ In addition, all States bear the burden of protecting and preserving the marine environment, developing and transferring marine scientific research and marine technology, and resolving disputes peacefully in accordance with the provisions of the Convention.²⁸⁹

²⁸⁰ Art. 234.

²⁸¹ *Ibid.*

²⁸² See Part IV.

²⁸³ See Part III.

²⁸⁴ See *ibid.*

²⁸⁵ See *ibid.*

²⁸⁶ See *ibid.*

²⁸⁷ See Part VI.

²⁸⁸ See Part II A. & D.

²⁸⁹ See Part II B., C. & E.

In particular, coastal States bear several particular burdens. They must publish and publicize charts and geographical information specific to the State and, in many instances, deposit copies of the same with the Secretary General.²⁹⁰ They must also permit innocent passage of ships through their territorial sea (except in limited circumstances), observe a series of restrictions on the enjoyment of their rights over its exclusive economic zone (foremost among which being the conservation of the natural resources of the zone), and delineate and publicize the outer limits of their continental shelves and observe the rights of others in their continental shelf areas.²⁹¹

In addition, member States possessing specific geographical features must observe specific enumerated requirements established by the Convention.²⁹² Finally, member States with significant ports, that grant their nationality to ships, that lay pipelines or cables, that engage in research, or that possess ice-covered areas must also abide by certain specific obligations incurred as a result.²⁹³

Finally, it would be prudent for each member State of the OAS that is a State Party to establish a legal team responsible for ensuring that any responsive action that the State takes with regard to the maritime activities of others is within the limits and controls of the Convention. Not the least of the provisions of the Convention that should be kept in mind, moreover, are Convention's specific and mandatory provisions relating to dispute resolution.²⁹⁴ In this regard, member States in the Inter-American system will do well to recall their rights and obligations concerning any pending maritime disputes with other member States Parties to this Convention.

²⁹⁰ See Part V A.

²⁹¹ See Part V B., C., & D.

²⁹² See Part VII.

²⁹³ See Part VIII.

²⁹⁴ See Part II E.

4. Preparation of model legislation on illicit enrichment and transnational bribery

At their fifty-fourth regular period of sessions (Rio de Janeiro, January 1999), the members of the Inter-American Juridical Committee had documents titled *Articles proposed for the model legislation on illicit enrichment*, presented by Dr. Brynmor T. Pollard (CJI/doc.44/98 rev.1), and *Articles proposed for the model legislation on illicit enrichment* (CJI/doc.68/98 rev.1), presented by Dr. Brynmor T. Pollard, Dr. João Grandino Rodas and Dr. Eduardo Vío Grossi.

Dr. João Grandino Rodas gave a brief summation of the history of this subject within the Inter-American Juridical Committee, and mentioned the document it had approved at its August 1998 regular period of sessions, titled *Model legislation on illicit enrichment and transnational bribery* (CJI/doc.70/98 rev.2), having as Annex I the document *Model legislation on transnational bribery: guide for the legislator*. At the fifty-fourth regular period of sessions, the Juridical Committee's work focused on preparation of a model law on illicit enrichment: guide for the legislator.

In the course of the deliberations, some members of the Juridical Committee singled out three areas that needed particular attention. The first was the definition of illicit enrichment, which some said was not broad enough to encompass every aspect of the performance of a public function. It was suggested that the definition of public official, government official or public servant should be opened up to include other factors. There was also discussion of the idea of using the definition of "public service" instead, so that the definition would include government officials, civil servants or officials in the private sector.

The second question that some members of the Inter-American Juridical Committee raised concerned the increase of assets in public office. It was pointed out that one had to be very careful to ensure that due process was not disregarded and that a number of questions related to the burden of proof had to be considered. The accused always had to be given the opportunity to prove his innocence. In this regard, some members of the Juridical Committee noted that this was the central issue since under the Inter-American Convention against Corruption, as it was presently worded, the rules of due process in some States could be violated. Enrichment might not necessarily be classified as a criminal offense. The accused would have to be given the opportunity to prove his innocence.

The third question raised by some members of the Juridical Committee had to do with the *straw man* or *testaferro*. Since in principle a straw man has no public office to lose, this problem would have to be approached from a different angle. Some members of the Juridical Committee were of the view that the presence of the straw man was a means to circumvent the crime of illicit enrichment. They felt that whereas straw men were part of the corruption problem, they did not figure in the problem of illicit enrichment.

Other members of the Inter-American Juridical Committee pointed out that the boundaries of the Committee's work were delineated by the *Inter-American Convention against corruption*. The concept of public official, government official or public servant, therefore, should be limited to the concept as defined in that Convention. The scope of that definition was different from the concept of public function. The concept of public official did not include those who performed public functions without having been elected to do so. The concept of public function, moreover, also included persons who were not officials, such as those who worked on a fee basis or in a temporary capacity.

They also noted that transnational bribery was clearly an act of corruption. They pointed out that transnational bribery was different in nature from illicit enrichment. With the latter, nothing was being offered, solicited or granted. The crime would be the increase in one's assets. There would be no defined instigator in this crime, either.

It was emphasized that it is Article IX of the *Convention* that defines illicit enrichment as a criminal offense. The Inter-American Juridical Committee's job would be to point out the strengths and weaknesses of this classification. It was noted that the term "assets" is used only in this article; elsewhere the Convention always uses the term "property". Secondly, illicit enrichment would not necessarily have to be in the form of an increase in a public official's personal assets; instead, it might be in the form of indirect increases or benefits. Mention was also made to the use of the expression "significant increase in the assets of a public official" which would then make possible certain excesses.

Where illicit enrichment was concerned, the general rules of due process that applied in the case of transnational bribery would not suffice. Because the crime was in the results and the burden of proof was reversed, the accused had to be assured the opportunity to prove his innocence.

The declaration of assets was a measure that came about with the progressive development of international law within the Convention. While the declaration can be grounds for suspecting that a crime has been committed, it can never be the decisive factor in determining guilt.

It was also pointed out that the Inter-American Juridical Committee could not make any judgment as to whether the domestic laws conformed to the Convention, because what the Convention stipulated was an obligation of performance only.

Other members raised other issues, including the question of the document's format. They shared the view that the model law that the Inter-American Juridical Committee was to prepare had to conform to Article IX of the Convention and should contain minimum standards upon which the various States could build.

The point was made that the nature of the model law was a penal matter, especially in the area of crimes against the public administration.

After all the discussion, the members of the Inter-American Juridical Committee approved document CJI/doc.13/99 rev.3, *Appendix II: Model legislation on illicit enrichment: guide for the legislator*. It was decided that that document would be sent as soon as possible to the pertinent organs of the Organization. On January 29, 1999, the Department of International Law sent the Chairman of the Permanent Council the text of the final document, as the Inter-American Juridical Committee had completed its consideration of the topic.

Later, the Juridical Committee decided to do an additional report so that this document would be included in the *Annual Report of the Inter-American Juridical Committee to the General Assembly* for 1998.

What follows is the text of document CJI/doc.21/99, *Model legislation on illicit enrichment and transnational bribery*, whose appendices combine the final reports on illicit enrichment and transnational bribery.

MODEL LEGISLATION ON ILLICIT ENRICHMENT AND TRANSNATIONAL BRIBERY

1. BACKGROUND

In resolution AG/RES.1395 (XXVI-O/96), the General Assembly of the Organization of American States (OAS) commissioned the Inter-American Juridical Committee (IAJC) *pursuant to*

its contribution to the adoption of the Inter-American Convention against Corruption, to prepare model legislation covering illicit enrichment and transnational bribery, which could be used by the member States.

During its XVII and XVIII periods of sessions in 1997 and 1998, the General Assembly reiterated the intention of the Organization to continue with the Inter-American Program of Cooperation to Combat Corruption and, making specific reference to the types of crimes described in Articles III and IX of the instrument concluded in Caracas on 29 March 1996, *to analyze illicit enrichment and transnational bribery on the basis of the feedback supplied by the Inter-American Juridical Committee, including its draft model Legislation on this matter.*

During its regular period of sessions in March 1997, the Inter-American Juridical Committee adopted the Report prepared by the Rapporteurs as commissioned, entitled *Elements for the preparation of model legislation on illicit enrichment and transnational bribery* (CJI/SO/II/doc.12/97 rev.1) as a preliminary input on these matters. The Department of International Law of the Secretariat for Juridical Affairs undertook an investigative follow-up study for the use of the Committee, given in document OEA/Ser.Gral CJI/doc.16/97 rev.1 dated 14 July 1997.

2. TREATMENT OF THE TOPIC DURING THE LIII PERIOD OF SESSIONS

Based on the background outlined above, during this LIII regular period of sessions held in Rio de Janeiro from 3-28 August, the Committee continued to comply with the above-mentioned mandate. The rapporteurs appointed for this purpose prepared drafts of a preliminary outline covering both types of crimes.

The preparation of legislation that could be adopted by domestic legislators included a study of the legislation in the Hemisphere on illicit enrichment. The outcome of this task leads to the conclusion

that this type of criminal conduct is already defined as a crime in many of the legal systems of the member States. In others, although certain aspects related to this conduct are regulated, illicit enrichment is not defined as an independent offense.

With regard to international bribery, the domestic arrangements of the States in the Inter-American System were also reviewed, and it was determined that by the date of this Report that in only one of them – the United States of America – is transnational bribery defined as a crime, in the U.S. legislation known as the *Foreign Corrupt Practices Act*.

The Committee studied and reviewed in detail the *Convention to combat bribery of foreign public officials in international commercial transactions*, whose final version was adopted by the Organization for Economic Cooperation and Development (OECD) on 9 December 1997 (original in English), as well as its Annex, the *Common elements agreed on matters of criminal legislation and associated actions*, and the Comments prepared by the respective Working Group. This Convention was signed by the OECD countries as well as Argentina, Brazil, Bulgaria, Chile and Slovakia (including six member States of the Organization of American States).

It should be stressed that of this instrument is intended to establish the obligations to legislate for the member States, and does not adopt the methodological technique of a *Model Law* intended for possible future inclusion by national legislators.

During the preparation of the preliminary articles, the Rapporteurs were very much aware that in both Article VIII (Transnational Bribery) and Article IX (Illicit Enrichment) the Convention of Caracas requires that each State Party ban and sanction these acts "subject to the Constitution and the fundamental principles of their juridical arrangements".

By placing these obligations on the obligation to legislate, the Convention acknowledges the important differences that may exist on this matter among the States Party.

The study carried out by the Committee of the legal systems of the various countries in the Hemisphere leads to the conclusion that, in criminal terms, the differences among the countries, even those with the same language, the same juridical tradition and a similar historical background, are far deeper and more varied than those in other branches of the law, such as civil law or trade law.

Not only are there basic differences in terms of criminal law with regard to the interpretation of the permissible limits for the extra-territorial exercise of criminal jurisdiction, or certain principles relative to the burden of proof, but there are also considerable variations with regard to everything involved in the fundamental principles of criminal law, criminal and trial legislative technique, and even terminology.

This is why the Committee has not attempted to prepare detailed, lengthy items. Should this be attempted, items of this type would be of use to no more than a very small number of countries with similar criminal juridical systems, and would be unacceptable to the rest.

The Committee has thus drafted a minimum number of basic articles (which will probably not be adopted as they stand by any State) and through detailed comments on the various elements involved in each aspect, has attempted to draw up a type of guide for the legislator (in the sense that the term "legislative guide" is used by the United Nations Commission for International Trade Law).

These guides for the legislator seek in each case to refer only to the criminal provisions required by the Convention, without including any references to other administrative, fiscal, trade, accounting measures or those of any other nature that should be adopted in relation to the topic in terms of other provisions in the Convention.

During its current Regular Period of Sessions, the Committee discussed and adopted, on the basis of the proposals put forward by the Rapporteurs, the document entitled *Model legislation on transnational bribery: guide for the legislator*, which is attached hereto. It also progressed with the discussion of the informative report on model legislation on illicit enrichment, which it expects to conclude during its LIV regular period of sessions.

* * *

ANNEX I

MODEL LAW ON TRANSNATIONAL BRIBERY:

guide for the legislator

(Attached to the report on the *Model legislation on illicit enrichment and transnational bribery* approved by the Inter-American Juridical Committee during its 53rd Regular Period of Sessions on 22 August 1998)

I. PRELIMINARY EXPLANATION

This document constitutes an attachment to the report on the topic of *Model legislation on illicit enrichment and transnational bribery* (OEA/Ser.Q CJI/doc.70/98 rev.2), adopted by the Inter-American Juridical Committee during its 53rd regular period of sessions on 22 August 1998).

As mentioned in this report, the profound differences between the States in the Hemisphere in terms of criminal law with respect to the fundamental principles thereof, as well as criminal legislative technique and even terminology, making it almost impossible to draft a detailed model law that could be of use to most of the States, or even an appreciable number of them.

For this reason, in order to comply with the mandate in article VII, "Transnational Bribery" of the Inter-American Convention against Corruption, (known hereinafter as the "Convention") the

Committee decided to simply draft the "basic articles", which reproduce as accurately as possible the wording of the Convention, and offer detailed comments on them as well as other provisions in the Convention that could require legislative measures related to the crime of transnational bribery, that could serve as a guide to the legislator in the task of adapting the "basic articles" to the requirements of his own legislation.

It should be recalled that although the Convention establishes the obligation for each State Party to ban transnational bribery, it makes this obligation conditional on the respective Constitutional provisions and fundamental principles of the respective legislation. In the course of the observations, references are made to some cases where there may be substantial differences in this respect among the States in the Hemisphere.

II. WORDING OF THE BASIC ARTICLES

ARTICLE 1. DEFINITIONS

For the purposes of the present act, the following definitions shall apply:

"Transnational bribery": the act of directly or indirectly offering or delivering any article of monetary value, or other benefits such as gifts, favors, promises or advantages, by a national, habitual resident, or company domiciled in one country to a public official of another State, in exchange for such official performing or failing to perform any of his public functions, association with any economic or commercial transaction.

ARTICLE 2. SANCTIONS

1. Any individual who is either a national or habitual resident and who commits the crime of transnational bribery, will be subject to the following sanctions:

- A. A prison term of (...)
- B. A fine of (...)
- C.

without adversely affecting other sanctions established by the law.

2. A corporation domiciled in a country that commits the crime of transnational bribery will be subject to a fine of (...), without adversely affecting the other sanctions established in the laws.

III. OBSERVATIONS FOR THE USE OF THE LEGISLATOR

- A. Observations on article 1
 - a) Definition of transnational bribery

"Transnational bribery": the act of directly or indirectly offering or delivering any article of monetary value, or other benefits such as gifts, favors, promises or advantages, by a national, habitual resident, or company domiciled in one country to a public official of another State, in exchange for such official performing or failing to perform any of his public functions in association with any economic or commercial transaction.

OBSERVATIONS:

This definition of "transnational bribery" follows the text of the Inter-American Convention against Corruption (Article VIII, "Transnational Bribery"). Individual countries should make the necessary adjustments as required by their legal systems in terms of the provisions of their Constitutions and the fundamental principles of their legal system, as well as their legislative procedures, especially for penal matters, and their usual legal terminology. For instance, legislators may choose, as the present draft does, to include the description of the crime in an article on definitions and subsequently make reference to it at the time of its definition as a crime and the corresponding sanctions, or they may include it directly (or repeat it) in the respective articles.

The legislating State should bear the following points in mind:

1. Active perpetrator

The Convention is limited to calling for the punishment of "nationals, habitual residents, or companies domiciled in the country", without including other persons such as foreigners who are not habitual residents or companies that are not domiciled within its territory. This differs from the usual penal provisions, which are applicable to all persons under the jurisdiction of the legislating State. This limitation is possibly due to the transnational character of the crime and a wish that there be a clear link between the active perpetrator of the crime and the legislating State, as in order to avoid exaggerated or illegal extensions of national criminal jurisdiction. To this end, it should be borne in mind that article IV, "Scope" of the Convention stipulates that "this Convention is applicable provided that the alleged act of corruption has been committed or has effects in a State Party."

It should be borne in mind that the Convention is limited to establishing the minimum legislative obligation for the State Party, and does not limit its capacity to extend the scope of the article to other perpetrators under its jurisdiction, within the limits established by the standards and principles of international law or those of its own legislation. (*Note: The "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" of the Organization for Economic Cooperation and Development signed on 17 December 1997 - hereinafter referred to as the OECD Convention - includes all persons subject to the jurisdiction of the State).*

The term "national" may need clarification or adjustment to the legislation or legal terminology of the legislating country, since in some juridical systems the term "national" has a broader meaning than "citizen" or "subject". It should be borne in mind that the apparent intention of the Convention is to cover all persons normally included under the concept of "national" in international law. It should be recalled that under some legal systems, special mention is required in order to include as possible perpetrators the public officials of the legislating State.

The term "habitual resident" is already commonly used in various international conventions, many of them inter-American, particularly in the field of private international law. However, as this is a criminal matter, it may in some cases require adaptation to the legislation or legal terminology of the legislating country (e.g., "permanent resident" or "individual domiciled in the country"). The concept of "economic resident" has also been developing in some countries. In this case also, the intention that seems to emerge from the wording of the Convention is to define as broadly as possible within the limits permitted by international law those individuals who are not nationals of the legislating State but who perform the main portion of their activities within its territory in a permanent manner.

The term "company" or "corporation" may require adaptation to the legislation or legal terminology of the legislating country, since in many systems this is a commercial rather than a juridical term, or is used only in economic or fiscal legislation. The apparent intention of the Convention is to include all entities that manage capital and labor and which could receive benefits. It would seem that the intention of the Convention is to endow this category with ample scope within the limits allowed by international law. Therefore, the legislating State should thus consider the inclusion in this category of not only corporate legal entities (e.g., "companies" or "corporations"), but also entities with no corporate status under law, and non-profit entities that may carry out their activities within its territory, whether or not they have an economic or commercial purpose. The

intention of the Convention seems to be to include State-owned enterprises or companies under its control. The legislating State should study whether special provisions are required in this case, as well as whether to include other State entities in the establishment of this offense.

The term "domiciled" may require adaptation to the legislation or legal terminology of the legislating country (e.g., companies "that have established domicile in the country", "that are incorporated under the laws of the country", or "whose head offices or senior management are in the country"). The juridical arrangements of some States include the concept of the nationality of corporate legal entities, while others use the term "national company". In this case also, the intention of the Convention seems to be to include all entities that perform their principal activities in a permanent manner within the territory of the country, whether or not they are of an economic or commercial nature.

2. Indirect bribery

The terms "directly or indirectly" include bribery committed through third parties, whether or not they are nationals or habitual residents of the legislating country, or corporations domiciled within its territory. These third parties may intervene as co-perpetrators or accomplices in the transmission of the offer or delivery of the bribe. The legislating country should consider inclusion of the corresponding provisions to cover these cases in the definition of the crime. Additionally, these persons should be punished as co-perpetrators or accomplices when, as indicated above, they fall within the jurisdiction of the legislating States as nationals, habitual residents or companies domiciled in its territory. In this respect, it should be recalled that under article XI, "Progressive Development", item c. of the Convention, the State Parties agree to consider the establishment as an offense under their legislation "any act or omission by any person who, personally or through a third party or acting as an intermediary, seeks to obtain a decision from a public authority whereby he illicitly obtains for himself or for another person any benefit or gain, whether or not such act or omission harms State property."

The legislating country should also consider the problem of the persons or entities that could receive the bribe on behalf of a foreign public official or for the benefit thereof, ("figureheads" for instance). It should be recalled that where article VI, "Acts of Corruption", of the Convention defines acts of corruption, its Paragraph a) includes a bribe received by a public official "for himself or for another person or entity".

It is thus necessary to include this hypothesis in the definition of this crime, in terms of the persons covered in the previous paragraph, although in the case of transnational bribery the Convention does not require that these persons be punished by the legislating State.

A problem that warrants attention is that of contributions to political organizations or campaign funds when this is proven to be directly associated with an act or omission on the part of a public official. It should be recalled that article XVII, "Nature of the Act", of the Convention refers expressly to the disposal of property obtained through or deriving from an act of corruption committed for political purposes and acts of corruption committed for political reasons or ends. (*Note: Approved prior to the Convention, the Foreign Corrupt Practices Act in the United States of America includes this type of contributions in the definition of bribery, while the OECD Convention does not do so.*)

Another problem deserving consideration is the possibility of an attempt to indirectly influence the performance of a public official through the payment of money or other advantages granted to the benefit of an entity (e.g. a company or other State-run enterprise) where he or she renders services.

3. Advantages offered or delivered

The phrase "any article of monetary value, or other benefit, such as a gift, favor, promise, or advantage" may need adaptation to the legislation or juridical terminology of the legislating country. The intention of the Convention would seem to be to cover all benefits as widely as possible,

whether direct or indirect and whether or not of a monetary nature, that could improperly influence the actions of the public official. It should be recalled that article I, "Definitions", of the Convention contains a broad definition of "property".

4. Association with an economic or commercial transaction

The phrase "an economic or commercial transaction" may need to be adapted in cases where these terms are not part of the juridical terminology of the legislating country or if they do not have a specific juridical meaning. The intention of the Convention seems to be to cover any type of activity with an economic effect or content, without limiting this to acts that the legislation qualifies as "commercial acts".

It should be noted that in some legal systems the Spanish word "transacción" is used solely to designate the out-of-court settlement of a lawsuit. In such cases, it would be necessary to use a term that covers the activities mentioned in the previous paragraph.

The term "associated" refers directly and exclusively to the act or omission of the public official. For the purposes of the establishment of an offense required by the Convention, it is irrelevant if the perpetrators or their accomplices are parties to the transaction in question or if an economic or commercial benefit is obtained therefrom. *(Note: Both the legislation of the United States of America as mentioned above and the OECD Convention require in their definition of transnational bribery that the perpetrator intend "to obtain or maintain a deal or business or obtain some other improper advantage in the course of international business").*

The legislating State should also bear in mind that the obligation to establish as an offense contained in the Convention is limited to acts or omissions associated with this type of activities, and this does not extend to other types of acts or omissions (e.g. bribery of juridical authorities in order to obtain a court decision awarded in favor of or against the accused, to obtain the official's participation in criminal activities with no economic effects or content, for exclusively political or military purposes, to cause a loss to an enemy or a competitor etc.) which be could be just as serious as those covered, if not more so. The fact that the requirements of the Convention do not extend to the punishment of these other acts obviously does not prevent the legislating country from deciding to include them in its definition of the offense as well.

a) Definition of public official

"Public official" is any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy.

OBSERVATIONS:

This definition of public official corresponds exactly to that contained in the Convention. However, the alleged act of transnational bribery may be committed in a foreign State that is not a Party to the Convention or which has not adapted its domestic legislation to the definition in the Convention. In these cases, if the qualification of "public official" used by the State is narrower, the situation may arise where the act may not constitute a crime in its territory. This problem is covered below in this document, in the treatment of the scope of jurisdiction.

Although the Convention refers specifically to the public officials of foreign States, the legislating State may also consider the case of bribery of an international public official, such as a public official in the service of a international inter-State organization (e.g. the Organization of American States or the International Monetary Fund), whether its seat is within the State's territory or elsewhere.

b) Definition of public function

"Public function" is any temporary or permanent paid or honorary activity that is performed by an individual in the name of the State or in the service of the State or its institutions, at any level of its hierarchy.

OBSERVATIONS:

The same observations apply as those given for the previous definition.

B. Observations on article 2

a) Wording of the basic article

ARTICLE 2. SANCTIONS

1. Any individual who is either a national or habitual resident and who commits the crime of transnational bribery, will be subject to the following sanctions:

D. A prison term of (...)

E. A fine of (...)

without adversely affecting other sanctions established by the law.

2. A corporation domiciled in a country that commits the crime of transnational bribery will be subject to a fine of (...), without adversely affecting the other sanctions established in the laws.

OBSERVATIONS:

As noted above, the criminal legislative technique of some States may require the full reproduction of the definition of the crime given in the previous article.

The legislating State should bear the following aspects in mind:

- i. The legislating State may scale the severity of the penalties in accordance with the parameters established in its criminal legislation (e.g. establish maximum and minimum limits, or leave wider or narrower margins for the discretion of the judge handing down the decision).
- ii. The legislating State could also scale the severity of the penalties according to the size of the bribe, the rank of the public official involved, or the importance of the advantage or benefit expected from or obtained through the bribe etc. It would seem possible to exclude acts considered insignificant in order to make the legislation more effective.
- iii. Similarly, it may be convenient to distinguish between acts considered as bribery and those that could be considered as usual acts of promotion or public relations.

(Note: The above-mentioned legislation of the United States of America excludes from the definition of transnational bribery any small payments or minor favors offered to a foreign public official when intended solely to facilitate or speed up the processing of paperwork and not to influence the content of the decision in view).

- iv. With regard to companies, it should be stressed that although all legal systems make provision for imposing fines or other measures in case of infraction, some legal

systems do not consider corporations as subject to criminal law, nor do they consider that the fines or other measures are penal in nature. The legislating State should adapt the wording to the principles, techniques and terminology of its own legislation, as applicable, in order to comply with the requirements of the Convention.

It may be necessary, insofar as a State's legislation fails to do so, to determine the conditions under which individual persons (proprietors, directors, managers or employees) should be punished should they commit an act of transnational bribery imputable to the company, in addition to the corresponding sanctions.

It may also be necessary to determine the conditions under which the individual act of any of the persons mentioned in the previous paragraph is binding on the company.

In this respect, the possibility should be borne in mind that some agent or intermediary may commit bribery to the benefit of the company without the knowledge of the persons responsible for the management thereof. For such cases, the legislating country should consider whether the lack of knowledge of the latter is due to their own negligence. (Note: The above-mentioned legislation of the United States of America covers this case).

- C. Observations on other matters covered by the convention associated directly with the crime of transnational bribery
 - 1. Other legislative measures mentioned in the Convention in relation to transnational bribery

The legislating State should bear in mind that, in addition to the provisions in its article VIII, "Transnational bribery", the Convention contains other provision articles related to transnational bribery that could require the adoption of legislative measures, with or without a criminal nature, such as the following:

- a) in accordance with article III, "Preventive measures", Paragraph 7 of the Convention, the State Parties have agreed to "consider the applicability of measures within their own institutional systems to create, maintain or strengthen ... laws that deny favorable tax treatment for any individual or corporation for expenditure made in violation of the anticorruption laws of the State Parties". This would prevent, for instance, the perpetrator of a transnational bribe from deducting the property or goods offered as a transnational bribe from its revenues for tax payment purposes;
- b) paragraph 10 of article III, "Preventive measures", of the Convention mentioned in the previous paragraph imposes an identical obligation on the member States with regard to "deterrents to the bribery of domestic and foreign government officials, such as mechanisms to ensure that publicly held companies and other types of associations maintain books and records which, in reasonable detail, accurately reflect the acquisition and disposition of assets, and have sufficient internal accounting controls to enable their officers to detect corrupt acts." Thus, the legislating State should consider, if it has not yet done so, the adoption of the corresponding measures either under a separate law or in the text of this same law. For the purposes of this law, the penalties applicable in case of non-compliance should be determined, as well as the effects of non-compliance in relation to the proof of the crime;
- c) article XV, "Measures Regarding Property", of the Convention refers to the confiscation or forfeiture of property obtained or derived from the performance of acts of corruption. Consequently, consideration could be given to the inclusion of provisions covering this matter, in compliance with the standards and principles of the State's legislation;

- d) in compliance with article VI, "Acts of Corruption", item (d) of the Convention, sanctions should be imposed on "the fraudulent use or concealment of property derived from ... " the act of bribery,
- e) in compliance with article VI, "Acts of Corruption", item (e) of the Convention, sanctions should also be imposed on " participation as principal, co-principal, instigator, accomplice, or accessory after the fact, or in any other manner, in the commission or attempted commission of, or in any collaboration or conspiracy to commit ... " the act of bribery.

2. Other measures

The Convention does not curb the powers of the legislating State to adopt or maintain other measures or sanctions, whether criminal or not, in relation to transnational bribery.

3. Jurisdictional aspects

The legislating State should consider the following cases for the purposes of abstaining from the exercise of its jurisdiction:

- i. When the alleged perpetrator has been definitively judged in another State for the crime imputed thereto, in order to avoid double jeopardy;
- ii. When the crime has been committed wholly outside its territory and does not produce direct, substantial or foreseeable effects therein.

Article IV, "Scope", of the Convention stipulates that: "This Convention is applicable provided that the alleged act of corruption has been committed or has effects in a State Party". This article should be interpreted jointly with article V, "Jurisdiction", Paragraph 2 of the Convention, which stipulates that "Each State Party may adopt such measures as may be necessary to establish its jurisdiction over the offenses it has established in accordance with this Convention when the offense is committed by one of its nationals or by a person who habitually resides in its territory."

It should be stressed here that there are major differences among the laws of the member States with regard to both the interpretation of the limits permitted by international law regarding the extent of national jurisdiction, as well as the cases in which they may exercise their criminal jurisdiction over their own nationals for acts committed outside their territorial jurisdiction.

For instance, in the case of a national who is a habitual resident in the territory of another State, who does not have assets, businesses or interests in the legislating territory, and who commits an act of bribery wholly outside such State, that does not produce any direct, substantial or foreseeable effects within its territory, some States may consider that the application of their jurisdiction would exceed the permissible limits.

- iii. When the act is not established as a crime by the legislation of the State to which the public official belongs.

It should be borne in mind that, although the State Parties to the Convention have assumed the obligation to establish the crime of corruption of public officials with the scope established by this same Convention, the concept of transnational bribery contained in its article VIII, "Transnational Bribery", extends to the public officials of any foreign State, and not only the States Parties. This is why it is possible that an act which constitutes a bribe according to the provisions of the Convention may not be a crime under the laws of the State to which the public official belongs.

Some States may consider that the fact that punishing a person for an act not banned by the legislation of the State in whose territory such act is committed would constitute an abusive extra-territorial application of its laws and jurisdiction, in accordance with the standards and principles of international law and its own legislation.

- iv. It should be borne in mind that article XVIII, "Extradition", to which reference is made below, imposes on the State the obligation to adopt the legislative measures necessary to judge within its own territory persons whose extradition is denied due to nationality. In the case of transnational bribery, it is understood that this obligation is subject to the limits established in the Constitution and the fundamental rules of the legislating State.
 - v. The legislating State may also take under consideration cases where the perpetrator has been the victim of extortion by a public official assumed to have been bribed.
4. Assistance and cooperation

Article XIV: "Assistance and Cooperation" of the Convention stipulates that:

1. In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in this Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption.

2. The States Parties shall also provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption. To that end, they shall foster exchanges of experiences by way of agreements and meetings between competent bodies and institutions, and shall pay special attention to methods and procedures of citizen participation in the fight against corruption.

Article VIII, "Transnational Bribery" of the Convention stipulates the following in its Paragraphs Two and Three:

Among those States Parties that have established transnational bribery as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established transnational bribery as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.

Taken together, these provisions first ensure that the legislating State may count on cooperation and assistance in this matter from all the other States Parties, to the extent permitted by their respective legal systems.

Second, any legislating State is obliged to provide assistance and cooperation in this matter to the other States Parties, insofar as is permitted by its legal system. In compliance with this obligation, the legislating State should consider whether it is necessary to include in the corresponding law, insofar as permitted by its Constitution and the general principles of its juridical arrangements, the provisions needed to make this assistance and cooperation possible. There is no need to add there is no reason for this assistance and cooperation to be limited only to the States Parties, as it may be extended to all foreign States that have established transnational bribery as an offense.

On this issue, article XVI, "Bank Secrecy" of the Convention states that "the Requested State shall not invoke bank secrecy as a basis for refusal to provide the assistance sought by the Requesting State. The Requested State shall apply this article in accordance with its domestic law, its procedural provisions, or bilateral or multi-lateral agreements with the Requesting State." (*Note: In this respect, it is useful to recall the "Inter-American Convention on Mutual Assistance in Criminal Matters" signed in Nassau, Bahamas, on 23 May 1992 during the XXII regular period of sessions of the General Assembly*)

5. Extradition

Article XIII of the Convention, "Extradition", stipulates the following:

1. This article shall apply to the offenses established by the States Parties in accordance with this Convention.

2. Each of the offenses to which this article applies shall be deemed to be included as an extraditable offense in any extradition treaty existing between or among the States Parties. The States Parties undertake to include such offenses as extraditable offenses in every extradition treaty to be concluded between or among them.

3. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it does not have an extradition treaty, it may consider this Convention as the legal basis for extradition with respect to any offense to which this article applies.

4. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offenses to which this article applies as extraditable offense between themselves.

5. Extradition shall be subject to the conditions provided for by the law of the Requested State or by applicable extradition treaties, including the grounds on which the Requested State may refuse extradition.

6. If extradition for an offense to which this article applies is refused solely on the basis of the nationality of the person sought, or because the Requested State deems that it has jurisdiction over the offense, the Requested State shall submit the case to its competent authorities for the purpose of prosecution unless otherwise agreed with the Requesting State, and shall report the final outcome to the Requesting State in due course.

7. Subject to the provisions of its domestic law and its extradition treaties, the Requested State may, upon being satisfied that the circumstances so warrant and are urgent, and at the request of the Requesting State, take into custody a person whose extradition is sought and who is present in its territory, or take other appropriate measures to ensure his presence at the extradition proceedings.

As indicated above, article VIII of the Convention, "Transnational Bribery", stipulates the following in its Paragraphs Two and Three:

Among those States Parties that have established transnational bribery as an offense, such offense shall be considered an act of corruption for the purposes of this Convention.

Any State Party that has not established transnational bribery as an offense shall, insofar as its laws permit, provide assistance and cooperation with respect to this offense as provided in this Convention.

Taken together, these provisions first ensure that the legislating State may obtain the extradition of persons tried or sentenced for the offense of transnational bribery from any State Party, under the conditions stipulated in this Convention.

Second, they impose on the State the obligation to grant the extradition under the same conditions of persons tried or sentenced for the offense of transnational bribery, to any other Requesting State Party.

The legislating State shall consider whether it should include special provisions in the law for the case of transnational bribery in order to comply with these obligations. Such provisions may, of course, extend to the granting of extradition to other States that are not parties to the Convention.

It should be recalled that article XVII, "Nature of the Act" of the Convention stipulates, for the purposes of extradition, that "the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offense or as a common offense related to a political offense."

Finally, it should be borne in mind that the extradition treaties usually establish the requirement for extradition that the offense be punished with a penalty greater than a certain stipulated level. (*Note: In this respect it is useful to recall the "Inter-American Convention on Extradition" signed in Caracas on 25 February 1981.*)

* * *

ANNEX II

MODEL LAW ON ILLICIT ENRICHMENT:

guide for the legislator

(Attached to the report on *Model legislation on illicit enrichment and transnational bribery*, OEA/Ser.Q CJI/doc.21/99 (previously OEA/Ser.Q CJI/doc.70/98 rev.2), adopted by the Inter-American Juridical Committee during its 54th regular period of sessions on 29 January 1999)

I. PRELIMINARY EXPLANATION

Adopted by the Juridical Committee during its 54th regular period of sessions on January 28, 1999, this document constitutes the second attachment to the report on the topic Model legislation on illicit enrichment and transnational bribery (OEA/Ser.Q CJI/doc.70/98 rev.2), adopted by the Inter-American Juridical Committee during its 53rd regular period of sessions on 22 August 1998.

As mentioned in this report, there are profound differences between the States in the Hemisphere in the area of criminal law with respect to the fundamental principles thereof, as well as in the drafting of legislation and even in terminology, which make it almost impossible to draft a detailed model law that could be of use to most of the States, or even an appreciable number of them.

For this reason, in order to comply with the mandate in article IX "Illicit Enrichment" of the Inter-American Convention against Corruption (known hereinafter as the "Convention"), the Juridical Committee decided simply to draft some basic articles consistent with the Convention. This document offers detailed comments on them, as well as on other provisions in the Convention which could require legislative measures related to the crime of illicit enrichment, and which could serve as a guide to the legislator in the task of adapting the basic articles to the requirements of national legislation in each case.

It should be recalled that although the Convention establishes the obligation for each State Party to prohibit and punish illicit enrichment, it makes this obligation conditional on consistency with the respective Constitutional provisions and fundamental principles of their legislation. In the course of the following comments, reference is made to some cases where there may be substantial differences in this respect among the States in the Hemisphere.

II. WORDING OF THE BASIC ARTICLES

ARTICLE I. "DEFINITIONS"

"Illicit enrichment" means a significant increase in the assets of a government official that is appreciably greater than the earnings received from the State as remuneration for his services during the exercise of his functions, and which cannot be reasonably explained.

“Public official”, “government official” or “public servant” means any official or employee of the State or its agencies, including those who have been selected, appointed or elected to perform activities or functions in the name of the State or at the service of the State, at all hierarchical levels.

ARTICLE II. OBLIGATIONS OF PUBLIC OFFICIALS

Every public official shall have the obligation to:

A. Declare the full amount of his assets in writing to the competent authority

- i) within (...) days after the start of his functions;
- ii) annually, as long as he continues in the exercise of his functions; and
- iii) within (...) days after the date of termination of the exercise of his functions;

B. provide the competent authority with all necessary information on the origin of his earnings, other than remuneration received from the State for the exercise of his functions, when requested to do so thereby on the grounds that the increase in his assets is considered as significantly excessive in relation to such remuneration.

ARTICLE III. PENALTIES

1. A public official who commits the crime of illicit enrichment will be punished by:

- a) imprisonment of (...) to (...)
- b) fine of (...) to (...)
- c) dismissal
- d) disqualification from holding any public office for a period of (...)

2. A public official who does not present the declaration of assets mentioned in this law within the established periods will be liable to (...)

3. A public official whose declaration contains untrue statements intended to mislead in terms of either the amount or origin of his assets will be punished by (...), without prejudice to other penalties provided by law.

III. COMMENTS FOR USE OF THE LEGISLATOR

A. Comments on Article I. “Definitions”

“Illicit enrichment” means a significant increase in the assets of a government official that is significantly greater than earnings received from the State as remuneration for his services, and which cannot be reasonably explained thereby.

This definition follows closely the wording of Article IX of the Convention. In some cases, the legislating State may have to adapt the language thereof to the language and juridical concepts of its own legal system.

It should be borne in mind that the definition contained in the Convention uses the expression “significantly in excess of his lawful earnings” which makes sense only if interpreted as “significantly in excess of the earnings received by the official from the State as remuneration for his functions”. For this reason the Committee has substituted this latter wording in the proposed text.

Although the Convention does not require it, the legislating State may also take into consideration the period immediately before or after that in which the official held his position.

“Public official”, “government official” or “public servant” means any official or employee of the State or its agencies, including those who have been selected, appointed or elected to perform activities or functions in the name of the State or at the service of the State, at all hierarchical levels.

This definition follows exactly the wording of Article I. “*Definitions*” of the Convention. In some cases, it may be necessary to adapt it to the usual legal terminology of the legislating State.

Nevertheless, the definition of “public official” used in Article I of the Convention merits some comment: because it includes all civil servants –both officials and employees, at all levels of the hierarchy-, the definition would appear to apply to all public servants, even those at the lowest levels. The legislator could include provision conferring a discretion on the court, whereby the penalty would be more severe in the case of officials of higher rank.

In addition, notwithstanding the definition of “public official” in the Convention, the legislator may wish to examine whether the scope of the definition of “public official” should be extended to address the new realities arising from the divestment to the private sector of essential services such as electricity, telephone and water, previously performed by the public sector.

B. Comments on Article II. “Obligations of the Public Official”

Article II. Obligations of the Public Official

Every public official shall have the obligation to:

A. declare the full amount of his assets in writing to the competent authority

- i) within (...) days after the start of his functions;
- ii) annually, as long as he continues in the exercise of his functions; and
- iii) within (...) days after the date of termination of the exercise of his functions;

B. provide the competent authority with all necessary information on the origin of his earnings, other than remuneration received from the State for the exercise of his functions, when requested to do so thereby on the grounds that the increase in his assets is considered as significantly excessive in relation to such remuneration.

The obligation to declare earnings, assets and liabilities by public officials is stipulated in Article III. “*Preventive measures*”, of the Convention. The legislating State has the option of deciding whether these declarations should be made public or kept confidential. It may also determine whether they should be sworn before a notary, or whether there must be compliance with any other formality required by its legislation.

The legislating State may consider the possibility of requiring the official to indicate in his declaration the source of earnings other than those received from the State as remuneration.

The legislating State may consider the possibility of requiring the public official to include in his declaration the net assets of the spouse and other members of his immediate family, for example, up to the first level of consanguinity.

The obligation of the official to declare his assets and justify disproportionate increases should be considered as a duty inherent in the exercise of public functions, as a condition for the acceptance thereof. In any case, criminal responsibility deriving from the lack of a reasonable explanation of appreciable increases in assets should always be subject to the relevant provisions of

criminal law, and to the constitutional guarantees and administrative safeguards to which persons accused of crimes are entitled.

With regard to the requirement to provide reasonable justification for disproportionate increases in assets, far from being self-incriminatory in itself, it offers the official the possibility of absolving himself. The incrimination would in all cases derive from the failure of the official to comply with the duty of justifying the increases.

C. Comments on Article III. “Penalties”

Article III. Penalties

- 1. A public official who commits the crime of illicit enrichment will be punished by:**
 - a) imprisonment of (...) to (...);**
 - b) fine of (...) to (...);**
 - c) dismissal;**
 - d) disqualification from holding any public office for a period of (...)**
- 2. A public official who does not present the declaration of assets mentioned in this law within the established periods will be liable to (...)**
- 3. A public official whose declaration contains untrue statements intended to mislead in terms of either the amount or origin of his assets will be punished by (...), without prejudice to other penalties provided by law.**

It should be noted that illicit enrichment, in terms similar to those used by the Convention, had already been classified as a crime, at the time of the adoption of the Convention, by twelve Latin American countries (Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Haiti, Honduras, Mexico, Panama, Peru and Venezuela). The respective legal and constitutional provisions are listed at the end of this document.

In the other member States, although an excessive and unexplainable increase in the assets of a public official may constitute an indication that the official has been involved in acts of corruption, neither the fact of the disproportionate increase nor the lack of a reasonable explanation constitute crimes in themselves.

It is possible that doubt may arise in some legal systems over whether the fact of requiring public officials to justify significant increases in their assets and punishing them should they be unable to do so, may constitute a reversal of the burden of proof and, consequently, a violation of the principle that everyone is presumed innocent until proven guilty or, alternatively, an obligation to incriminate himself, in violation of guarantees of due criminal process. In view of this, care must be taken, particularly in certain common law jurisdictions, to ensure that the jurisprudence relating to the constitutional guarantees for the protection of the presumption of innocence is respected by the provisions of the legislation and that the burden of proof on the public official is confined to particular facts, and not to all of the essential elements of the offence.

It should be noted that most, if not all, legal systems contain various types of penalties for failure to declare or justify earnings, under fiscal matters or in terms of combating the drug trade.

If the legislating State considers that the classification of the crime of illicit enrichment in the manner in which it is proposed in this draft may be contrary to some fundamental principle of its legislation, it might opt to establish the obligation for the public official to provide information with regard to the disproportionate increase in his assets and classify non-compliance with this obligation as a crime, through omission, falsehood or insufficiency.

To this end, the following alternative wording could be considered for the first paragraph of this article:

A public official who, when requested by the competent authority to furnish information on his earnings in compliance with this Law,

- a) does not furnish the requested information;***
- b) furnishes untrue information that could be misleading in terms of either the amount or origin of his earnings; or***
- c) furnishes information that is insufficient to reasonably justify the increase in his assets that is significantly excessive in relation to the remuneration received from the State for the performance of his functions,***

shall be liable to:

- a) imprisonment of (...) to (...);***
- b) a fine of (...) to (...);***
- c) dismissal;***
- d) disqualification from holding any public office for (...),***
- e) confiscation of assets equivalent to his unjustified excess assets.***

In any case, the legislating State may include all or only some of the penalties covered in the model article, and may also scale the severity thereof, depending on the level or category of the official in question, the amount of the unjustified enrichment, or the loss caused.

The legislating State may consider the case in which the official has concealed the increase in his assets through the use of straw-men or abettors.

The legislating State may consider the possibility of making provision for precautionary measures such as seizure or freezing the assets of the official being tried for illicit enrichment.

D. Additional comments

1. **Due process**: In all cases the right to due process should be respected in the case of an official accused of any of the crimes covered by this present law. In order to impose sanctions of a criminal nature the accused should have had the opportunity to employ all means of defence, as well as constitutional or other legal guarantees.

2. **Competent authority**: The competent authority to examine the declarations of assets and determine whether there is a disproportionate increase in the assets of a public official that requires justification, should be a judicial authority or other similar authority having full independence. The competent authority should determine whether there are well-founded grounds indicating a disproportionate increase in the assets of the official prior to demanding the corresponding justification. In all cases, the official should have the opportunity to exculpate himself before the authority prior to being formally accused.

3. **Confidentiality**: The State may consider the possibility of keeping this initial stage of the investigation confidential, in order to make provision for the case where the authority finds that there are no grounds for instituting legal proceedings against the public official.

4. **Relationship with other articles of the Convention**: The legislating State should note that paragraph 2 of Article IX of the Convention, provides that illicit enrichment should be considered as

an act of corruption. This means that the State should adopt the legislative measures which may be necessary in order to ensure the assistance and cooperation covered in the Convention in the following articles: Articles V, *Jurisdiction*, item 3; Article XIII, *Extradition*; Article XIV, *Assistance and cooperation*; Article XV, *Measures on assets*; and Article XVI, *Banking secrecy*.

5. Legislation of other States: The legislating State may find it useful to examine the following constitutional or legislative provisions on illicit enrichment in force in other States in the Hemisphere, the text of which can be obtained from the Under Secretariat for Legal Affairs of the Organization of American States:

Argentina: Criminal Law Code, Chapter IX bis, Article 268 (1) and (2).

Brazil: Law 8429 dated 2 June 1992.

Colombia: Criminal Law Code, Chapter Six, Article 148.

Costa Rica: Criminal Law Code, Article 344. Law on the Illicit Enrichment of Public Officials dated June 17, 1983. Regulation of the Law dated December 4, 1995.

Ecuador: Criminal Law Code.

El Salvador: Criminal Law Code, Article 447.

Haiti: Constitution, Articles 241 and 242.

Honduras: Law against Illicit Enrichment by Public Officials.

Mexico: Criminal Law Code, Chapter XIII, Article 224, and the Responsibilities Act for Officials and Employees of the Federation, the Federal District and Senior Civil Servants, dated 1979, Article 85.

Panama: Criminal Law Code, Article 335, item 4.

Peru: Criminal Law Code, Article 401.

Venezuela: Basic Law for Safeguarding Public Assets, dated 23 December 1982, Title V, Chapter I, articles 44 - 47.

5. Juridical dimension of integration and international trade

The Inter-American Juridical Committee did not discuss this topic at its fifty-fourth regular period of sessions (Rio de Janeiro, January 1999) because its rapporteur, Dr. Jonathan T. Fried, was not present.

At its twenty-ninth regular period of sessions (Guatemala City, June 1999), the General Assembly adopted resolution AG/RES.1616 (XXIX-O/99) wherein it asked the Inter-American Juridical Committee to continue studying the various aspects of the legal dimension of integration. It particularly asked the Juridical Committee to identify what it considered to be the most relevant aspects of the current development of hemispheric integration, and to recognize the importance of maintaining proper coordination among the Inter-American Juridical Committee, the Permanent Council, the Special Committee on Trade, and the General Secretariat, through its Secretariat for Legal Affairs and Trade Unit.

At the fifty-fifth regular period of sessions of the Inter-American Juridical Committee (Rio de Janeiro, August 1999), Dr. Luis Marchand introduced document *Juridical dimension of integration and of international trade: some notes on certain juridical aspects concerning integration* (CJI/doc.28/99 rev.2). That document is in five parts: an introduction, a section on the constitutional framework, another on the legal relationship between the integration rules and regulations and the domestic legal systems, a fourth on international juridical harmonization to facilitate integration, and a fifth on the globalization process and regional integration. Two appendices were also presented containing excerpts of constitutions and a table of multilateral instruments concluded at the universal and regional levels on subjects in private international law.

Dr. Marchand explained that the document suggested the need to harmonize laws so as to facilitate regional and sub-regional integration and thereby properly steer the combination of globalization, free trade at the hemispheric level, and the sub-regional and eventual regional processes.

The text of that document appears below:

JURIDICAL DIMENSION OF INTEGRATION AND INTERNATIONAL TRADE: some notes on certain juridical aspects concerning integration

(presented by Dr. Luis Marchand Stens)

1. Introduction

The legal theme has special importance in any process of integration, since the evolution of this process, on both the political and economic level, as on the socio-cultural level, calls not only for a certain normative reference framework, but its progress will also be greatly enhanced to the extent that a proper degree of harmonization and uniformity is achieved among the various national laws.

In this sense, the political will of governments has been fulfilled in the coordination of international treaties and conventions on the different activities inherent in inter-relations: constituent instruments of the basic commitments for integration; agreements on legal questions relating to the sale of goods, transportation, communications, insurance, patents, trademarks, transfer of technology, commercial arbitration, trade associations, and so on.

It should be added that some of the operative provisions resulting from integration agreements are issued by the Executive Power or competent authorities, because of their administrative nature, and because they are based on such treaties and agreements.

An initial point to consider in the legal problem of integration is related to the constitutional structure of the member countries. As second matter is the legal relationship between the integrationist normative order and the internal legal scope of each respective State. Yet another aspect to consider concerns international legal harmonization to promote integration.

The following comments will deal with these three topics.

II. The constitutional framework

In our opinion the main theme of this first point is clarifying whether the progress made in integration requires greater constitutional precision or if progress can be brought about without having to resort to such fine-tuning in the constitutional Charters.

Obviously, constitutional formulations obviously meant to facilitate the process of integration are not only desirable because they open up the path towards uniformity in the legal community, but also because they express a clear decision of national policy.

Nonetheless, when one considers the complex process inherent in changing constitutional texts and the equally complicated national debate on the same issue, perhaps a gradual path might be to advance constituent treaties by means of additional complementary multilateral instruments.

Of course, it could be argued that such additional instruments are beyond constitutional limits. In that case, the respective Parliaments would have to observe special procedures for the approval of the treaties when they involve rules of the constitutional Charter.

It may be argued that such a procedural alternative fails to resolve the complexities noted with regard to introducing greater constitutional precision, but these would not take into account three vital elements.

First, producing constitutional reforms by means of an international instrument contributes to the process of legal uniformity or harmonization. Secondly, the process to coordinate such a multipartite instrument involved a prior phase of negotiations aiming at a convergence of positions, that is, a confluence of sovereign wills. Thirdly, the fact that constitutional reform is solicited by a multilateral international act offers a significantly favorable element to political and parliamentary consensus, since such an international act contains a shared multinational proposal in favour of integrational progress.

Dr. Jorge Reinaldo A. Vanossi, former member of the *Inter-American Juridical Committee*, in his report, *Juridical institutional profile of the phenomenon of Latin American integration*²⁹⁵ (which includes a list of certain constitutional precepts of countries in the region) concluded the following:

- 9) That, returning to the point of departure for these conclusions, from the experience acquired in the integration processes in progress and from its parallel correspondence with the respective constitutional frameworks, it may be inferred that the constitutions of the states concerned have not hindered cooperative and collaborative relations among them, nor have they foreclosed the launching of the initial and gestational stages of the new integration relations. At the same time, however, they have drawn attention to the need to move forward with the required constitutional changes so that integration will

²⁹⁵ Report of the Inter-American Juridical Committee on the topic of *Preparation of a chart comparing constitutions and legal consequences of integration efforts: a legal-institutional profile of the phenomenon of Latin American integration* (OEA/Ser.Q CJI/RES.I-3/92, 6 March 1992).

not only be viable but will receive enough normative recognition to accompany the future steps and preclude any questioning of its constitutional validity.

- 10) That, in sum, to ensure that the integration processes unfold gradually and are thereby strengthened, it would be well for the states of the Hemisphere that are inspired by the goals embodied in the new communities that already exist in today's world to consider the advisability of proceeding to reform or amending their constitutions as much as needed to adapt to the changes described.

III. The legal relationship between the integrationist normative order and the internal legal sphere

Concerning the second point, that is, the juridical relationship between the integrationist normative order and the internal legal sphere, it is appropriate to stress that the basic political-judicial commitment to a process of integration springs from an international instrument, which puts us in the area of legal receptiveness that envisages internal order in which a contractual context generates legal effects in the national setting.

In general terms, one may claim that the constitutions of Latin-American countries follow the dualist doctrine, that is, the international rules to effect changes in the national scope have to be incorporated into the internal legal system.

Therefore the international instruments formally agreed upon, whatever their nomenclature, treaties, agreements, conventions, etc., must be approved according to relevant constitutional rules and must be duly ratified.

This is the general procedure, but it is not unusual for the basic treaty approved by the respective Parliament to contain within its contractual structure certain facultative clauses so that the Executive Power, within the limits of the treaty, can assume a certain type of operative community commitment, or issue provisions of an administrative nature related to the process of integration. Obviously, such commitments made by the Executive Power and based on the power in the duly perfected treaty obviously do not require the approval of Parliament.

With regard to the above, it is appropriate to add that, in general, the internal order and practice in matters of foreign policy give the Executive Power legal room to adopt international contractual understandings on subjects that do not involve matters of a constitutional or legislative nature.

Without going deeply into the important but controversial issue of the supranationality of community rules, it is interesting to note that the treaty that created the Court of Justice of Cartagena Accord set up at the Andean level a significant legal experiment regarding the validity *per se* of acts coming from this judicial body.

It should be underlined that the question of settling private commercial disputes is of utmost importance in promoting the process of integration. There is a tendency in the countries of the region to settle these matters with sub-regional mechanisms, so it is believed that for the moment there is no need to establish a judicial organ with regional competence.

IV. International legal harmonization to promote integration

In general, it is timely to add that in international commercial legal matters, currents of opinion in the countries of the Americas also denote different trends.

In effect, some States feel it appropriate to promote the validity of multilateral instruments of universal scope such as: the UN Convention on Contracts for the International Sale of Goods (Vienna, 1980); the Convention on the Law Applicable to Contracts for the International Sale of Goods (The Hague, 1986); the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL, 1985); the Conventions on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations, New York, 1958 and The Hague, 1971), etc.

Nonetheless, other governments claim that it is more suitable to the trade interests of the hemisphere to count on regional-type multipartite instruments, *inter alia*: the Inter-American Convention on General Rules of Private International Law (CIDIP-II, 1979); the Inter-American Convention on Contracts for the International Carriage of Goods by Road (CIDIP-IV, 1989); the Inter-American Convention on International Commercial Arbitration (CIDIP-II, 1975); the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments (CIDIP-III, 1985), etc.

In light of the trends in the Americas on legal matters regarding commercial activities, the contribution of the Organization of American States, both through the Specialized Inter-American Conferences on Private International Law (CIDIP) and its competent departments and commissions, takes on a special importance, since it paves the way for harmonization of the various national and international orders.

It goes without saying that within the vast and complex process of integration, legal questions assume a special significance, particularly normative harmonization which is an important factor to generate a framework of security and economic-legal stability, which is indispensable to the constant growth of commercial and financial relations.

In order to contribute to future studies of a deeper and more comprehensive nature that seek to identify, as much as possible, the normative areas of convergence between the stipulations deriving from universal instruments and those at the regional level, as well as to reflect on the legal points where the world and of the inter-American perspectives diverge, this paper offers in Annex II a schematic list containing different multilateral instruments agreed upon at the world and regional level.

This schematic list groups together the above-mentioned instruments in three large areas: International Commercial Law, International Procedural Law, and International Civil Law. Within each area, the conventions appear in separate columns by field of application, that is, in one column are those of a universal nature and in the other are those of a regional nature. It should be added that the regional instrument is placed alongside the universal whenever both deal with analogous material.

It is unnecessary to add that a fuller and more comprehensive study would allow the Member States of the Hemispheric System – as has already been pointed out - to see with precision the identification, similarities and differences between rules on specific matters at the global and regional level.

Also attached to this paper, Annex I offers a compilation of the constitutional precepts contained in the national Charters of Latin-American countries, concerning the competence and authority of the Executive and Legislative Powers to promote and approve treaties. The rules transcribed are related to the vast context of integration.

For methodological reasons, it is useful to note that with respect to the order of presentation of constitutional texts, those countries whose constitutional Charters contain express rules on integration are first, followed by those connected with promoting and approving treaties. In the last section appear the articles that may have some connection to the broad integrational spectrum.

Reading this compilation, one notes that some constitutions fail to refer to integration, but possess articles on participating in economic associations and solidarity on behalf of common Latin-American interests. In these cases it was felt appropriate to present these statements first.

V. A short reflection on the process of globalization and regional integration

To end and by way of simple reflection, it is timely to mention that the “tsunami” of globalization – driven on preferentially by transnational corporations – configures a quasi universal process of inevitable option for the countries of Latin America and the Caribbean, since access to technological, commercial and financial sources is only permitted to those States that assume the rules of free-market economy and open their doors to the powerful globalizing currents.

If, as we have just stated, this is a reality to which the region's developing countries must adjust (countries whose traditional sovereign economic competence is affected by the influence of globalizing powers and interests), then this necessary adjustment must not lead to the neglect of the priorities and aims of integration, especially since the results of globalization have not yet reached the rates expected - which led the countries of the region to adopt strict national programs of economic austerity at a high social cost. Indeed, the indices of distribution of wealth have not improved: the rates of unemployment have risen; the demand for and prices of raw materials have gone down; non-traditional exports are still facing the familiar difficulties of access to major markets, accentuated by the competitiveness of the Asian production. And most worrisome of all is that in most countries in the region – as pointed out in the latest report by UNPD- poverty is on the rise.

Globalization and regional and sub-regional integration are not exclusive realities. Unquestionably, in some areas they flow together, which requires proper community policies to reconcile this confluence and preserve the economic, commercial, cultural and social niches that are not part of the integration process.

It is nonetheless useful to look clearly at the parameters of globalization and the horizons of integration. The former – as has been said – is an inevitable option that is driven along by international corporations. Its objectives are pragmatically utilitarian.

Integration obviously also calls for economic benefits, but this is only a part of its goals, which also include socio-economic, cultural and technological development and physical interconnection to ensure a constant strengthening of links based on a community of nations both on a sub-regional and regional scale.

It therefore bears repeating that the efforts of the countries of the region to take an active part in globalization should also include energizing the processes of integration, since coordination of the policies that lie at the base of the scheme provide these countries with better means to enjoy the advantages and face the risks of the global economic process.

* * *

ANEXO I

TEXTOS CONSTITUCIONALES

1. ARGENTINA (1994)

PRIMERA PARTE

CAPÍTULO PRIMERO

Declaraciones, Derechos y Garantías

Artículo 31. Esta Constitución, las leyes de la Nación que en su consecuencia se dicten por el Congreso y los tratados con las potencias extranjeras son la ley suprema de la Nación; y las autoridades de cada provincia están obligadas a conformarse a ellas, no obstante cualquiera disposición en contrario que contengan las leyes o constituciones provinciales, salvo para la provincia de Buenos Aires, los tratados ratificados después del Pacto de 11 de noviembre de 1859.

.....

SEGUNDA PARTE

AUTORIDADES DE LA NACIÓN
TÍTULO PRIMEROGobierno Federal
SECCIÓN PRIMERA.....
CAPÍTULO CUARTO

Atribuciones del Congreso

Artículo 75. Corresponde al Congreso:

.....

22. Aprobar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes.

La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Cruelles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Sólo podrán ser denunciados, en su caso, por el Poder Ejecutivo nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara.

Los demás tratados y convenciones sobre derechos humanos, luego de ser aprobados por el Congreso, requerirán del voto de las dos terceras partes de la totalidad de los miembros de cada Cámara para gozar de la jerarquía constitucional.

23. Legislar y promover medidas de acción positiva que garanticen la igualdad real de oportunidades y de trato, y el pleno goce y ejercicio de los derechos reconocidos por esta Constitución y por los tratados internacionales vigentes sobre derechos humanos, en particular respecto de los niños, las mujeres, los ancianos y las personas con discapacidad.

Dictar un régimen de seguridad social especial e integral en protección del niño en situación de desamparo, desde el embarazo hasta la finalización del período de enseñanza elemental, y de la madre durante el embarazo y el tiempo de lactancia.

24. Aprobar tratados de integración que deleguen competencias y jurisdicción a organizaciones supraestatales en condiciones de reciprocidad e igualdad, y que respeten el orden democrático y los derechos humanos. Las normas dictadas en su consecuencia tienen jerarquía superior a las leyes.

La aprobación de estos tratados con Estados de Latinoamérica requerirá la mayoría absoluta de la totalidad de los miembros de cada Cámara. En el caso de tratados con otros Estados, el Congreso de la Nación, con la mayoría absoluta de los miembros presentes de cada Cámara, declarará la conveniencia de la aprobación del tratado y sólo podrá también ser aprobado con el voto de la mayoría absoluta de los miembros de cada Cámara, después de ciento veinte días del acto declarativo.

La denuncia de los tratados referidos a este inciso, exigirá la previa aprobación de la mayoría absoluta de la totalidad de los miembros de cada Cámara.

....

SECCIÓN SEGUNDA

Del Poder Ejecutivo

CAPÍTULO TERCERO

Atribuciones del Poder Ejecutivo

Artículo 99. El Presidente de la Nación tiene las siguientes atribuciones:

.....

11. Concluye y firma tratados, concordatos y otras negociaciones requeridas para el mantenimiento de buenas relaciones con las organizaciones internacionales y las naciones extranjeras, recibe sus ministros y admite sus cónsules.

....

SECCIÓN TERCERA

Del Poder Judicial

CAPÍTULO SEGUNDO

Atribuciones del Poder Judicial

Artículo 116. Corresponde a la Corte Suprema y a los tribunales inferiores de la Nación, el conocimiento y decisión de todas las causas que versen sobre puntos regidos por la Constitución, y por las leyes de la Nación, con la reserva hecha en el inciso 12 del artículo 75; y por los tratados con las naciones extranjeras; de las causas concernientes a embajadores, ministros públicos y cónsules extranjeros; de las causas de almirantazgo y jurisdicción marítima; de los asuntos en que la Nación sea parte; de las causas que se susciten entre dos o más provincias; entre una provincia y los vecinos de otra; entre los vecinos de diferentes provincias; y entre una provincia o sus vecinos, contra un Estado o ciudadano extranjero.

2. **BOLIVIA (1994)**

PARTE SEGUNDA

El Estado Boliviano

TÍTULO PRIMERO

Poder Legislativo

CAPÍTULO I

Disposiciones Generales

.....

Artículo 59. Son atribuciones del Poder Legislativo:

.....

12. Aprobar los tratados, concordatos y convenios internacionales.

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TÍTULO SEGUNDO

Poder Ejecutivo

CAPÍTULO I

Presidente de la República

.....

Artículo 96. Son atribuciones del Presidente de la República:

.....

2. Negociar y concluir tratados con naciones extranjeras; canjearlos, previa ratificación del Congreso.
3. Conducir las relaciones exteriores, nombrar funcionarios diplomáticos y consulares, admitir a los funcionarios extranjeros en general.

PARTE CUARTA

Primicia y Reforma de la Constitución

TÍTULO PRIMERO

Primicia de la Constitución

Artículo 228. La Constitución Política del Estado es la ley suprema del ordenamiento jurídico nacional. Los tribunales, jueces y autoridades la aplicarán con preferencia a las leyes, y éstas con preferencia a cualesquier otras resoluciones.

Artículo 229. Los principios, garantías y derechos reconocidos por esta Constitución no pueden ser alterados por las leyes que regulen su ejercicio, ni necesitan de reglamentación previa para su cumplimiento.

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3. **BRASIL (1988)**

TÍTULO I

Dos Princípios Fundamentais

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Artigo 4º. A República Federativa do Brasil rege-se nas suas relações internacionais pelos seguintes princípios:

.....

PARÁGRAFO ÚNICO. A República Federativa do Brasil buscará a integração econômica, política, social e cultural dos povos da América Latina, visando à formação de uma comunidade latino-americana de nações.

.....

TÍTULO IV

Da Organização dos Poderes

CAPÍTULO I

Do Poder Legislativo

SEÇÃO II

Das Atribuições do Congresso Nacional

.....

Artigo 49. É da competência exclusiva do Congresso Nacional:

I. Resolver definitivamente sobre tratados, acordos ou atos internacionais que acarretem encargos ou compromissos gravosos ao patrimônio nacional;

.....

CAPÍTULO II

Do Poder Executivo

SEÇÃO II

Das Atribuições do Presidente da República

Artigo 84. Compete privativamente ao Presidente da República:

.....

VIII. celebrar tratados, convenções e atos internacionais, sujeitos a referendo do Congresso Nacional;

4. CHILE (1980)

CAPÍTULO I

Bases de la Institucionalidad

Artículo 5. La soberanía reside esencialmente en la Nación. Su ejercicio se realiza por el pueblo a través del plebiscito y de elecciones periódicas y, también, por las autoridades que esta Constitución establece. Ningún sector del pueblo ni individuo alguno puede atribuirse su ejercicio.

El ejercicio de la soberanía reconoce como limitación el respeto a los derechos esenciales que emanan de la naturaleza humana. Es deber de los órganos del Estado respetar y promover tales derechos, garantizados por esta Constitución, así como por los tratados internacionales ratificados por Chile y que se encuentren vigentes.

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CAPÍTULO 4

Gobierno

Presidente de la República

.....

Artículo 32. Son atribuciones especiales del Presidente de la República:

.....

17. Conducir las relaciones políticas con las potencias extranjeras y organismos internacionales, y llevar a cabo las negociaciones; concluir, firmar y ratificar los tratados que estime convenientes para los intereses del país, los que deberán ser sometidos a la aprobación del Congreso conforme a lo prescrito en el artículo 50 N° 1°. Las discusiones y deliberaciones sobre estos objetos serán secretas si el Presidente de la República así lo exigiere;

.....

CAPÍTULO 5

Congreso Nacional

Atribuciones exclusivas del Congreso

Artículo 50. Son atribuciones exclusivas del Congreso:

1. Aprobar o desechar los tratados internacionales que le presentare el Presidente de la República antes de su ratificación. La aprobación de un tratado se someterá a los trámites de una ley.

Las medidas que el Presidente de la República adopte a los acuerdos que celebre para el cumplimiento de un tratado en vigor no requerirán nueva aprobación del Congreso, a menos que se trate de materias propias de ley.

En el mismo acuerdo aprobatorio de un tratado, podrá el Congreso autorizar al Presidente de la República a fin de que, durante la vigencia de aquél, dicte las disposiciones con fuerza de ley que estime necesarias para su cabal cumplimiento, siendo en tal caso aplicable lo dispuesto en los incisos segundo y siguientes del artículo 61, y

.....

5. COLOMBIA (1991)

TÍTULO VII

De la Rama Ejecutiva

CAPÍTULO 8

De las Relaciones Internacionales

Artículo 224. Los tratados, para su validez, deberán ser aprobados por el Congreso. Sin embargo, el Presidente de la República podrá dar aplicación provisional a los tratados de naturaleza económica y comercial acordados en el ámbito de organismos internacionales, que así lo dispongan. En este caso tan pronto como un tratado entre en vigor provisionalmente, deberá enviarse al Congreso para su aprobación. Si el Congreso no lo aprueba, se suspenderá la aplicación del tratado.

.....

Artículo 226. El Estado promoverá la internacionalización de las relaciones políticas, económicas, sociales y ecológicas sobre bases de equidad, reciprocidad y conveniencia nacional.

Artículo 227. El Estado promoverá la integración económica, social y política con las demás naciones y especialmente, con los países de América Latina y del Caribe mediante la celebración de tratados que sobre bases de equidad, igualdad y reciprocidad, creen organismos supranacionales, inclusive para conformar una comunidad latinoamericana de naciones. La ley podrá establecer elecciones directas para la constitución del parlamento andino y del parlamento latinoamericano.

TÍTULO I

De los Principios Fundamentales

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Artículo 4. La Constitución es norma de normas. En todo caso la incompatibilidad entre la Constitución y la ley u otra norma jurídica, se aplicarán las disposiciones constitucionales.

Es deber de los nacionales y de los extranjeros en Colombia acatar la Constitución y las leyes, y respetar y obedecer a las autoridades.

.....

TÍTULO VI

De la Rama Legislativa

CAPÍTULO 3

De las leyes

Artículo 150. Corresponde al Congreso hacer las leyes. Por medio de ellas ejerce las siguientes funciones:

.....

16. Aprobar o improbar los tratados que el Gobierno celebre con otros Estados o con entidades de derecho internacional. Por medio de dichos tratados podrá el Estado, sobre bases de equidad, reciprocidad y conveniencia nacional, transferir parcialmente determinadas atribuciones a organismos internacionales, que tengan por objeto promover o consolidar la integración económica con otros Estados.

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TÍTULO VII

De la Rama Ejecutiva

CAPÍTULO 1

Del Presidente de la República

.....

Artículo 189. Corresponde al Presidente de la República como Jefe de Estado, Jefe del Gobierno y Suprema Autoridad Administrativa:

.....

2. Dirigir las relaciones internacionales. Nombrar a los agentes diplomáticos, y consulares, recibir a los agentes respectivos y celebrar con otros Estados y entidades de derecho internacional tratados o convenios que se someterán a la aprobación del Congreso.

.....

TÍTULO VIII

De la Rama Judicial

CAPÍTULO 4

De la Jurisdicción Constitucional

.....

Artículo 241. A la Corte Constitucional se le confía la guarda de la integridad y supremacía de la Constitución, en los estrictos y precisos términos de este artículo. Con tal fin, cumplirá las siguientes funciones:

.....

10. Decidir definitivamente sobre la exequibilidad de los tratados internacionales y de las leyes que los aprueben. Con tal fin, el Gobierno los remitirá a la Corte, dentro de los seis días siguientes a la sanción de la ley. Cualquier ciudadano podrá intervenir para defender o impugnar su constitucionalidad. Si la Corte los declara constitucionales, el Gobierno podrá efectuar el canje de notas; en caso contrario no serán ratificados. Cuando una o varias normas de un tratado multilateral sean declaradas inexecutable por la Corte Constitucional, el Presidente de la República sólo podrá manifestar el consentimiento formulando la correspondiente reserva.

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6. COSTA RICA (1949)

TÍTULO I

La República

CAPÍTULO ÚNICO

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Artículo 10. Las disposiciones del Poder Legislativo o del Poder Ejecutivo contrarias a la Constitución serán absolutamente nulas, así como los actos de quienes usurpen funciones públicas y los nombramientos hechos sin los requisitos legales. La potestad de legislar establecida en los artículos 105 y 121 inciso 1) de esta Constitución, no podrá ser renunciada ni sujeta a limitaciones, mediante ningún convenio o contrato, ni directa ni indirectamente, salvo el caso de los tratados de conformidad con los principios del Derecho Internacional.

(Así reformado por ley N° 5701 de 5 de junio de 1975).

Corresponde a la Corte Suprema de Justicia, por votación no menor de dos tercios del total de sus miembros, declarar la inconstitucionalidad de las disposiciones del Poder Legislativo y de los decretos del Poder Ejecutivo.

La ley indicará los tribunales llamados a conocer de la inconstitucionalidad de otras disposiciones del Poder Ejecutivo.

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TÍTULO IX

El Poder Legislativo

CAPÍTULO II

Atribuciones de la Asamblea Legislativa

Artículo 121. Además de las otras atribuciones que le confiere esta Constitución, corresponde exclusivamente a la Asamblea Legislativa:

.....

4) Aprobar o improbar los convenios internacionales, tratados públicos y concordatos. Los tratados públicos y convenios internacionales que atribuyan o transfieran determinadas competencias a un ordenamiento jurídico comunitario, con el propósito de realizar objetivos regionales y comunes, requerirán la aprobación de la Asamblea Legislativa, por votación no menor de los dos tercios de la totalidad de sus miembros.

No requerirán aprobación legislativa los protocolos de menor rango, derivados de tratados públicos o convenios internacionales aprobados por la Asamblea, cuando estos instrumentos autoricen de modo expreso tal derivación.

(Así reformado por ley N° 4123 de 31 de mayo de 1968).

.....

TÍTULO X

El Poder Ejecutivo

CAPÍTULO II

Deberes y atribuciones de quienes ejercen el Poder Ejecutivo

Artículo 140. Son deberes y atribuciones que corresponden conjuntamente al Presidente y al respectivo Ministro de Gobierno.

.....

Celebrar convenios, tratados públicos y concordatos, promulgarlos y ejecutarlos una vez aprobados por la Asamblea Legislativa o por una Asamblea Constituyente, cuando dicha aprobación la exija esta Constitución.

Los protocolos derivados de dichos tratados públicos o convenios internacionales que no requieran aprobación legislativa, entrarán en vigencia una vez promulgados por el Poder Ejecutivo.

(Así reformado por ley N° 4123 de 31 de mayo de 1968).

7. ECUADOR (1998)

TÍTULO I

De los Principios Fundamentales

.....

Artículo 4. El Ecuador en sus relaciones con la comunidad internacional:

1. Proclama la paz, la cooperación como sistema de convivencia y la igualdad jurídica de los estados.
2. Condena el uso o la amenaza de la fuerza como medio de solución de los conflictos, y desconoce el despojo bélico como fuente de derecho.
3. Declara que el derecho internacional es norma de conducta de los estados en sus relaciones recíprocas y promueve la solución de las controversias por métodos jurídicos y pacíficos.
4. Propicia el desarrollo de la comunidad internacional, la estabilidad y el fortalecimiento de sus organismos.
5. Propugna la integración, de manera especial la andina y latinoamericana.
6. Rechaza toda forma de colonialismo, de neocolonialismo de discriminación o segregación, reconoce el derecho de los pueblos a su autodeterminación y a liberarse de los sistemas opresivos.

Artículo 5. El Ecuador podrá formar asociaciones con uno o más estados, para la promoción y defensa de los intereses nacionales y comunitarios.

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TÍTULO III

De los Derechos, Garantías y Deberes

CAPÍTULO 1

Principios Generales

Artículo 17. El Estado garantizará a todos sus habitantes, sin discriminación alguna, el libre y eficaz ejercicio y el goce de los derechos humanos establecidos en esta Constitución y en las declaraciones, pactos, convenios y más instrumentos internacionales vigentes. Adoptará, mediante planes y programas permanentes y periódicos, medidas para el efectivo goce de estos derechos.

.....

TÍTULO IV

De la Función Legislativa

CAPÍTULO I

Del Congreso Nacional

Artículo 130. El Congreso Nacional tendrá los siguientes deberes y atribuciones:

.....

6. Aprobar o improbar los tratados internacionales, en los casos que corresponda.

TÍTULO VII

De la Función Ejecutiva

CAPÍTULO I

Del Presidente de la República

Artículo 171. Serán atribuciones y deberes del Presidente de la República los siguientes:

1. Cumplir y hacer cumplir la Constitución, las leyes, los tratados y convenios internacionales y demás normas jurídicas dentro del ámbito de su competencia;

.....

12. Definir la política exterior, dirigir las relaciones internacionales, celebrar y ratificar los tratados y convenios internacionales, previa aprobación del Congreso Nacional, cuando la Constitución lo exija.

8. EL SALVADOR (1983)

TÍTULO III

El Estado, su forma de Gobierno y sistema político

Artículo 89. El Salvador alentará y promoverá la integración humana, económica, social y cultural con las Repúblicas americanas y especialmente con las del istmo centroamericano. La integración podrá efectuarse mediante tratados o convenios con las repúblicas interesadas los cuales podrán contemplar la creación de organismos con funciones supranacionales.

También propiciará la reconstrucción total o parcial de la República de Centro-América, en forma unitaria, federal o confederada, con plena garantía de respeto a los principios democráticos y republicanos y de los derechos individuales y sociales de sus habitantes.

El proyecto y bases de la unión se someterán a consulta popular.

TÍTULO VI

Órganos del Gobierno, atribuciones y competencias

SECCIÓN TERCERA

Tratados

Artículo 144. Los tratados internacionales celebrados por El Salvador con otros Estados o con organismos internacionales constituyen leyes de la República al entrar en vigencia, conforme a las disposiciones del mismo tratado y de esta Constitución.

La ley no podrá modificar o derogar lo acordado en un tratado vigente para El Salvador. En caso de conflicto entre el tratado y la ley, prevalecerá el tratado.

Artículo 145. No se podrán ratificar los tratados en que se restrinjan o afecten de alguna manera las disposiciones constitucionales, a menos que la ratificación se haga con las reservas correspondientes. Las disposiciones del tratado sobre las cuales se hagan las reservas no son ley de la República.

Artículo 146. No podrán celebrarse o ratificarse tratados u otorgarse concesiones en que, de alguna manera, se altere la forma de gobierno o se lesionen o menoscaben la integridad del territorio, la soberanía e independencia de la República o los derechos y garantías fundamentales de la persona humana.

Lo dispuesto en el inciso anterior se aplica a los tratados internacionales o contratos con gobiernos o empresas nacionales o internacionales en los cuales se someta el Estado salvadoreño, a la jurisdicción de un tribunal de un estado extranjero.

Lo anterior no impide que, tanto en los tratados como en los contratos, el Estado salvadoreño en caso de controversia, someta la decisión a un arbitraje o a un tribunal internacional.

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TÍTULO VI

Órganos del Gobierno, atribuciones y competencias

CAPÍTULO I

Órgano Legislativo

SECCIÓN PRIMERA

Asamblea Legislativa

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Artículo 131. Corresponde a la Asamblea Legislativa:

7. Ratificar los tratados o pactos que celebre el Ejecutivo con otros Estados u organismos internacionales, o denegar su ratificación.

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CAPÍTULO II

Órgano Ejecutivo

.....

Artículo 168. Son atribuciones y obligaciones del Presidente de la República:

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4. Celebrar tratados y convenciones internacionales, someterlos a la ratificación de la Asamblea Legislativa, y vigilar su cumplimiento;

5. Dirigir las relaciones exteriores;

.....

9. GUATEMALA (1985)

TÍTULO III

El Estado

CAPÍTULO 3

Relaciones internacionales del Estado

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Artículo 150. De la comunidad centroamericana.

Guatemala, como parte de la comunidad centroamericana, mantendrá y cultivará relaciones de cooperación y solidaridad con los demás Estados que formaron la Federación de Centroamérica; deberá adoptar las medidas adecuadas para llevar a la práctica, en forma parcial o total, la unión política o económica de Centroamérica. Las autoridades competentes están obligadas a fortalecer la integración económica centroamericana sobre bases de equidad.

Artículo 151. Relaciones con Estados afines.

El Estado mantendrá relaciones de amistad, solidaridad y cooperación con aquellos Estados, cuyo desarrollo económico, social y cultural, sea análogo al de Guatemala, con el propósito de encontrar soluciones apropiadas a sus problemas comunes y de formular conjuntamente, políticas tendientes al progreso de las naciones respectivas.

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TÍTULO IV

Poder Público

CAPÍTULO 2

Organismo Legislativo

SECCIÓN SEGUNDA

Atribuciones del Congreso

Artículo 171. Otras atribuciones del Congreso:

Corresponde también al Congreso:

1) Aprobar, antes de su ratificación, los tratados, convenios o cualquier arreglo internacional cuando:

- 1) Afecten a leyes vigentes para las que esta Constitución requiera la misma mayoría de votos.
- 2) Afecten el dominio de la Nación, establezcan la unión económica o política de Centroamérica, ya sea parcial o total, o atribuyan o transfieran competencias a organismos, instituciones o mecanismos creados dentro de un ordenamiento jurídico comunitario concentrado para realizar objetivos regionales y comunes en el ámbito centroamericano.

- 3) Obliguen financieramente al Estado, en proporción que exceda al uno por ciento del Presupuesto de Ingresos Ordinarios o cuando el monto de la obligación sea indeterminado.
- 4) Constituyan compromiso para someter cualquier asunto a decisión judicial o arbitraje internacionales.
- 5) Contengan cláusula general de arbitraje o de sometimiento a jurisdicción internacional; y

CAPÍTULO 3

Organismo Ejecutivo

SECCIÓN PRIMERA

Presidente de la República

.....

Artículo 183. Funciones del Presidente de la República.

Son funciones del Presidente de la República:

.....

k) Someter a la consideración del Congreso para su aprobación, y antes de su ratificación, los tratados y convenios de carácter internacional y los contratos y concesiones sobre servicios públicos;

.....

o) Dirigir la política exterior y las relaciones internacionales, celebrar, ratificar y denunciar tratados y convenios de conformidad con la Constitución;

.....

TÍTULO II

Derechos Humanos

CAPÍTULO I

Derechos Individuales

Artículo 46. Preeminencia del Derecho Internacional.

Se establece el principio general de que en materia de derechos humanos, los tratados y convenciones aceptados y ratificados por Guatemala, tienen preeminencia sobre el derecho interno.

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10. HAÏTI (1987)

TITRE XII

Dispositions Générales

Article 276. L'Assemblée Nationale ne peut ratifier aucun Traité, Convention ou Accords Internationaux comportant des clauses contraires à la présente Constitution.

Article 276-1. La ratification des Traités, des Conventions et des Accords Internationaux est donnée sous forme de Décret.

Article 276-2. Les Traités ou Accords Internationaux, une fois sanctionnés et ratifiés dans les formes prévues par la Constitution, font partie de la Législation du Pays et abrogent toutes les Lois qui leur sont contraires.

Article 277. L'Etat Haïtien peut intégrer une Communauté Economique d'Etats dans la mesure où l'Accord d'Association stimule le développement économique et social de la République d'Haïti et ne comporte aucune clause contraire à la Présente Constitution.

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TITRE V

De la Souveraineté Nationale

CHAPITRE II

Du Pouvoir Législatif

SECTION C

De l'Assemblée Nationale

Article 98. La réunion en une seule Assemblée des deux (2) branches du Pouvoir Législatif constitue l'Assemblée Nationale.

.....

Article 98-2. Les Pouvoirs de l'Assemblée Nationale sont limités et ne peuvent s'étendre à d'autres objets que ceux qui lui sont spécialement attribués par la Constitution.

Article 98-3. Les attributions sont:

D'approuver ou de rejeter les Traités et Conventions Internationaux;

CHAPITRE III

Du Pouvoir Exécutif

SECTION B

Des attributions du Président de la République

Article 139. Il négocie et signe tous Traités, Conventions et Accords Internationaux et les soumet à la ratification de l'Assemblée Nationale.

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11. HONDURAS (1982)

CAPÍTULO III

De los Tratados

Artículo 15. Honduras hace suyos los principios y prácticas del derecho internacional que propenden a la solidaridad humana, al respeto de la autodeterminación de los pueblos, a la no intervención y al afianzamiento de la paz y la democracia universales.

Honduras proclama como ineludible la validez y obligatoria ejecución de las sentencias arbitrales y judiciales de carácter internacional.

Artículo 16. Todos los tratados internacionales deben ser aprobados por el Congreso Nacional antes de su ratificación por el Poder Ejecutivo.

Los tratados internacionales celebrados por Honduras con otros Estados, una vez que entran en vigor, forman parte del derecho interno.

Artículo 17. Cuando un tratado internacional afecte una disposición constitucional, debe ser aprobado por el mismo procedimiento que rige la reforma de la Constitución antes de ser ratificado por el Poder Ejecutivo.

Artículo 18. En caso de conflicto entre el tratado o convención y la Ley, prevalecerá el primero.

Artículo 19. Ninguna autoridad puede celebrar o ratificar tratados u otorgar concesiones que lesionen la integridad territorial, la soberanía e independencia de la República.

Quien los haga será juzgado por el delito de traición a la Patria. La responsabilidad en este caso es imprescriptible.

Artículo 20. Cualquier tratado o convención que celebre el Poder Ejecutivo referente al territorio nacional, requerirá la aprobación del Congreso Nacional por votación no menor de tres cuartas partes de la totalidad de sus miembros.

Artículo 21. El Poder Ejecutivo puede, sobre materias de su exclusiva competencia, celebrar o ratificar convenios internacionales con Estados extranjeros u organizaciones internacionales o adherirse a ellos sin el requisito previo de la aprobación del Congreso, al que deberá informar inmediatamente.

TÍTULO V

De Los Poderes del Estado

CAPÍTULO I

Del Poder Legislativo

.....

Artículo 205. Corresponden al Congreso Nacional las atribuciones siguientes:

.....

30. Aprobar o improbar los tratados internacionales que el Poder Ejecutivo haya celebrado.

.....

Artículo 245. El Presidente de la República tiene la administración general del Estado: son sus atribuciones:

.....

11. Dirigir la política y las relaciones internacionales;

.....

13. Celebrar tratados y convenios, ratificar, previa aprobación del Congreso Nacional, los Tratados Internacionales de carácter político, militar, los relativos al territorio nacional, soberanía y concesiones, los que impliquen obligaciones financieras para la Hacienda Pública o los que requieran modificación o derogación de alguna disposición constitucional o legal y los que necesiten medidas legislativas para su ejecución;

.....

12. MÉXICO (1917)

TÍTULO PRIMERO

CAPÍTULO I

De las Garantías Individuales

.....

Artículo 3. Todo individuo tiene derecho a recibir educación. El Estado —Federación, Estados, Municipios— impartirá educación preescolar, primaria y secundaria. La educación primaria y la secundaria son obligatorias.

La educación que imparta el Estado tenderá a desarrollar armónicamente todas las facultades del ser humano y fomentará en él, a la vez, el amor a la Patria y la conciencia de la solidaridad internacional, en la independencia y en la justicia.

.....

Artículo 15. No se autoriza la celebración de tratados para la extradición de reos políticos, ni para la de aquellos delincuentes del orden común que hayan tenido en el país donde cometieron el delito, la condición de esclavos; ni de convenios o tratados en virtud de los que se alteren las garantías y derechos establecidos por esta Constitución para el hombre y el ciudadano.

TÍTULO TERCERO

CAPÍTULO II

Del Poder Legislativo

SECCIÓN III

De las Facultades del Congreso

.....

Artículo 76. Son facultades exclusivas del Senado:

I. Analizar la política exterior desarrollada por el Ejecutivo Federal con base en los informes anuales que el Presidente de la República y el Secretario del Despacho correspondiente rindan al

Congreso; además, aprobar los tratados internacionales y convenciones diplomáticas que celebre el Ejecutivo de la Unión.

.....

CAPÍTULO III

Del Poder Ejecutivo

.....

Artículo 89. Las facultades y obligaciones del Presidente son las siguientes:

.....

X. Dirigir la política exterior y celebrar tratados internacionales, sometiéndolos a la aprobación del Senado. En la conducción de tal política, el titular del Poder Ejecutivo observará los siguientes principios normativos; la autodeterminación de los pueblos; la no intervención; la solución pacífica de controversias; la proscripción de la amenaza o el uso de la fuerza en las relaciones internacionales; la igualdad jurídica de los Estados; la cooperación internacional para el desarrollo; y la lucha por la paz y la seguridad internacionales;

.....

13. NICARAGUA (1987)

TÍTULO II

Sobre el Estado

CAPÍTULO ÚNICO

.....

Artículo 8. El pueblo de Nicaragua es de naturaleza multiétnica y parte integrante de la nación centroamericana.

Artículo 9. Nicaragua defiende firmemente la unidad centroamericana, apoya y promueve todos los esfuerzos para lograr la integración política y económica y la cooperación en América Central, así como los esfuerzos por establecer y preservar la paz en la región.

Nicaragua aspira a la unidad de los pueblos de América Latina y el Caribe, inspirada en los ideales unitarios de Bolívar y Sandino.

En consecuencia, participará con los demás países centroamericanos y latinoamericanos en la creación o elección de los organismos necesarios para tales fines.

Este principio se regulará por la legislación y los tratados respectivos.

TÍTULO VIII

De la Organización del Estado

CAPÍTULO 2

Poder Legislativo

.....

Artículo 138. Son atribuciones de la Asamblea Nacional:

.....

11. Aprobar o desaprobar los tratados internacionales.

.....

CAPÍTULO 3

Poder Ejecutivo

.....

Artículo 150. Son atribuciones del Presidente de la República las siguientes:

.....

8. Dirigir las relaciones internacionales de la República, celebrar los tratados, convenios o acuerdos internacionales y nombrar a los jefes de misiones diplomáticas.

.....

14. PANAMA (1972)²⁹⁶

TÍTULO I

El Estado Panameño

.....

Artículo 4. La República de Panamá acata las normas del Derecho Internacional.

.....

TÍTULO V

El Órgano Legislativo

CAPÍTULO 1

Asamblea Legislativa

Artículo 153. La función legislativa es ejercida por medios de la Asamblea Legislativa y consiste en expedir las leyes necesarias para el cumplimiento de los fines y el ejercicio de las funciones del Estado declarados en esta Constitución y en especial para lo siguiente:

3. Aprobar o desaprobar, antes de su ratificación, los tratados y los convenios internacionales que celebre el Órgano Ejecutivo.

.....

²⁹⁶ Está en proceso de elaboración una nueva Constitución.

TÍTULO VI

El Órgano Ejecutivo

CAPÍTULO 1

El Presidente y Vicepresidente de la República

.....

Artículo 179. Son atribuciones que ejerce el Presidente de la República con la participación del Ministro respectivo:

.....

9. Dirigir las relaciones exteriores; celebrar tratados y convenios internacionales, los cuales serían sometidos a la consideración del Órgano Legislativo y acreditar y recibir agentes diplomáticos y consulares.

15. PARAGUAY (1992)

PARTE II

Del Ordenamiento Político de la República

TÍTULO I

De la Nación y del Estado

CAPÍTULO I

De las Declaraciones Generales

De la supremacía de la Constitución

Artículo 137. La ley suprema de la República es la Constitución. Ésta, los tratados, convenios y acuerdos internacionales aprobados y ratificados, las leyes dictadas por el Congreso y otras disposiciones jurídicas de inferior jerarquía, sancionadas en su consecuencia, integran el derecho positivo nacional en el orden de prelación enunciado.

Quienquiera que intente cambiar dicho orden, al margen de los procedimientos previstos en esta Constitución, incurrirá en los delitos que se tipificarán y penarán en la ley.

Carecen de validez todas las disposiciones y los actos de autoridad opuestos a lo establecido en esta Constitución.

.....

CAPÍTULO II

De las Relaciones Internacionales

De los tratados internacionales

Artículo 141. Los tratados internacionales válidamente celebrados, aprobados por ley del Congreso, y cuyos instrumentos de ratificación fueran canjeados o depositados, forman parte del ordenamiento legal interno con la jerarquía que determina el artículo 136.

De la denuncia de los tratados

Artículo 142. Los tratados internacionales relativos a los derechos humanos no podrán ser denunciados sino por los procedimientos que rigen para la enmienda de esta Constitución.

.....

Del orden jurídico supranacional

Artículo 145. La República del Paraguay, en condiciones de igualdad con otros Estados, admite un orden jurídico supranacional que garantice la vigencia de los derechos humanos de la paz, de la justicia, de la cooperación y del desarrollo, en lo político, económico, social y cultural.

Dichas decisiones sólo podrán ser adoptadas por la mayoría absoluta de cada Cámara del Congreso.

.....

TÍTULO II

De la estructura y de la organización del Estado

CAPÍTULO I

Del Poder Legislativo

SECCIÓN I

De las disposiciones generales

.....

De los deberes y atribuciones

Artículo 202. Son deberes y atribuciones del Congreso:

1) velar por la observancia de esta Constitución y de las leyes;

.....

9) aprobar o rechazar los tratados y demás acuerdos internacionales suscriptos por el Poder Ejecutivo;

....

CAPÍTULO II

Del Poder Ejecutivo

SECCIÓN I

Del Presidente de la República y del Vicepresidente

....

De los deberes y atribuciones del Presidente de la República

Artículo 238. Son deberes y atribuciones de quien ejerce la Presidencia de la República:

- 1) representar al Estado y dirigir la administración general del país;
- 2) cumplir y hacer cumplir esta Constitución y las leyes;

....

7) el manejo de las relaciones exteriores de la República. En caso de agresión externa y previa autorización del Congreso, declarar el Estado de Defensa Nacional o concertar la paz; negociar y firmar tratados internacionales; recibir a los jefes de misiones diplomáticas de los países extranjeros y admitir a sus cónsules y designar embajadores, con acuerdo del Senado;

.....

16. PERÚ (1993)

TÍTULO II

Del Estado y la Nación

CAPÍTULO II

De los Tratados

Artículo 55. Los tratados celebrados por el Estado y en vigor forman parte del derecho nacional.

Artículo 56. Los tratados deben ser aprobados por el Congreso antes de su ratificación por el Presidente de la República, siempre que versen sobre las siguientes materias:

1. Derechos Humanos.
2. Soberanía, dominio o integridad del Estado.
3. Defensa Nacional.
4. Obligaciones financieras del Estado.

También deben ser aprobados por el Congreso los tratados que crean, modifican o suprimen tributos; los que exigen modificación o derogación de alguna ley y los que requieren medidas legislativas para su ejecución.

Artículo 57. El Presidente de la República puede celebrar o ratificar tratados o adherir a éstos sin el requisito de la aprobación previa del Congreso en materias no contempladas en el artículo precedente. En todos esos casos, debe dar cuenta al Congreso.

Cuando el tratado afecte disposiciones constitucionales debe ser aprobado por el mismo procedimiento que rige la reforma de la Constitución, antes de ser ratificado por el Presidente de la República.

La denuncia de los tratados es potestad del Presidente de la República, con cargo de dar cuenta al Congreso. En el caso de los tratados sujetos a aprobación del Congreso, la denuncia requiere aprobación previa de éste.

TÍTULO IV

De la estructura del Estado

CAPÍTULO I

Poder Legislativo

Artículo 102. Son atribuciones del Congreso:

1. Dar leyes y resoluciones legislativas, así como interpretar, modificar o derogar las existentes.
2. Velar por el respeto de la Constitución y de las leyes, y disponer lo conveniente para hacer efectiva la responsabilidad de los infractores.
3. Aprobar los tratados, de conformidad con la Constitución.

CAPÍTULO IV

Poder Ejecutivo

Artículo 118. Corresponde al Presidente de la República:

- 1) Cumplir y hacer cumplir la Constitución y los tratados, leyes y demás disposiciones legales.
- 2) Representar al Estado, dentro y fuera de la República.
-
11. Dirigir la política exterior y las relaciones internacionales; y celebrar y ratificar tratados.

17. REPÚBLICA DOMINICANA (1996)

TÍTULO I

SECCIÓN I

De la Nación, de su Soberanía y de su Gobierno

....

Artículo 3. La soberanía de la nación dominicana como Estado libre e independiente es inviolable. La República es y será siempre libre e independiente de todo poder extranjero. Por consiguiente, ninguno de los poderes públicos organizados por la presente Constitución podrá realizar o permitir la realización de actos que constituyan una intervención directa o indirecta en los asuntos internos o externos de la República Dominicana, o una injerencia que atente contra la personalidad e integridad del Estado y los atributos que se le reconocen y consagran en esta Constitución. El principio de la no intervención constituye una norma invariable de la política internacional dominicana.

La República Dominicana reconoce y aplica las normas del Derecho Internacional general y americano, en la medida en que sus poderes públicos las hayan adoptado y se pronuncia en favor de la solidaridad económica de los países de América y apoyará toda iniciativa que propenda a la defensa a sus productos básicos y materias primas.

.....

TÍTULO IV

SECCIÓN V

Del Congreso

.....

Artículo 37. Son atribuciones del Congreso:

14. Aprobar o desaprobar los tratados y convenciones internacionales que celebre el Poder Ejecutivo.

.....

TÍTULO V

SECCIÓN I

Del Poder Ejecutivo

.....

Artículo 55. El Presidente de la República es el Jefe de la Administración Pública y el Jefe Supremo de todas las fuerzas armadas de la República y de los cuerpos policiales.

Corresponde al Presidente de la República:

.....

6. Presidir todos los actos solemnes de la Nación, dirigir las negociaciones diplomáticas y celebrar tratados, con las naciones extranjeras u organismos internacionales, debiendo someterlos a la aprobación del Congreso, sin lo cual no tendrán validez ni obligarán a la República.

18. URUGUAY (1967)

SECCIÓN I

De la Nación y su soberanía

CAPÍTULO IV

.....

Artículo 6. En los tratados internacionales que celebre la República propondrá la cláusula de que todas la diferencias que surjan entre las partes contratantes serán decididas por el arbitraje y otros medios pacíficos.

La República procurará la integración social y económica de los Estados Latinoamericanos, especialmente en lo que se refiere a la defensa común de sus productos y materias primas. Asimismo, propenderá a la efectiva complementación de sus servicios públicos.

.....

SECCIÓN V

Del Poder Legislativo

CAPÍTULO I

Artículo 83. El Poder Legislativo será ejercido por la Asamblea General.

Artículo 84. Esta se compondrá de dos Cámaras: una de Representantes y otra de Senadores, las que actuarán separada o conjuntamente, según las distintas disposiciones de la presente Constitución.

Artículo 85. A la Asamblea General compete:

.....

7. Decretar la guerra y aprobar o reprobado la mayoría absoluta de votos del total de componentes de cada Cámara, los tratados de paz, alianza, comercio y las convenciones o contratos de cualquier naturaleza que celebre el Poder Ejecutivo con potencias extranjeras.

.....

SECCIÓN IX

Del Poder Ejecutivo

CAPÍTULO III

Artículo 168. Al Presidente de la República, actuando con el Ministro o Ministros respectivos, o con el Consejo de Ministros, corresponde:

.....

20. Concluir y suscribir tratados, necesitando para ratificarlos la aprobación del Poder Legislativo.

.....

19. VENEZUELA (1961)

CAPÍTULO V

Derechos económicos

.....

Artículo 108. La República favorecerá la integración económica latinoamericana. A este fin se procurará coordinar recursos y esfuerzos para fomentar el desarrollo económico y aumentar el bienestar y seguridad comunes.

Artículo 109. La ley regulará la integración, organización y atribuciones de los cuerpos consultivos que se juzguen necesarios para oír la opinión de los sectores económicos privados, la población consumidora, las organizaciones sindicales de trabajadores, los colegios de profesionales y las universidades, en los asuntos que interesan a la vida económica.

.....

TÍTULO IV

Del Poder Público

CAPÍTULO I

Disposiciones Generales

.....

Artículo 128. Los tratados o convenios internacionales que celebre el Ejecutivo Nacional deberán ser aprobados mediante la ley especial para que tengan validez, salvo que mediante ellos se trate de ejecutar o perfeccionar obligaciones preexistentes de la República, de aplicar principios expresamente reconocidos por ella, de ejecutar actos ordinarios en las relaciones internacionales o de ejercer facultades que la ley atribuya expresamente al Ejecutivo Nacional. Sin embargo, la Comisión Delegada del Congreso podrá autorizar la ejecución provisional de tratados o convenios internacionales cuya urgencia así lo requiera, los cuales serán sometidos, en todo caso, a la posterior aprobación o improbación del Congreso.

En todo caso el Ejecutivo Nacional dará cuenta al Congreso en sus próximas sesiones, de todos los acuerdos jurídicos internacionales que celebre, con indicación precisa de su carácter y contenido, estén o no sujetos a su aprobación.

Artículo 129. En los tratados, convenios y acuerdos internacionales que la República celebre, se insertará una cláusula por la cual las partes se obliguen a decidir por las vías pacíficas reconocidas en el derecho internacional, o previamente convenidas por ellas, si tal fuere el caso, las controversias que pudieran suscitarse entre las mismas con motivo de su interpretación o ejecución si no fuere improcedente y así lo permita el procedimiento que deba seguirse para su celebración.

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* * *

ANEXO II

RELACIÓN ESQUEMÁTICA DE INSTRUMENTOS MULTILATERALES CONCERTADOS A NIVEL UNIVERSAL Y A ESCALA REGIONAL SOBRE MATERIAS DE DERECHO INTERNACIONAL PRIVADO

Derecho Comercial Internacional

Ámbito Universal

Convención de las Naciones Unidas sobre los Contratos de compraventa Internacional de mercaderías (Viena, 1980)

Convención sobre la prescripción en materia de compraventa internacional de mercaderías (New York, 1974)

Protocolo por el que se enmienda la Convención sobre la prescripción en materia de compraventa internacional de mercaderías (Viena, 1980)

Convención de las Naciones Unidas sobre el transporte marítimo de mercaderías (Hamburgo, 1978)

Convenio de las Naciones Unidas sobre la responsabilidad de los empresarios de terminales de transporte en el comercio internacional (Viena, 1991)

Convención sobre la ley aplicable a los contratos de compraventa internacional de mercaderías (La Haya, 22 de diciembre de 1986)

Ámbito Regional

Convención interamericana sobre derecho aplicable a los contratos internacionales (CIDIP-V, 1994)

Convención sobre derecho internacional privado (Código Bustamante) (La Habana, 20 de febrero de 1928)

Convención interamericana sobre contrato de transporte internacional de mercadería por carretera (CIDIP-IV, 1989)

Convención interamericana sobre conflictos de leyes en materia de sociedades mercantiles (CIDIP-II, 1979)

Derecho Comercial Internacional

Ámbito Universal

Ley Modelo de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional sobre Arbitraje Comercial Internacional (CNUDMI, 1985)

Convención sobre la ley aplicable a los Contratos de compraventa internacional de mercaderías (La Haya, 22 de diciembre de 1996)

A nivel Comunidad Económica Europea

Convenio sobre la ley aplicable a las obligaciones contractuales (Roma, 19 de junio de 1980)

Ámbito Universal

Convención de las Naciones Unidas sobre letras de cambio internacionales y pagarés internacionales (New York, 1988)

Ámbito Regional

Convención interamericana sobre arbitraje comercial internacional (CIDIP-I, 1975)

Ámbito Regional

Convención interamericana sobre conflictos de leyes en materia de letras de cambio, pagarés y facturas (CIDIP-I, 1975)

Convención interamericana sobre conflictos de leyes en materia de cheques (CIDIP-I, 1975)

Convención interamericana sobre conflictos de leyes en materia de cheques (CIDIP-II, 1979)

Derecho Comercial Internacional

Ámbito Sudamericano

Tratado de derecho comercial internacional
(12 de febrero de 1889)²⁹⁷

Tratado de derecho de navegación
comercial internacional
(19 de marzo de 1940)²⁹⁸

Tratado de derecho comercial terrestre
internacional

(19 de marzo de 1940)²⁹⁹

²⁹⁷ Celebrados durante el Primer y Segundo Congresos Sudamericanos de Derecho Internacional Privado, efectuados en Montevideo, durante los años de 1888-1889 y 1939-1940, respectivamente.

²⁹⁸ Idem.

²⁹⁹ Idem.

Derecho Procesal Internacional

Ámbito Universal

Convención sobre reconocimiento y ejecución de las sentencias arbitrales extranjeras (New York, 1958)

Convention on the recognition and

enforcement of foreign judgements in civil and commercial matters (The Hague Conference, 1971)

Protocol to The Hague Convention on the recognition and enforcement of foreign judgements in civil and commercial matters (The Hague Conference, 1971)

Convention relative a la procedure civil (Conference de la Haye, 1954)

Convention on the taking of evidence abroad in civil and commercial matters

(The Hague Conference, 1970)

Ámbito Regional

Convención sobre derecho internacional privado (Código Bustamante) (20 de febrero de 1928)

Convención interamericana sobre eficacia extraterritorial de las sentencias y laudos arbitrales extranjeros (CIDIP-II, 1979)

Convención interamericana sobre exhortos o cartas rogatorias (CIDIP-I, 1975)

Convención interamericana sobre recepción de pruebas en el extranjero

(CIDIP-I, 1975)

Convención interamericana sobre cumplimiento de medidas cautelares

miento de medidas cautelares

(CIDIP-II, 1979)

Convención interamericana sobre prueba e información acerca del derecho extranjero (CIDIP-II, 1979)

Derecho Procesal Internacional

Ámbito Universal

Convention pour régler les conflits entre la loi nationale et la loi du domicile (Conférence de la Haye, 1955)

Convention concernant la reconnaissance de la personnalité juridique de sociétés, associations et foncations étrangères (Conférence de la Haye, 1956)

Ámbito Regional

Convención interamericana sobre domicilio de las personas físicas en el derecho internacional privado (CIDIP-II, 1979)

Convención interamericana sobre personalidad y capacidad de personas jurídicas en el derecho internacional privado (CIDIP-III, 1984)

Convención interamericana sobre competencia en la esfera internacional para la eficacia extraterritorial de las sentencias extranjeras (CIDIP-III, 1984)

Protocolo adicional a la Convención interamericana sobre pruebas en el extranjero (CIDIP-III, 1984)

Convención interamericana sobre contrato de transporte internacional de mercadería por carretera (CIDIP-IV, 1989)

Derecho Procesal Internacional

Ámbito Sudamericano

Tratado de derecho procesal internacional
(11 de enero de 1989)³⁰⁰

Tratado de derecho procesal internacional
(19 de marzo de 1940)³⁰¹

³⁰⁰ Celebrados durante el Primer y Segundo Congresos Sudamericanos de Derecho Internacional Privado, efectuados en Montevideo, Uruguay, durante los años de 1888-1889 y 1939-1940, respectivamente.

³⁰¹ Idem.

Derecho Civil Internacional

Ámbito Regional

Convención sobre derecho internacional privado (Código Bustamante) (La Habana, 20 de febrero de 1928)

Tratado de derecho civil internacional

(12 de febrero de 1889)³⁰²

Tratado de derecho civil internacional

(19 de marzo de 1940)³⁰³

Protocolo adicional a los tratados de derecho internacional privado

(13 de febrero de 1889)³⁰⁴

Protocolo adicional a los tratados de derecho internacional privado

(19 de marzo de 1940)³⁰⁵

In response to the document's presentation, the members of the Inter-American Juridical Committee underscored the multiple and complex facets of the topic under discussion, and recalled that on its agenda this was classified as an item under observation. Mention was made of the need to focus on one specific area so as to facilitate study thereof. Some members spoke of the need to examine convergence in the sub-regional and universal integration processes; to do a comparative study of the methods for settling disputes, as provided in the various integration agreements, and how those methods have been applied in practice; the compatibility of the integration arrangements now in effect with those currently being negotiated; measures to guarantee application of the concept of "open regionalism" within the region; and the opportunities for political integration among the countries

³⁰² Celebrados durante el Primer y Segundo Congresos Sudamericanos de Derecho Internacional Privado, efectuados en Montevideo, Uruguay, durante los años de 1888-1889 y 1939-1940, respectivamente.

³⁰³ Idem.

³⁰⁴ Idem.

³⁰⁵ Idem.

of the region. It was also pointed out that inasmuch as the OAS General Assembly had mandated the inclusion of this topic on the Inter-American Juridical Committee's agenda, it had to be regarded as a priority item.

During this regular period of sessions, Dr. Jonathan T. Fried, rapporteur for the topic, gave a brief presentation summing up the history of the topic within the Inter-American Juridical Committee and in the broader context of the OAS. He expressed concern that no legal issue of hemispheric scope had as yet been singled out as the target for the Inter-American Juridical Committee's studies.

Other members were of the opinion that some kind of political consensus on the topic was currently being sought. Once that consensus had been expressed, the Inter-American Juridical Committee would be able to tackle the legal aspects of the issue. In the meantime, the Inter-American Juridical Committee's job was to make its presence felt by compiling everything that had been done, by topic, and distribute it to the governments by way of their permanent missions, so that they are available at the forthcoming meetings of the Ministers of Trade. The Inter-American Juridical Committee could also draw attention to the various multilateral and bilateral legal instruments in various areas such as economic integration, free trade, investment protection, double taxation, and so on, as part of its mandate under the *OAS Charter*, including some instruments approved within the framework of CIDIP as well. It was further noted that as States are always under an obligation to settle trade and investment disputes, the Inter-American Juridical Committee should urge efforts to improve these mechanisms.

Dr. Sergio González Gálvez introduced document *List to subjects that must be discussed under the issue: the juridical dimension of integration and international trade* (CJI/doc.33/99). That document appears below:

LIST OF SUBJECTS THAT MUST BE DISCUSSED UNDER THE ISSUE:

THE JURIDICAL DIMENSION OF INTEGRATION AND INTERNATIONAL TRADE

(presented by Dr. Sergio González Gálvez)

- a. Convergence in sub-regional and universal integration processes;
- b. Comparative study of the mechanisms to be used in integration agreements for the peaceful settlement of disputes;
- c. Compatibilities between the integration agreements in force and those currently under negotiation;
- d. Measures to guarantee that the concept of "open regionalism" is put into effect in the region;
- e) Possibilities to establish political integration among countries in the region.

Based on all these considerations, the Inter-American Juridical Committee approved resolution *Juridical dimension of integration and international trade* (CJI/RES.10/LV/99), and resolved to examine this topic at its next regular period of sessions in the light of the outcome of the Meeting of Ministers of Trade of the Americas and of the Third Ministerial Conference of the WTO. It also asked Dr. Jonathan T. Fried to represent the Juridical Committee at these meetings. The resolution in question reads as follows:

JURIDICAL DIMENSION OF INTEGRATION

AND INTERNATIONAL TRADE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECOGNIZING the positive contribution that the liberalization of trade and investment in the hemisphere can make to improving the well-being of people throughout the Americas;

AFFIRMING that enhanced trade and investment relations are best pursued within a framework of rules accompanied by timely, effective and agreed mechanisms for the avoidance and settlement of disputes that may arise;

RECALLING that international trade and investment can be facilitated by the promotion of the harmonization of private law through legal development of integration;

WELCOMING the progress made to date in negotiations on a *Free trade agreement of the Americas* since their launch at the Santiago Summit in 1998;

HAVING BENEFITED at its current session from an extensive exchange of views on a paper presented by Dr. Sergio González Gálvez on the *Juridical dimension of integration and international trade* (OEA/Ser.Q CJI/doc.36/99) and by Dr. Luis Marchand Stens on *Some notes on certain juridical aspects concerning integration* (OEA/Ser.Q CJI/doc.28/99 rev.2) and on current developments in the field;

ANTICIPATING positive results at the forthcoming meeting of Trade Ministers of the Americas in Toronto, Canada, November 1-4, and at the Third World Trade Organization Ministerial Conference in Seattle, November 30-December 3 this year,

RESOLVES:

1. To analyze, at its next regular period of sessions, the topic of juridical dimension of integration and international trade, in the light of the results of the meeting of Trade Ministers of the Americas and the Third WTO Ministerial Conference.

2. To designate Dr. Jonathan T. Fried as the representative of the Inter-American Juridical Committee to the meeting of Trade Ministers of the Americas and to the Third WTO Ministerial Conference.

This resolution was unanimously approved at the session of August 18, 1999, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi, and Gerardo Trejos Salas.

6. Improving the administration of justice in the Americas

At the fifty-fourth regular period of sessions of the Inter-American Juridical Committee (Rio de Janeiro, January 1999), Dr. Brynmor T. Pollard, as co-rapporteur for this topic, introduced document *Administration of justice in the Americas: the Caribbean Commonwealth countries* (CJI/doc.43/98). During his presentation, he said that he hoped to get more information on the administration of justice in the member States of the OAS during the Second Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas, to be held in Lima, March 1, 2 and 3. Such information could be used to continue the Juridical Committee's studies and papers. The following is the text of that document:

ADMINISTRATION OF JUSTICE IN THE AMERICAS: the Caribbean Commonwealth countries

(presented by Dr. Brynmor T. Pollard)

I. THE LEGAL SYSTEM

The English Speaking Commonwealth Caribbean countries have a common law tradition originating from the United Kingdom and arising from their former constitutional status as dependent territories of the United Kingdom. However, aspects of Roman - Dutch in divorce and conveyancing continue to apply in Guyana as a former Dutch colony. In Guyana, the Civil Law Ordinance enacted in 1917 provides that from the 1st January, 1917, the common law of the territory shall be the common law of England. In St. Lucia, formerly belonging to France, aspects of the Code Napoleon continue to apply in some areas of commercial law. Also, in some of the English-speaking Commonwealth Caribbean countries, there are certain UK statutes which still apply. Those statutes applied as part of the law of the territory before independence, and they continue to apply until replaced by indigenous legislation, for example, the Merchant Shipping Act 1894, regulating matters relating to shipping, legislation relating to the rendition of fugitives and legislation relating to intellectual property.

The legal system or the justice system is organized on the basis of inferior and superior courts. The inferior courts are presided over by magistrates who are attorneys-at-law, and the superior courts are presided over by Judges, sometimes referred to as the higher judiciary. The magistrates' courts exercise a limited jurisdiction in criminal and in civil matters. In criminal matters, the jurisdiction relates to the type of offences, and the limits of the penalties, which can be imposed, for example, maximum fines and terms of imprisonment. In civil matters, the jurisdiction of magistrates is limited to a monetary maximum. In the superior or higher courts, presided over by judges, the jurisdiction is unlimited.

As a general rule, the more serious offences, for example, homicide, wounding or causing grievous bodily harm, robbery with violence or robbery under arms, house breaking or burglary, are triable in the superior courts - the High Court or the Supreme Court, as they are collectively called. The trial is conducted before a judge with a jury of selected as a panel by an impartial process for each session, by the registrar of the Court. In some of the countries, the jury is composed of twelve (12) persons at trials of indictable offences. In others, the jury consists of less than twelve persons in trials for indictable offences, other than homicide. There is a proceeding called a preliminary inquiry or trial, to establish whether or not there is an answerable or *prima facie* case against the accused person, to justify the case being referred for trial by a judge with a jury. In Jamaica, following the precedent of the United Kingdom, preliminary inquiries have been abolished. There is a view that the conducting of preliminary inquiries contributes significantly to delays and the disposal of cases in the courts.

Also in Guyana, it was the position prior to 1978 that there were certain serious offences, normally triable by a judge and jury in the High or Supreme Court, which could have been tried in the magistrate's court, if the accused so consented. Since 1978, with the enactment of legislation, if the magistrate at the preliminary inquiry, having regard to representations made by the prosecutor and the accused becomes satisfied that it is expedient that the case should be dealt with by him or her, the matter is disposed of accordingly. In such cases, the magistrate on a finding of guilt can impose a maximum sentence of five (5) years' imprisonment. This procedure was introduced in 1978, in Guyana, in an attempt to stem the flow of criminal cases to be dealt with by judges of the High Court sitting with juries and in an attempt to accelerate the rate of disposal of cases. The results have, however, not fulfilled expectations. The magistrates contend that their workload has increased as a consequence.

In all of the Commonwealth Caribbean countries, appeals lie to national courts of appeal from decisions of the magistrates and the judges in both civil and criminal cases. In all of the jurisdictions, except Guyana, appeals lie further to the Judicial Committee of the Privy Council in London, England. Guyana abolished appeals to the Judicial Committee in 2 stages, during the period 1970 to 1973, on becoming a Republic within the Commonwealth of Nations in February 1970. The first set of appeals were abolished in 1970, leaving constitutional appeals still to be heard by the Judicial Committee. Those appeals related to the interpretation of the Constitution and appeals in cases involving the fundamental rights provisions of the Constitution. Appeals to the Judicial Committee of the Privy Council were abolished totally in 1973, so that the Guyana Court of Appeal is the final Court of Appeal for appeals in Guyana. In the Commonwealth Caribbean, the tendency has developed to have further resort to the Inter-American system and the UN system in cases of unsuccessful appeals against convictions for the capital offence carrying the mandatory death penalty. The appeal of the seventeen (17) persons who were convicted for the murder of Mr. Maurice Bishop, then Prime Minister of the People's Revolutionary Government of Grenada, can be cited in this regard. It will be recalled that the death sentence was ultimately commuted to life imprisonment. It is felt that this may have been done as a means of avoiding an anticipated resort to the Inter-American system on behalf of the convicted persons. Instead of the death sentence being carried out, the convicted persons are now serving sentences of life imprisonment. In other jurisdictions, for example, Jamaica, the Bahamas, Barbados and Guyana, there has been limited success in the carrying out of the death penalty, on the ground that delay in disposing of the appeal against conviction and sentence and the carrying out of the death penalty constitutes inhuman and degrading punishment in violation of the fundamental rights provisions of the Constitutions. In the well-known Jamaica case of Pratt & Morgan -v- Attorney-General for Jamaica³⁰⁶, the Judicial Committee of the Privy Council held that a five year delay is long enough, and that the sentence of death should be commuted to life imprisonment when that period is exceeded.

II. INDEPENDENCE OF THE JUDICIARY - SECURITY OF TENURE

In the desire of Commonwealth Caribbean countries to establish an independent and impartial judiciary, uninfluenced by the Executive, it must be appreciated that absolute separation of the Legislature, the Executive, and the Judiciary is an ideal, but not attainable in practice as experienced in other jurisdictions. In the independent Commonwealth countries, Barbados, Guyana, Trinidad and Tobago, Jamaica, Belize and the Bahamas, the head of the judiciary is appointed by the Head of State after consultations with the Leaders of the main opposition parties in Parliament. In the sub-regional body - The Organization of Eastern Caribbean States, comprising what was formerly described as the Leeward and Windwards Islands - there is one Supreme Court serving the countries forming that group and the judges serve in rotation in the constituent countries. The appointment of the Chief Justice of the Supreme Court of the OECS, who is also the President of the Court of Appeal, is made by Her Majesty the Queen, with the concurrence of all of the Prime Ministers of the OECS countries. The question may be asked whether or not this procedure

³⁰⁶ (1994) 2 AC 1.

provides security of tenure, one Prime Minister with a negative vote being able to block an appointment? The argument in support of the requirement of unanimity is that the appointment must receive the consensus of all the parties, otherwise the candidate ought not to be appointed. This is an interesting issue for debate. Appeals lie from decisions of the judges of the High Court of the OECS countries to the Court of Appeal, from which appeals lie to the Judicial Committee of the Privy Council. Magistrates are appointed by a Judicial Service Commission under the chairmanship of the head of the judiciary and they can be disciplined by the Commission. The Commission includes in its membership one or more judges, a representative of the country's Bar Association and the Chairman of the Public Service Commission. That introduces the lay element in the membership. The judges, other than the head of the judiciary, are appointed by the Head of the State acting on advice tendered by the Judicial Service Commission. In Barbados, the independence constitution was amended to enable the judges to be appointed by the Governor-General, representing Her Majesty the Queen as Head of State, to appoint the judges acting on the advice of the Prime Minister or Head of Government, so that the judges in Barbados are not appointed through the Judicial Service Commission, but on the advice of the Prime Minister after consultation with the Leader of the Opposition in Parliament. This has not caused a problem in Barbados.

The judges enjoy security of tenure under the respective constitutions. They are removable from office only for misbehaviour and on the finding of a judicial tribunal to be established for that purpose³⁰⁷. Also, the office of a judge cannot be abolished while there is a substantive appointment to it subsisting. Magistrates may be removed from office for cause, after due inquiry, by the Judicial Service Commission. The emoluments and other conditions of service of judges are guaranteed in accordance with the constitution and other statutory provisions. The emoluments and other conditions of service of the judges, not the magistrates, must be prescribed by Parliament by law and cannot be altered to their disadvantage during their tenure of office, except of course, if they consent. The expenditure to be incurred is regarded as statutory expenditure, charged by the Constitution on the national revenues and, therefore, not dependent on Parliamentary appropriations. All of these are constitutional and statutory mechanisms, intended to guarantee the independence of the judiciary. However, who determines judicial remuneration? The role of the Executive in this area cannot be avoided and must be acknowledged. The judges may be consulted and may make proposals but the determination is not theirs. In Trinidad & Tobago, the Constitution establishes a Salaries Review Commission, which has included in its membership, a senior member of the practising bar, and a representative of the private sector. The Commission makes recommendations on the remuneration of the judiciary and the holders of other high offices triennially to the Government. The Constitution requires that the Report of the Salaries Review Commission be laid on the Table of both Houses of Parliament. There is no provision as in Canada protecting the remuneration of judges from inflation. The question which springs readily to mind is whether this kind of mechanism operates only for the judiciary or includes the senior public service or the public service as a whole in Canada. The question is relevant because it must be appreciated that one operates in a political context. Politicians are always concerned that if special arrangements are made for a particular category of officials, this could have the effect of raising the expectations of other public officials. Politicians and the judiciary would like to be assured that whatever is done for the judiciary would not trigger demands for better remuneration by other categories of officials in the public service. This tends consequently to operate as a brake on the politicians doing their very best for the judiciary. In discussing judicial remuneration, there is another factor to be taken into account. There are some people who are of the view that if the judiciary is treated too favourably by the Executive, this could result in sending wrong signals to the public.

³⁰⁷ BARNWELL –V.- Attorney-General of Guyana and the Judicial Service Commission 49 WIR 88. REES, Evan, CRANE, Richard Alfred [et al.].[1994] 2 A.C. 173.

III. ABOLITION OF THE JURISDICTION OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Since 1988, plans are in progress to establish the Caribbean Supreme Court as the final Appeal Court for Members of the Caribbean Community (CARICOM) thereby abolishing final appeals to the Judicial Committee of the Privy Council. Caribbean decision-makers are very conscious of the fact that if Canada and New Zealand abolish the residue of the Judicial Committee's jurisdiction, and with Hong Kong having reverted to China's sovereignty from July 1, 1997, the English speaking Caribbean Commonwealth Countries, except Guyana, will be included among the few remaining countries in the Commonwealth with the Judicial Committee as its final Court of Appeal. It is felt that the continued exercise by the Judicial Committee of its appellate jurisdiction in appeals from the courts of the Caribbean Commonwealth countries is a negation of independence. However, to abolish that jurisdiction and to establish the Caribbean Court of Justice as the final Appeal Court will in most of the countries involve significant constitutional amendments. In some of the countries, particularly in the member countries of the Organization of Eastern Caribbean States, the provisions in the constitution dealing with the courts and the judges are deeply entrenched provisions. To repeal or alter them requires special voting majorities in Parliament for the constitutional amendments. In some countries, they must be approved by special majorities in a subsequent referendum. It will be appreciated that under these circumstances, even though the politicians accept the fact that it is desirable that the jurisdiction of the Privy Council ought to be abolished, they are nevertheless realists, having regard to the fact that the outcome of a *referendum* is by no means predictable.

It is envisaged that the Caribbean Court of Justice will comprise a President and not more than nine (9) Justices of Appeal. The President of the Court is to be appointed by special majority vote of the Heads of Government of the Caribbean Community (CARICOM), on the recommendation of the Judicial Service Commission the Justices of Appeal will be appointed by a Regional Judicial Service Commission to be constituted with the President of the Court as its Chairman. It is also considered desirable in some circles that the proposed Caribbean Court of Justice should also have an *inter se* jurisdiction: an original jurisdiction to hear and determine disputes among Member States under the treaty that establishes the Caribbean Community, particularly, having regard to the move towards the creation of a CARICOM Single Market by the year 1999. The Court will be properly constituted with five Judges and where there are ten judges of the Court including the President, the Court may sit in two divisions of five judges.

IV. EXERCISE OF THE PREROGATIVE OF MERCY

There is one mechanism to which reference should be made in relation to appeals in criminal matters. In all of the constitutions, there is provision for the exercise of the prerogative of mercy by the Head of State. Notwithstanding a conviction for homicide, the person who is consequently under sentence of death could, after unsuccessful appeals to the appellate courts, appeal to a special committee established by the Constitution which advises the Head of State on the exercise of the prerogative of mercy. The Committee pays due regard to any recommendation in the report of the trial Judge. If the appeal to the committee is successful, the death sentence can be commuted to a sentence of imprisonment for life or a shorter period, or there may be a reduction in the sentence in other cases.

V. LEGAL AID SERVICES

In most of the Caribbean Commonwealth countries, there is mandatory legal aid for persons charged with the capital offence of homicide. The accused is provided with legal representation by the State if the accused cannot afford the expense of legal representation. In Trinidad & Tobago, a legal aid service is provided by the state through a statutory body. In Jamaica, legal aid is provided in certain areas of the country with financial and other assistance from Governmental and non-governmental sources. Legal aid is also provided in conjunction with the Norman Manley Law School in Jamaica and the Hugh Wooding Law School in Trinidad, respectively, where as a compulsory part of their practical training, the law students at the professional law schools are

required to undergo practical training and to give service in the legal aid centres. In Guyana, there is a legal aid centre which has received funding from the United States Agency for International Development (USAID) through the Government of Guyana with the Government providing an attorney-at-law for service with the Centre. Because of the limited human and material resources of the centre it has restricted its activities to certain types of litigation as well as the geographical area of its operations. The financial assistance from USAID will enable the Centre to be operational for the next two years.

It has been the experience of the administrators of the legal aid centres that it is difficult to recruit senior members of the Bar for service with the centres and, consequently, only the services of junior members of the Bar can be recruited, particularly those who are at the beginning of their careers at the Bar. As their practice develops, these attorneys-at-law are no longer available for service with the centres. This, therefore, continues to be a problem particularly in the experience of the legal aid centre in Guyana. There are frequent entreaties to the Bar Association in Guyana, for example, for members of the Bar to give service in at least one case per year. The question is how can a constant supply of lawyers be guaranteed to provide legal aid service? Also, in some of the countries, for example, Guyana, in matrimonial proceedings legal aid is provided, voluntarily, by assignment of the Chief Justice, if the party cannot afford the expense of legal representation.

VI. THE OFFICE OF OMBUDSMAN

In some of the CARICOM countries, the office of the Ombudsman is established by the Constitution providing an important functionary with responsibility for investigating allegations of faults in administration resulting in injustice being suffered by complainants and providing for redress by the State. Certain matters of state are, however, excluded from the Ombudsman's jurisdiction. These include action taken for the purpose of protecting the security of state and matters affecting relations and dealings between the Government and any other Government as is so certified by the Head of the State or by a Minister of Government. The grant of honours and awards by the Head of State is also excluded from investigation by the Ombudsman. Also, the Ombudsman is not authorized to investigate any action in which the complainant has or had a remedy by way of proceedings in a court or a right to appeal, reference or review to or before an independent and impartial tribunal, other than a court.

VII. ALTERNATIVE DISPUTE RESOLUTION

In Jamaica, an Alternative Dispute Resolution programme was instituted in 1990 as a project between Capital University Law School in the United States of America and the Jamaica Bar Association with funds provided by the Ford Foundation. The aim of the initial project envisaged training in mediation techniques intending to adopt procedures in order to encourage and develop the settling of disputes outside the court system.

A private Dispute Resolution Foundation has since been established with the following as some of its objectives:

- a) to establish methods of resolving disputes;
- b) to educate the public about viable alternatives to litigation;
- c) to encourage the public to use viable alternatives to litigation without resorting to extra-legal means of resolution;
- d) to establish court-sponsored ADR processes to alleviate the pressure on the court system in the settling of certain types of disputes;
- e) the training of suitable personnel.

Next, Dr. Luis Marchand, the other rapporteur for the topic, introduced document *Improving the administration of justice in the Americas: the access to justice and poverty in Latin America* (CJI/doc.6/99). Dr. Marchand described how difficult it was for the poor to have access to the courts. Mention was also made of a number of studies, done mainly under the aegis of the Inter-American Development Bank, which addressed the issue from a variety of angles. Those studies pointed up the fact that half the population in Latin America eked out a subsistence living; for economic and job-related reasons, these people had no real access to the courts. He also pointed out that regrettably the legislative projects to reform the State justice systems rarely concerned themselves with ensuring that the less fortunate had access to the courts. Finally, he pointed out that his intention in presenting the paper in question was to draw attention to the problem of the disadvantaged' access to the courts so that it might be taken into account. The following is the document presented by Dr. Marchand:

IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS:

the access to justice and poverty in Latin America

(presented by Dr. Luis Marchand Stens)

Human rights and democracy must be construed as fully interlinked concepts under a single political, economic, social, juridical, cultural and moral identity.

Within the context of this identity, democracy becomes the irreplaceable political framework for the full exercise of the fundamental rights of individuals, whose underpinnings lie in justice for all members of society, *ergo* in citizen access with no economic barriers or otherwise, to the bodies in charge of its administration, within the principle of actual and effective equality before the courts.

In other words, the full, effective exercise of human rights requires that access to justice not be restricted to equal legal status but that it be also, and fundamentally, an actual fact.

We would be disclosing nothing new when we point out that in several parts of the world, particularly in third world countries, there are large sectors of the population which have been, and still are, excluded from access to justice for various reasons, stemming from the lack of services and facilities, shortage of judges, lack of knowledge about individual rights, but chiefly due to a lack of resources. In the case of sectors under the poverty line (about 50% of the Latin American and Caribbean population) access to judicial instances is a virtually unreachable goal.

We shall make a few comments about this serious social issue regarding the inevitable need to assign due priority in the reform processes of the Judicial Power to facilitating access to justice for groups excluded since time immemorial because of their lowly economic *status*.

We shall start by pointing out that, although the reform of the system of administration of justice is a large-scale undertaking that ranges from the independence, authenticity and stability of the courts, financial self-reliance of the justice sector, legal and procedural reforms, simplified alternative approaches for the settlement of disputes, through to the infrastructure and appropriate location of facilities, computer skills, judicial statistics, etc., the central goal of modernization should be to make available to the whole population –particularly lower-income brackets, which in some countries include indigenous communities– access to a reliable, fair, efficient and expeditious system.

The fact that justice should reach the needier sectors offers a challenge that can no longer be postponed for the strengthening of the Rule of Law, for economic development seen in the proper light of human development, as well as juridical and political stability and safety, which are the indispensable foundations of national progress, harmony and cohesion.

In this connection I would like to mention that the relevant programs and projects sponsored by international financial agencies in coordination with their respective governments are geared to the gradual broad-ranging modernization of the justice system. They therefore do not address this aspect only but incorporate it into an overall framework in the assumption that, once the reform is completed, it will result in better services for the population at large.

Here I would like to remind you that the Inter-American Institute on Human Rights –with headquarters in San José, Costa Rica– and the Inter-American Development Bank are spearheading a major drive focused in facilitating access to justice to sectors traditionally excluded from Judiciary Power services.

In point of fact, the program called “Program to Support Improved Access to Justice in Latin America” –whose implementing agency is the aforementioned Inter-American Institute on Human Rights –which is scheduled for implementation in Bolivia, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua and the Dominican Republic- aims specifically at promoting the establishment of facilities for poorer sectors of the population. This will undoubtedly not only become a model for other similar programs but will also highlight the urgent need to give priority to this social problem of unquestionable significance for the consolidation of democracy, the full exercise of human rights, and economic and social development.

It is important to bring into the discussion a survey called *Governability and the reform of justice systems*. The author, Fernando Carrillo, former Minister of Justice of Colombia and advisor to the State and Civil Society Division of the IDB, mentions in connection with the reform of the justice systems as a whole, that it was the Inter-American Bank which launched this reflection on the reality of such systems at regional level, in a lecture called *Justice in Latin America and the Caribbean in the 90s: challenges and opportunities*, given in Costa Rica in February 1993.

It is pointed out in this paper that the Conference emphasized an in-depth look into study and reflection on the modernization of the justice systems; the advisability of disseminating the documents and conclusions of that trail-blazing meeting; the urgent need to launch a process of assessing experiences through regional and national workshops; the need to include the topic of justice in the Bank’s Eighth Capital Funds Replacement; to start, within the Bank’s schedule, an analysis of the administration of justice; and assign high priority to loan and technical cooperation operations in the new areas promoted by the conference.

As a result of the pioneering effort of the Conference, the modernization and strengthening of the justice systems was included in the activities of the IDB and incorporated in the Eighth Capital Funds Replacement, which enabled it to go further in-depth in the field work, study and reflection on the subject. Still in this connection, the aforementioned study also stresses the organization of workshops to develop regional and nationwide consensus in several countries, among them Colombia, Costa Rica, Honduras, Dominican Republic, Guatemala, and Peru. Also mentioned is the holding of workshops to assess experiences in judicial reforms, carried out in Washington, D.C., and Williamsburg, Virginia.

Returning to the topic of the administration of justice in poverty-stricken sectors, we would like to repeat what was stated in previous paragraphs regarding the urgency of drawing the attention of governments to the need to give special priority to this serious social problem within the process of State reform.

We could add as an illustration in the context of modernization, that government officials can take certain steps within relatively short time-frames to facilitate access for marginalized sectors. In fact, centers for the administration of justice can now be set up in rural areas far from court facilities, as well as in the outskirts of urban areas where the poorer segment lives; these would take care of family matters, guardianship of minors, domestic violence and labor issues. Also, the relevant authorities could increase the number of state bureaus responsible for providing legal counseling and defense in criminal matters for the poorer sectors, or set up free legal services where they are absent. For the populations living in jungle areas where communications take place along rivers, they could also set up

legal services on boats, as it is done now with medical care in areas of the Amazon. Similarly, universities and technical centers could be urged to set up guidance and advisory programs for the underprivileged.

In short, despite the sheer size of the social and juridical problems outlined here, and bearing in mind that the full reform of the justice system is not a task to be concluded over the short term because of its complex and gradual nature, it would still be possible –as stated earlier– to adopt practical, effective measures of decentralization, with those mentioned above being mere examples. Also, other civic and cultural steps could be taken to disseminate nationwide, through information campaigns, the rights of the population as well as the facilities the State could or can offer: legal service offices, state defense counsels, guarantees to which the poor who resort to the courts are entitled, etc.. The latter is important because there is a high degree of mistrust and fear among the poor when faced with the stateliness and formality of the courts.

But although the adoption of such measures and other similar ones could assist in easing the marginalization of those social sectors, the fact is that the problem goes beyond the confines of the modernization of the Judicial Power to become inserted in a broader context: the eradication of poverty as a priority target of development policies.

In a recently published survey called *The Inter-American Bank and the alleviation of poverty*, written by Nora Lustig, the Head of the Unit on Poverty and Inequality of this regional agency, and Ruthanne Deutsch, an economist with Unit, it is stated that, in the past decade, poverty has increased in most Latin American countries, and that this social bane has not visibly ebbed in the present decade.

The assessment of the above-mentioned survey regarding the social and economic reality of the region deserves close attention both from governments and economists, sociologists, political analysts, as well as opinion-makers in each of the countries of the region.

Starting from the premise that economic growth is basic to reduce poverty, it is claimed that, if the current levels of disparities are to continue, the reduction of poverty will be slow, stressing that one of the highest levels of distribution disparities in the world is to be found in Latin America and the Caribbean. This regrettable hemispheric record is concluded by stating that the eradication of extreme poverty in some of our countries would require 60 years and over two centuries in others, with a yearly per capita growth rate of 3%.

In contrast –adds the survey– the amount of transfers required to eradicate extreme poverty immediately is not too high; in most countries, provided there is the right focus, 0.5% of the GDP would be enough to provide the poor with the necessary transfers to lift them from their state of destitution. The problem therefore is not necessarily the availability of funds, except for the poorer countries of the region. What is needed is the political will backed by technically sound measures and programs.

At the start of these comments, we noted that the study published by the IDB should warrant detailed analysis by the governments, due not only to the in-depth investigation undertaken by the authors of the document, but also because of the clear definition of certain corrective factors within the reach of the respective governments, such as that specified in the transcribed paragraph.

In relation to this serious social problem, it is also vital to mention that the last report issued by the United Nations Development Program (UNDP) notes that the reduction in poverty in Latin America over the past few years is due more to economic recovery than to any progress in the redistribution of wealth. This report also adds that over the past few years, the gap between rich and poor has widened, to the extent that the poorest 20% of the regional population receive only 4.5% of national revenues. The UNDP adds that in 15 countries in this region, "an inverse ratio has been posted between economic growth and poverty," (which in my view rebuts the statement on the reduction of poverty).

In the work entitled *Poverty: an issue that cannot be postponed*, Bernardo Kliksberg, the Coordinator of the Inter-American Institute for Social Development of the IDB who compiled this significant publication, states that "the available sources tend to indicate expansion in the poverty-stricken segment that is slipping into the ranks of utter poverty".

Although not strictly necessary, it is convenient to reiterate that the scourge of poverty is the underlying causal factor at the very root of the problem, due to the impossibility of access to the administration of justice that today thwarts vast social sectors of our region. This is the reason why the treatment of this issue demands that it be viewed not only in the light of the specific constraints imposed by the lack of resources needed to exercise this fundamental human right, but also, in function of the guidelines that should shape the modernization of the State in terms of both its capacity to implement human development policies, as well as the reform of the Judiciary and consequently its democratization, namely access to justice for sectors endowed with sparse means of subsistence.

From the context outlined above, it may be inferred -although this is certainly no revelation - that economic growth in the countries of the region has neither resulted in any acceptable improvement in poverty levels, nor any progress in the redistribution of wealth, with a few rare exceptions. To the contrary - as stressed in the above-mentioned UNDP report- an inverse ratio has been noted between growth and poverty.

Consequently, there remains only the capacity for action and the moderating power of the State apparatus to further a deliberate or poorly-understood modernization that converts it into a spectator at the social drama of poverty and unemployment, with the foreseeable consequences of the collapse of national cohesion, an upsurge in grassroots demands, and the weakening of the democratic system.

Much to the contrary, the modernization of the State is intended to endow it with greater effectiveness, broader moderating powers, enhanced transparency and a better capacity to successfully implement an efficient, fair and people-driven economic market policy, while responding to the complex challenges of globalization. In turn, this also involves the core responsibility of eradicating poverty through appropriate social welfare and outreach programs. Along these lines of thought, the difference in market forces should be borne in mind between the industrialized nations and the developing countries. In the former, virtually the entire populace shares the benefits of well-regulated competitiveness; wealth distribution levels are more even; the organizations of civil society play a significant role and social welfare programs are broad-ranging and effective.

In contrast, the developing societies are burdened with vast sectors whose precarious livelihoods prevent them from participating in free market transactions. Additionally, wealth distribution levels are very uneven; participation by the organizations of civil society is often minor and limited by these same governments, and the social welfare services are unable to deal with the vast scope of the urgent problems of the population in precarious situations.

This is why the modernization of the State and its institutions should be undertaken on the basis of the real social, economic and cultural conditions in each country. Under situational pressures, seeking models that respond to other realities may prove to be not only illusory but also antithetical to a modernity that underpins the dynamics of sustainable development within a market economy while shoring up the affirmation of the democratic system. This is why a top-heavy State is just as counter-productive as an oppressive State.

As has been said, the social, economic and cultural realities of each society should guide the reform of the State and its institutions, in compliance with the target of consolidating a State of Law, and always bearing in mind that the modernization of the Judiciary and real access to the court system for the members of society constitute an essential part of this State of Law, which is a vital juridical and political framework for the full exercise of human rights, as well as juridical stability and security, in addition to economic progress understood in its true dimension of human development.

Before concluding these reflections on access to justice for sectors of humankind endowed with precarious resources, we deem it convenient to note in summary that in the early pages we mentioned that surmounting poverty is the main hurdle facing Latin America and the Caribbean. We also mentioned that democracy and human rights – which are indissoluble values – are grounded on the dominion of freedom and justice for all members of society and that access to the judicial system for everyone consequently constitutes a factor that is both unavoidable and vital to guaranteeing these values, with no economic deterrents or barriers of any other type.

In closing, we would like to quote a phrase by an outstanding Mexican intellectual, Carlos Fuentes, from an article published on the fiftieth anniversary of the Charter of the Organization of American States, in which the writer lucidly and profoundly highlights the importance to the future of our democracies by responding successfully to the challenge of eliminating poverty in among much of the population of Latin American and the Caribbean: "The major hazard for Latin America as this century draws to a close is that, having once reached unparalleled levels of democratic organization, if democracy is not translated into well-being for the majorities, Latin America will revert to the authoritarian tradition that has shaped its history".

* * *

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The introduction of document CJI/doc.6/99 opened up a preliminary discussion among the members of the Inter-American Juridical Committee. They all concurred on the importance of this agenda topic. In the quest to enhance the administration of justice, priority had to be given to training programs in the universities of the countries of the Americas. There was also an exchange concerning the basic principles of the administration of justice and on the need for the conduct of judges to reflect the basic values of the society. It was also noted that the judiciary had to be separate from and independent of the other branches of government. The members of the Inter-American Juridical

Committee pointed out that in many countries the procedural systems grossly retarded the administration of justice, causing the grave attendant consequences. A delay in administering justice was, they pointed out, tantamount to denying justice. This was as true of the domestic legal systems as it was of the inter-American system. Reference was made to the inhumane conditions in which many persons being prosecuted for crimes were kept, in violation of their human rights.

At this juncture in the proceedings, the Assistant Secretary for Legal Affairs reported on the work being done within the OAS on the subject of the administration of justice. He said that the work basically centered on the preparation of the agenda for the Lima Meeting, approved by resolution CP/RES.739 (1179/98). He also reported that the Department of International Law had complied with the mandate it had received from the Inter-American Juridical Committee at its previous regular period of sessions. That mandate was to request information from the member States on constitutional, legislative, and administrative measures that afforded protection and guarantees for judges and attorneys in the practice of their professions. That information was intended for the report that the co-rapporteurs on the subject would prepare. Finally, he reported on the documents that the Secretariat for Legal Affairs was preparing for the Lima Meeting.

A number of members said it was important that the Inter-American Juridical Committee should present a document at the Second Meeting of Ministers of Justice. The document should draw upon the above findings, listing the problems with the administration of justice in the countries of the Americas today. It was also suggested that the topic of out-of-court settlements and other non-judicial methods of settling differences be included, as well as the topic of prosecution for transnational crimes. In short, the suggestion was that the Juridical Committee work on some of the issues that might come up during the Lima Meeting, recommending specific ideas that might elicit concrete conclusions and recommendations from that Meeting.

Other members of the Inter-American Juridical Committee underscored how important it was that the OAS examine the topic of the administration of justice and that periodic meetings of the ministers of justice and attorneys general be held. It was pointed out that the Juridical Committee had to make a substantive, original contribution to those meetings. The States had to be reminded of their international legal obligations vis-à-vis the administration of justice, particularly with regard to human rights, indigenous populations (which must have their own system of justice), consular relations, investment protection treaties, extradition treaties, and treaties for judicial cooperation, and so on. With that, the ministers of justice will have a basis for deciding whether they wish to continue to move forward in this area. It was also suggested that the Juridical Committee might point out what the consequences of failure to comply with those obligations might be; for example, the consequences a State's failure to comply with a decision adopted by some international body such as the Inter-American Commission or Court of Human Rights. The Inter-American Juridical Committee also noted the problem of concurrent jurisdictions and other juridical problems that could be brought to the attention of the Lima Meeting. All this would be couched within the framework of treaties, custom and general principles of law. The Juridical Committee was of the view that the Lima Meeting should focus on specific topics, such as swift access to the courts in criminal and civil matters, alternative sentences (imprisonment could be reserved for the more serious offenses), and the transfer of convicted persons under the terms of the *Inter-American Convention on serving criminal sentences abroad*.

The members of the Juridical Committee also had before them document *Improving the administration of justice in the Americas: protection of and guarantees for judges and lawyers in the exercise of their functions* (CJI/doc.7/99), sent by Dr. Jonathan T. Fried. That document appears below:

**IMPROVING OF THE ADMINISTRATION OF JUSTICE IN THE AMERICAS:
protection and guarantees for judges and lawyers in the exercise of their functions**

(presented by Dr. Jonathan T. Fried)

This report of the rapporteur provides an update on activities of the Organization and other bodies related to improving the administration of justice in the Americas, and recommends that the Juridical Committee approve a draft resolution with a view to providing input for the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, to be held in Lima, Peru on March 1-3, 1999.

I. BACKGROUND

Consideration by the Inter-American Juridical Committee

A summary of the ongoing work of the Juridical Committee on improving the administration of justice in the Americas is set out in Section B.2. of the *Annotated agenda* of the Committee (OEA/Sec.Gral. CJI/doc.7/98, 1 December 1998).

At its fifty-third regular meeting, by resolution CJI/RES.20/LIII/98, the Juridical Committee requested the General Secretariat to distribute the report of the rapporteur (CJI/SO/II/doc.42/94 rev.2 corr.1) to member States with the request that the information contained in the report on constitutional, legislative, and administrative measures for protection and guarantees for judges and lawyers in the exercise of their functions be brought up to date by the appropriate authorities and sent to the co-rapporteurs before the end of 1998. Although the Department of International Law of the Secretariat for Legal Affairs made such a request on October 14, 1998, to date no government responses have been received.

As set out in more detail below, the rapporteurs are in the process of compiling a review of developments in member States that have occurred since the time of the Juridical Committee's last comprehensive report on the subject.

The Working Group on improving of the administration of justice

The Working Group on the Administration of Justice, created in 1994, began its work slowly. In 1995, it focused its attention on the kinds of courses or training that might be offered on a regional basis, and in 1996, conducted [a] a three-day course at the Central American Court of Justice in Managua on the application of international law in domestic courts; [b] a three-day course, also in Managua, on recent developments in penal, procedural and commercial law; and [c] a three-day seminar for advanced training of public defenders, held at the School for Public Defenders in Tarija, Bolivia.

Since then, as reflected in the relevant resolutions of the General Assembly (AG/RES.1481 [XXVII-O/97] and AG/RES.1561 [XXVIII-O/98]), the Working Group has been instructed to continue to organize seminars and workshops aimed at achieving greater judicial cooperation in the region and at increasing awareness of international rules of law, "in keeping with resources allocated in the program budget". Further activities have been constrained by the limited budgetary resources available.

The Summit of the Americas process

At the Summit of the Americas, held in Miami in December 1994, the Miami *Plan of Action* makes a general reference to the issue of justice, under initiative 1 on strengthening democracy, where it states that governments will support the OAS by "encouraging opportunities for exchange of

experiences among member States' democratic institutions, particularly legislature-to-legislature and judiciary-to-judiciary."

Between Summits, from January 1995 to March 1998, at the initiative of the Secretary General of the Organization of American States, Dr. César Gaviria, the Permanent Council in April 1997 began considering holding of a Meeting of Justice Ministers, under auspices of the OAS. That meeting was held on December 1, 2 and 3, 1997, in Buenos Aires, Argentina. At that meeting the following issues, among several others, were discussed:

- a) the rule of law. New institutions and developments: experience at the national, regional and subregional level; and
- b) modernizing and strengthening the administration of justice. The process of reform, new trends and the use of such mechanisms as arbitration, mediation and conciliation.

At the end of the discussions, the delegates to the meeting agreed upon a series of conclusions and recommendations, as described in the Final Report. Ministers concluded that the strengthening of legal systems requires the adoption of norms to preserve the independence of the Judiciary and continuous enhancement of their institutions for the effective application of the rule of law.

During the ministerial meeting in Buenos Aires, the Government of Peru offered to host the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, which was originally scheduled for the second half of 1998. The Government of Chile offered to host the meeting of government experts that was held to incorporate the basic issues relating to the justice sector into the Summit of the Americas, in Santiago, Chile.

At the Second Summit of the Americas, held in Santiago, Chile in April 1998, governments decided, among other conclusions, to:

- develop mechanisms that permit easy and timely access to justice by all persons;
- strengthen, as appropriate, systems of criminal justice founded on the independence of the judiciary and the effectiveness of public prosecutors and defense counsels, recognizing the special importance of the introduction of oral proceedings;
- expedite the establishment of a justice studies center for the Americas;
- promote mutual legal and judicial assistance that is effective and responsive;
- support the convening of periodic meetings of Ministers of Justice and Attorneys General of the Hemisphere within the framework of the OAS.

Pursuant to resolution CP/RES.739 (1179/98), on December 11, 1998 the Permanent Council adopted the agenda for the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas. Included in the proposed agenda are the following topics for discussion by Ministers:

1. Access to Justice
 - 1.1 Legal aid and defense services
 - 1.2 Initiatives for the legal protection of minors
 - 1.3 Incorporation of alternative conflict settlement methods in national administration of justice systems
2. Training of judges, prosecutors, and judicial officials

- 2.1 Experiences acquired in basic, advanced and specialized training of judiciary personnel
- 2.2 Mechanisms to promote judicial independence and the effectiveness of public prosecutors or attorneys general
- 2.3 Creation of a center for judicial studies in the Americas

Recent developments

Government responses to the request of the Department of International Law of the Secretariat for Legal Affairs are likely to reveal significant improvements in the institutional framework to preserve and promote protection and guarantees for judges and lawyers in the exercise of their functions. Domestic developments, such as the discussion in Argentina regarding the creation of a Council of Magistrates to promote independence in the appointments process, increased focus on capacity building through bilateral, regional and multilateral technical assistance, such as the World Bank-funded programs for improvements in the judiciary in Venezuela, the growth of regional adjudicative procedures, such as the Andean Court of Justice and the evolution of dispute settlement procedures in Mercosur under the Protocol of Ouro Preto, and the increasing activity of such non-governmental organizations as the Andean Commission of Jurists, all suggest that the majority of member States recognize the importance of promotion and preservation of an independent judiciary and protecting the ability of lawyers to exercise their professional responsibilities.

At the same time, institutional and physical threats to judicial independence and the legal profession remain in many countries. Inadequate financing or allocation of budgetary resources, a problem identified in the report of the rapporteur in 1994, remains a serious problem. So too does the threat posed by declarations of states of emergency, as described by the periodic reports of the UN special rapporteur on Human Rights and States of Emergency (for example in ECOSOC doc.E/CN.4/Sub.2/1995/20). Individual abuses in the 1995-998 period in several countries are well-documented by various sources, including in the annual and special reports of the UN Special Rapporteur on the Independence of Judges and Lawyers (see, for example, his report on his mission to Peru, ECOSOC doc.E/CN.4/1998/39/Add.1, to Columbia, ECOSOC doc.E/CN.4/1998/39/Add.2, his annual report of 1997 in ECOSOC doc.E/CN.4/1997/32 which includes descriptions of country situations in Argentina, Bolivia, Brazil, Chile, Columbia, Ecuador, Guatemala, Mexico, Peru, and the USA), the Seventh and Eighth editions of *Attacks on Justice: the harassment and persecution of judges and lawyers* published by the Centre for the Independence of Judges and Lawyers under the auspices of the International Commission of Jurists as well as the annual activities reports of the International Commission of Jurists, and cases that have come before the Inter-American Commission on Human Rights.

Conclusions

Member States remain committed to the proposition that improving the administration of justice in the Americas, including the independence of the judiciary and guarantees for lawyers in the exercise of their functions, is an essential element of democratic governance in the hemisphere, as set out in the *Declaration of Panama* on the inter-American contribution to the development and codification of international law [AG/DEC.12 (XXVI-O/96)]. Experience gained through the activities of the Working Group on the Administration of Justice demonstrates clearly that dissemination of information, seminars and workshops serve to both raise awareness and to demonstrate to those who would give lower priority to the judicial branch the importance attached by other member States of the OAS.

Although subject to confirmation by government responses to the request of the Department of International Law of the Secretariat for Legal Affairs and to a more detailed review by the co-rapporteurs of the various reports of continued institutional and physical threats to the independence of the judiciary and to the ability of lawyers to perform their functions, it is apparent that the record in the hemisphere remains mixed. In other words, while there have been several positive

developments since the time of the Juridical Committee's last comprehensive report in early 1995, given the continuing threats it is important that governments continue to give priority to efforts to promote judicial independence and to protect judges and lawyers in the exercise of their functions.

With a view to the forthcoming Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, there is thus good reason for the Committee to reaffirm its recommendations set out in the 1995 report of the Juridical Committee. That report recommended that appropriate organs of the Organization:

- a) call the attention of member States to the basic principles on the independence of the judiciary and on the role of lawyers, as set out in the *UN basic principles on the independence of the judiciary* and *Basic principles on the role of lawyers*; and the Inter-American Commission on Human Rights' *Measures necessary to enhance the autonomy, independence and integrity of the members of the judicial branch* and supported by the International Bar Association *Code of minimum standards of judicial independence*, the Universal declaration on the independence of justice;
- b) urge member States to bring to the attention of judges, lawyers, members of the executive and the legislature and the public in general the international instruments in this field; and
- c) encourage all member States give priority to efforts to respect these principles.

The documents that set out the basic principles referred to in paragraph a) were set out in Annexes to the 1995 report of the Juridical Committee. For ease of reference, they are attached again as Annexes to this report.

The Juridical Committee's 1995 report also recommended that the Organization maintain under continuous review developments in member countries that may threaten the independence of the judiciary or that impede adequate protection of judges and lawyers in the exercise of their functions, through:

- a) developing a system for annual reporting by member countries on such threats and on steps taken to enhance independence and protection, as well as for receipt of information from non-governmental organizations on these matters;
- b) review of these reports by an appropriate organ of the Organization; and
- c) publishing, in an appropriate summary form, the results of such reports and reviews.

However, in view of the extensive and ongoing review of developments and reporting taking place at the United Nations, and taking account of the activities of non-governmental and other organizations in this regard, this recommendation should be considered again at a future meeting of the Juridical Committee.

The attached draft resolution therefore recommends that Ministers of Justice and Attorneys General, at their second meeting, give effect to the first recommendation of the Juridical Committee and reaffirm their commitment to the work of the Organization in this field.

* * *

ANNEX I

INTERNATIONAL BAR ASSOCIATION CODE OF MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

The Jerusalem Approved Standards as adopted in the Plenary Session of the 18th IBA Biennial Conference held on Friday, 22 October 1982, in New Delhi, India.

A. Judges and the Executive

1.
 - a) Individual judges should enjoy personal independence and substantive independence.
 - b) Personal independence means that the terms and conditions of judicial service are adequately secured, so as to ensure that individual judges are not subject to executive control.
 - c) Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.
2. The judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.
3.
 - a) Participation in judicial appointments and promotions by the Executive or Legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body, in which members of the judiciary and the legal profession form a majority.
 - b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.
4.
 - a) The Executive may participate in the discipline of judges, only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
 - b) The power of removal of a judge should preferably be vested in a judicial tribunal.
 - c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.
5. The Executive shall not have control over judicial functions.
6. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.
7. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.
8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.
10. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.
11.
 - a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
 - b) In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.

- c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.
12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
 13. Court services should be adequately financed by the relevant government.
 14. Judicial salaries and pensions shall be adequate, and should be regularly adjusted to account for price increases independently of Executive control.
 15.
 - a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
 - b) Judicial salaries cannot be decreased during the judges' service except as a coherent plan of an overall public economic measure.
 16. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.
 17. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.
 18.
 - a) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.
 - b) The Executive shall not have the power to close down, or suspend, the operation of the court system at any level.

B. Judges and the Legislature

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.
20.
 - a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation, unless the changes improve the terms of service.
 - b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.
21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before ad hoc tribunals.

C. Terms and Nature of Judicial Appointments

22.
 - a) Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement, at an age fixed by law at the date of appointment.
 - b) Retirement age shall not be reduced for existing judges.
23.
 - a) Judges should not be appointed for probationary periods except for in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment.

- b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.
- 24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.
- 25. Part-time judges should be appointed only with proper safeguards.
- 26. Selection of judges shall be based on merit.
- D. Judicial Removal and Discipline
- 27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.
- 28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to a final and reasoned disposition of this request by the Disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.
- 29.
 - a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.
 - b) All disciplinary action shall be based upon standards of judicial conduct promulgated by law, or in established rules of court.
- 30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.
- 31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.
- 32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.
- E. The Press, the Judiciary and the Courts
- 33. It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.
- 34. Subject to Standard 41, judges may write articles in the press, appear on television and give interviews to the press.
- 35. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.
- F. Standards of Conduct
- 36. Judges may not, during their term of office, serve in Executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.
- 37. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence taking.

38. Judges shall not hold positions in political parties.
 39. A judge, other than a temporary judge, may not practice law during his term of office.
 40. A judge should refrain from business activities, except his personal investments, or ownership of property.
 41. A judge should always behave in a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.
 42. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.
 43. Judges may take collective action to protect their judicial independence and to uphold their position.
- G. Securing Impartiality and Independence
44. A judge shall enjoy immunity from legal actions, and the obligation to testify concerning matters arising in the exercise of his official functions.
 45. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.
 46. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.
- H. The Internal Independence of the Judiciary
47. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

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ANNEX II

UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE

Unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Quebec, Canada) June 10th, 1983.

Preamble

Whereas justice constitutes one of the essential pillars of liberty;

Whereas the free exercise of fundamental human rights as well as peace between nations can only be secured through respect for the rule of law;

Whereas States have long established courts and other institutions with a view to assuring that justice be duly administered in their respective territories;

Whereas the Charter of the United Nations has established the International Court of Justice as its principal judicial organ in order to promote the peaceful solution of disputes between States, in conformity with the principles of justice and international law;

Whereas the Statute of the International Court of Justice provides that the latter shall be composed of a body of independent judges, elected regardless of nationality, which as a whole shall be representative of the main forms of civilisation and of the principal legal systems of the world;

Whereas various Treaties have established other courts endowed with an international competence, which equally owe exclusive allegiance to the international legal order and benefit from representation of diverse legal systems;

Whereas the jurisdiction vested in international courts shall be respected in order to facilitate the interpretation, application and progressive development of international law and the promotion of human rights;

Whereas national and international courts shall, within the sphere of their competence, cooperate in the achievement of the foregoing objectives;

Whereas all those institutions, national and international, must, within the scope of their competence, seek to promote the lofty objectives set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the latter Covenant and other pertinent international instruments, objectives which embrace the independence of the administration of the justice;

Whereas such independence must be guaranteed to international judges, national judges, lawyers, jurors and assessors;

Whereas the foundations of the independence of justice and the conditions of its exercise may benefit from restatement;

The World Conference on the Independence of Justice recommends to the United Nations on the consideration of this Declaration.

I. INTERNATIONAL JUDGES

Definitions

1.01 In this chapter:

- a) "judges means international judges and arbitrators;
- b) "court" means an international court or tribunal of universal, regional, community of specialized competence.

Independence

1.02 The international status of judges shall require and assure their individual and collective independence and their impartial and conscientious exercise of their functions in the common interest. Accordingly, States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities.

1.03 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

1.04 When governing treaties give international courts the competence to determine their rules of procedure, such rules shall come into and remain in force upon adoption by the courts concerned.

1.05 Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

1.06 The ethical standards required of national judges in the exercise of their judicial functions shall apply to judges of international courts.

1.07 The principles of judicial independence embodied in the Universal Declaration of Human Rights and other international instruments for the protection of human rights shall apply to judges.

1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

1.09 No reservation shall be made or admitted to treaty provisions relating to the fundamental principles of independence of the judiciary.

1.10 Neither the accession of a state to the statute of a court nor the creation of new international courts shall affect the validity of these fundamental principles.

Appointment

1.11 Judges shall be nominated and appointed, or elected in accordance with governing constitutional and statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination dependent on nationality.

1.12 Only a jurist of recognized standing shall be appointed or elected to be a judge of an international court.

1.13 When the statute of a court provides that judges shall be appointed on the recommendation of a government, such appointment shall not be made in circumstances in which that government may subsequently exert any influence upon the judge.

Compensation

1.14 The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

Immunities and Privileges

1.15 Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred upon chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the court concerned may lift these immunities.

1.16 Judges shall not be liable for acts done in their official capacity.

1.17 a) In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations;

b) States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

Discipline and Removal

1.18 All measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules of their courts, and be within their jurisdiction.

1.19 Judges shall not be removed from office, except by a decision of the other members of the court and in accordance with its statute.

Judges Ad Hoc and Arbitrators

1.20 Unless reference to the context necessarily makes it inapplicable or inappropriate, the foregoing articles shall apply to judges ad hoc and to arbitrators in public international arbitrations.

II. NATIONAL JUDGES

Objectives and Functions

2.01 The objectives and functions of the judiciary shall include:

- a) to administer the law impartially between citizen and citizen, and between citizen and the state;
- b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;
- c) to ensure that all peoples are able to live securely under the rule of law.

Independence

2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law and without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

2.03 In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

2.04 The judiciary shall be independent of the Executive and Legislative.

2.05 The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature.

2.06 a) No ad hoc tribunals shall be established;

b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts;

c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, and only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts;

d) In such times of emergency:

I. Civilians charged with criminal offenses of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional competent civilian judges;

II. Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures, so as to insure that the detention is lawful, as well as to inquire into any allegations of ill treatment;

- e) The jurisdiction of military tribunals shall be confined to military offenses committed by military personnel there shall always be a right of appeal from such tribunals to a legally qualified appellate court.

2.07 a) No power shall be exercised so as to interfere with the judicial process.

- b) The Executive shall not have control over judicial functions.

- c) The Executive shall not have the power to close down or suspend the operation of the courts.

- d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

2.08 No legislation or executive decree shall attempt retroactively, to reverse specific court decisions, nor to change the composition of the court to affect its decision-making.

2.09 Judges may take collective action to protect their judicial independence.

2.10 Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.

Qualifications, Selections and Training

2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.

2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.

2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.

- 2.14 a) There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives.

- b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultations with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.

2.15 Continuing education shall be available to judges.

Posting, Promotion and Transfer

2.16 The assignment of a judge, to a post within the court to which he is appointed is an internal administrative function to be carried out by the judiciary.

[Explanatory Note: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body.]

2.17 Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law. Article 2.14 shall apply to promotions.

2.18 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.

[Explanatory Note: Unless this principle is accepted, transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.]

Tenure

- 2.19 a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment.
- b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists.

2.20 The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually.

[Explanatory Note: This text is not intended to exclude part-time judges. Where such practice exists, proper safeguards shall be laid down to ensure impartiality and avoid conflict of interests. Nor is this text intended to exclude probationary periods for judges after their initial appointment, in countries which have a career judiciary, such as in civil law countries.]

- 2.21 a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.
- b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.
- c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

2.22 Retirement age shall not be altered for judges in office without their consent.

2.23 The executive authorities shall, at all times, ensure the security and physical protection of judges and their families.

Immunities and Privileges

2.24 Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity.

- 2.25 a) Judges shall be bound by professional secrecy in relation to their deliberations, and to confidential information acquired in the course of their duties other than in public proceedings.

- b) Judges shall not be required to testify on such matters.

Disqualifications

2.26 Judges may not serve in an executive or a legislative capacity unless it is clear that these functions are combined, without compromising judicial independence.

2.27 Judges may not serve as chairmen or members of committees of inquiry, except in cases where judicial skills are required.

2.28 Judges shall not be members of, or hold positions in, political parties.

[Explanatory Note: This text is not intended to permit membership of judges in political parties in countries where under law or practice such is excluded, but to lay down standards limiting the scope of judicial involvement in countries where such membership is permissible.]

2.29 Judges may not practice law.

[Explanatory Note: See note 2.20]

2.30 Judges shall refrain for business activities, except as incidental to their personal investments or their ownership of property.

2.31 A judge shall not sit in a case where a reasonable apprehension of bias on his part may arise.

Discipline and Removal

2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

- 2.33 a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary.
- b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33 (a).

[Explanatory Note: In countries where the legal profession plays an indispensable role in maintaining the rule of law and judicial independence, it is recommended that members of the legal profession participate in the selection of the members of the court or board, and be included as members thereof.

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36 With the exception of proceedings before the Legislature, the proceedings for discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37 With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.

2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status.

Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities, appropriate for the maintenance of judicial independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

2.42 The budget of the court shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the appropriate authority.

2.43 The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44 The head of the court may exercise supervisory powers over judges on administrative matters.

Miscellaneous

2.45 A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

2.46 Judges shall accord respect to members of the Bar.

2.47 The state shall ensure the due and proper execution of orders and judgments of the courts; but supervision over the execution of orders and judgments process shall be vested in the judiciary.

2.48 Judges shall keep themselves informed about international conventions and other instruments establishing human rights' norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

2.49 The provisions of Chapter II: National Judges, shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless reference to the context necessarily makes them inapplicable or inappropriate.

III. LAWYERS

Definitions

3.01 In this chapter:

- a) "lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters;
- b) "Bar Association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

3.03 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3.04 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

Legal Education and Entry into the Legal Profession

3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

3.06 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer, and of human rights and fundamental freedoms recognized by national and international law.

3.07 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

3.08 Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer, and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil and political rights.

Education of the Public Concerning the Law

3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant available remedies.

Rights and Duties of Lawyers

3.10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and , where required, c) representing him before courts, tribunals or administrative authorities.

3.11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his clients and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

3.14 No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.

3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

3.17 Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.

3.18 The independence of lawyers, in dealing with persons deprived of their liberty, shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement of dependence between the lawyer who acts for them and the authorities.

3.19 Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client relationship; b) the right to travel and to consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work; d) the right to accept or refuse a client or a brief.

3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly, and in particular shall have the right to: 1) take part in public discussion on matters concerning the law and the administration of justice, b) join or form freely local, national or international organizations, c) propose and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political social and cultural life of their country.

Legal Services for the Poor

3.22 It is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural as well as civil and political, of individuals and groups.

3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

3.24 Lawyers engaged in legal service programmes and organizations, which are financed wholly, or in part, from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with this professional conscience and judgment.

The Bar Association

3.25 There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers, recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join, in addition, other professional associations of lawyers and jurists.

3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

Functions of the Bar Associations

3.27 The functions of the Bar Association in ensuring the independence of the legal profession shall be, *inter alia*:

- a) to promote and uphold the cause of justice, without fear or favour;
- b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;
- c) to defend the role of lawyers in society and preserve the independence of the profession;
- d) to protect and defend the dignity and independence of the judiciary;
- e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;
- f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;
- g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
- h) to promote a high standard of legal education as a prerequisite for entry into the profession;
- i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
- j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
- k) to affiliate with, and participate in, the activities of international organization of lawyers.

3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting a foreign lawyer to obtain the necessary right of audience.

2.29 To enable the Bar Association to fulfil its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: i) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to take

proceedings affecting or calling into question the integrity of a lawyer. In such cases the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that professional secrecy is safeguarded.

ANNEX III

BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, in August and September, 1985, and welcomed by the 40th General Assembly of the United Nations in resolution 40/146, adopted December 13, 1985.

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedom, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats of interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted or its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to division. This principle is without prejudice to judicial review or to mitigation of commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of Service and Tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their terms of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

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ANNEX IV

BASIC PRINCIPLES ON THE ROLE OF LAWYERS

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba in August and September 1990, and welcomed by the 45th General Assembly of the United Nations in resolution 45/121, adopted December 14, 1990.

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligations of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards Guaranteeing Protection of Those Facing the Death Penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to Lawyers and Legal Services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special Safeguards in Criminal Justice Matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.

Qualifications and Training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and Responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;

b) Assisting clients in every appropriate way, and taking legal action to protect their interests;

c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the Functioning of Lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential.

Freedom of Expression and Association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional Associations of Lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary Proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

ANNEX V

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

1992 REPORT ON "MEASURES NECESSARY TO ENHANCE THE AUTONOMY, INDEPENDENCE AND INTEGRITY OF THE MEMBERS OF THE JUDICIAL BRANCH"

RECOMMENDATIONS

1. Guaranteeing that the executive and legislative branches will not interfere in matters that are the preserve of the Judicial Branch;

2. Providing the Judicial Branch with the political support and the means needed for it to be able to fully perform its function of guaranteeing human rights;

3. Ensuring the exclusive exercise of jurisdiction by the members of the Judicial Branch, and elimination of special courts;

4. Guaranteeing that judges cannot be removed from office as long as their conduct remains above reproach, and ensuring that panels are set up to consider the cases of judges who are accused of unethical conduct or corruption;

5. Maintaining of the constitutional state; and declaration of states of emergency solely when absolutely necessary, in terms of Articles 27 of the American Convention on Human Rights and 4 of the International [Covenant] on Civil and Political Rights, structuring this system in such a way that it does not appreciably change the independence of the different organs of government, so that human rights legislation remains basically untouched;

6. Ensuring unrestricted access to the courts and legal remedies and enabling the victim, when called for, to take action to bring those responsible to book;

7. Ensuring the effectiveness of the judicial guarantees essential for the protection of human rights, and removing the obstacles that prevent their swift and appropriate application;

8. Guaranteeing due process of law -- accusation, defense, evidence and judgment -- through the public holding of trials;

9. Returning to judges the responsibility for disposition and supervision over persons detained;

10. Guaranteeing that judges will be immediately notified of all facts and situations in which human rights are restricted or suspended, regardless of the juridical status of the accused;

11. Removal of the procedural obstacles that cause trials to run on for extended periods of time, so that cases may be tried within a reasonable period and settled by means of judgments covering all points involved;

12. Ensuring separate hearings of criminal cases and of civil or administrative disputes involving compensation for injuries and losses.

* * *

ANNEX VI

FEDERACION INTERAMERICANA DE ABOGADOS

RESOLUTION 13

April, 1993

Study of the Essential Conditions that Guarantee the Independence and Efficiency of the Judiciary

Whereas:

The overwhelming majority of the countries in the Hemisphere have re-established the basic norms of representative democracy;

That one of the most essential conditions for the consolidation of democracy is the respect for the norm of due process;

The existence of an independent, modern and efficient judiciary is an essential component of due process;

The ratification of the American Convention on Human Rights, and the legal value of the American Declaration of the Rights and Duties of Man, creates an obligation for the States of the Hemisphere to ensure respect for due process, including the existence of Judiciaries that are independent, modern, and efficient,

Resolves

1. To recommend that the Hemispheric States undertake to critically review the norms that could effectively ensure the independence and efficiency of the judiciary.

2. To recommend that those studies should include, *inter alia*:

- a) The systems to appoint and promote judges
- b) Preparation of judges
- c) Efficient judicial procedures
- d) Access to justice under conditions of equality.

3. Keep the subject under consideration by the Inter-American Bar Association.

The members of the Inter-American Juridical Committee also examined document Improving

the administration of justice in the Americas: proposed amendments to the agenda of the Second Meeting of Ministers of Justice or Ministers or Attorneys-General of the Americas (Peru, 1-3 March, 1999) (CJI/doc.18/99), presented by Dr. Sergio González Gálvez.

Dr. González Gálvez made an oral presentation of his document. He emphasized that the agenda for the Second Meeting of Ministers of Justice should include a topic on crimes of international transcendence, and mentioned drug trafficking as an example.

Dr. González Gálvez also noted that the temporary hand-over of suspects from one country to another for purposes of prosecution had also been among the topics added to the agenda. This would be the procedure whereby a suspect would be handed over to another country for trial, and then returned to serve out his sentence. The procedure would help solve some of the evidentiary and witness-related problems that arise in such cases.

He also pointed to the topic of corruption of judges in the prosecution of drug-trafficking cases, a problem in need of immediate correction. Lastly, in the case of transnational crime, he explained that in Mexico a number of measures had been adopted given the nature of these acts; as examples he cited the denial of bail and tougher sentencing guidelines. He explained that the ideal would be for the Inter-American Juridical Committee to send a document containing observations on the agenda of the Lima Meeting, which could then be taken up at that Meeting's first session. The terms of that document appear below:

IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS:

proposed amendments to the agenda of the Second Meeting of Ministers of Justice or Ministers or Attorneys-General of the Americas

(Peru, 1–3 March 1999)

(presented by Dr. Sergio González Gálvez)

RECOMMENDATIONS

In light of the foregoing conclusions and in order to pursue the process initiated in the current meeting, we recommend the following measures which could ensure enforcement of prompt and effective administration of justice by the Courts of each State, in accordance with their own legal systems:

To continue the process of strengthening the juridical systems of the Americas, in order to ensure full access to justice for all individuals, guarantee the independence of judges and the effectiveness of prosecutors or inspectors, and promote the establishment of responsible and transparent systems, as well as the modernization of institutions.

2. To approach the processes of modernization of justice from multidisciplinary standpoints, not confining them only to merely normative aspects. This means they should include issues such as: organizational analysis, management systems and social yields, as well as economic and statistical studies.

a) To promote ways of settling private disputes out of court.

3. To incorporate alternative methods for the settlement of disputes into national systems for the administration of justice.

4. To pursue the enhancement of inter-American instruments for legal cooperation, for which purpose every State should assess its effective application of the current instruments and implement measures to disseminate them more broadly, as well as promoting the formulation of other

instruments that may be necessary to cope with new needs.

5. To request the General Secretariat of the OAS to prepare a study on the obstacles to the effective enforcement of legal and judicial cooperation treaties, on the basis of reports submitted by the member States on such obstacles.

6. To promote the exchange of national experiences and technical cooperation in prison and penitentiary policies, within the framework of the OAS.

7. To promote the sharing of experiences and technical cooperation in matters related to criminal prosecution systems, access to justice and judicial administration.

8. To reinforce the fight against narcotraffic, corruption, organized crime and transnational criminal activity, on the basis of trying or handing over the alleged criminal, and to adopt multilateral mechanisms as needed to continue combating these scourges through actions such as the following:

- a) protection of witnesses and exchange of sentenced prisoners to serve their sentences,
- b) or timely exchange systems for charged prisoners from one country to another for trial;
- c) more intensive exchange of information among police and legal authorities;
- d) legal aid, including requests from the Ministry of Justice, guaranteeing due process to
- e) which every accused prisoner has the right;
- f) adopt special measures to strengthen the action of Courts that should try international crimes.

9. To welcome the forthcoming Summit of the Americas to be held in Santiago, Chile in April 1998, with the inclusion of the topic on strengthening the judicial system and the administration of justice as a particularly relevant issue.

10. To convene an analytical meeting of government experts, with the support of the OAS, in Santiago, Chile, before 28 February 1998, on basic issues in the Justice Sector, with a view to incorporating this analysis into the Summit of the Americas.

11. To support regular meetings being held of the Ministers of Justice or Ministers or Attorneys-General of the Americas, with the technical support of the General Secretariat of the Organization.

12. To accept with gratitude the offer of the Government of Peru to host the II Meeting of Ministers of Justice or Ministers or Attorneys-General of the Americas, to be held during the second half of 1998, and to agree that the Agenda for this meeting should be prepared within the framework of the OAS, focused on topics ranked as top priority.

[pursuant to document CP/RES.737 (1176/98), the II Meeting will be held on 1, 2 and 3 March 1999]

13. To request the OAS to provide the necessary funding for the implementation of the various recommendations stemming from this First Meeting of Ministers of Justice or Ministers or Attorneys-General of the Americas.

Lastly, the Inter-American Juridical Committee approved resolution *Improving the administration of justice in the Americas: protection of and guarantees for judges and lawyers in the exercise of their*

functions(CJI/RES.4/LIV/99). There, among other points, the Juridical Committee asked the co-rapporteurs to present a report on the Second Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas at the Juridical Committee's next regular period of sessions and to continue to study this topic, taking the most recent events and developments into account. The idea was that another report should be presented at the next regular period of sessions, which the Juridical Committee would be holding in August 1999.

The text of that resolution appears below:

**IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS:
protection and guarantees for judges and lawyers in the exercise of their functions**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

REAFFIRMING their commitment to cooperate as a consultative body of the Organization of American States (OAS) in juridical matters with the initiatives in the Hemisphere towards promoting the progressive development and codification of international law as well as improving the administration of justice in the Americas, including the independence of the judiciary and providing guarantees for judges and lawyers in the proper exercise of their functions;

CONSIDERING that the timely and effective administration of justice is an essential element of democratic governance in the Hemisphere, as set out in the Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law [AG/DEC.12 (XXVI-O/96)];

RECALLING that improving the administration of justice has been under consideration by the Inter-American Juridical Committee and that a preliminary report on that subject was presented to the General Assembly of the Organization in 1995 (CJI/SO/II/doc.42/94 rev.2, 13 February 1995 and its *corrigendum*);

RECOGNIZING that further reforms have been undertaken by several member States of the OAS since the time of the Inter-American Juridical Committee's last report (CJI/SO/II/doc.42/94 rev.2, 13 February 1995 and its *corrigendum*) to strengthen the independence of the judiciary and to provide better guarantees for the ability of lawyers to exercise their functions;

CONCERNED nonetheless that physical and institutional threats to the independent exercise of judicial functions and the practice of the legal profession have continued to arise in some member States of the OAS;

RECALLING that Ministers of Justice and Attorneys General of the Americas, at their First Meeting in Buenos Aires, Argentina, in December 1997, concluded that the strengthening of legal systems requires the adoption of norms to preserve the independence of the Judiciary and also to provide continuous enhancement of their institutions for the effective application of the rule of law;

CONSCIOUS that the General Assembly of the OAS in resolution AG/RES.1561 (XXVIII-O/98) instructed the Juridical Committee, in collaboration with other organs of the Organization and with national and international institutions involved with this subject, to continue its work on enhancement of the administration of justice in the Americas;

TAKING NOTE of the convening of the Second Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas [AG/RES.1562 (XXVIII-O/98)] on March 1 to 3 1999, as well as of its Agenda [CP/RES.739 (1179/98)]; and

CONSIDERING the reports submitted by the rapporteurs of the topic and by other members of the Juridical Committee (CJI/SO/II/doc.42/94 rev.2 corr.1; CJI/doc.43/98; CJI/doc.7/99; CJI/doc.6/99 and CJI/doc.19/99), as well as resolutions CJI/RES.II-19/94, CJI/RES.12/LI/97 and

CJI/RES.20/LIII/98, *“Improvement of the administration of justice in the Americas: protection and guarantees for judges and lawyers in the exercise of their functions”*,

RESOLVES TO:

1. Offer its firm support to and broadest collaboration with the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas aiming, in particular, at its successful outcome and the timely compliance by member States of the OAS with the resolutions it may adopt.

2. Express its satisfaction for the progressive development and the priority given to the topic of the Administration of Justice in the Americas in the Hemisphere’s agenda, as is the prerogative of the Inter-American Juridical Committee (CJI/RES.I-02/85, dated 26 January 1985), which, in addition, fully justifies the continuing interest shown in this matter.

3. Express also its satisfaction that the topic is now being addressed, within the OAS, by the principal policy makers of the Governments in the area of the administration of justice, which on the one hand reasserts the appropriateness of the Organization as a useful forum for dialogue in the Hemisphere on the most relevant matters pertaining to the Continent, while on the other hand guaranteeing that the said topic will be addressed with the depth and expertise it deserves and as warranted by the current circumstances in the Americas.

4. Recall that, although two out of the four topics to be addressed by the aforesaid Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas solely concern the national interests of the OAS member States, the whole agenda of the Conference is a response to the international juridical commitments made by them, particularly under the provisions of articles 18, 25 and 26 of the 1948 American Declaration of the Rights and Duties of Man, and articles 7 and 8 of the American Convention on Human Rights, the 1969 Pact of San José de Costa Rica, pursuant to the provisions of articles 1 and 3, items j) and n) of the OAS Charter.

5. Bear in mind, therefore, that any eventual breach by a member State of the OAS of the said international juridical obligations regarding the right of access of individuals to the judicial process on a timely basis and with the appropriate guarantees, would not only seriously affect one of the purposes and principles of the Organization, but also cause that member State, according to the general rules of International Law, to bear the resulting international responsibility, which could, in turn, give rise to an international dispute.

6. Call attention to the fact that, for the same reasons, the coordination of efforts of the Hemisphere are of the utmost importance, as will be, no doubt, the aim of the Second Conference of Ministers of Justice or of Ministers or Attorneys General of the Americas for the effective enforcement by every member State of the OAS, within its domestic jurisdiction, of the aforesaid international juridical obligations.

7. Indicate that it considers of the highest priority initiatives conducive to establish, enhance and consolidate multilateral and bilateral mechanisms with a view to making the cooperation between the national agencies responsible for the administration of justice most timely and efficient, so that ultimately, borders are no longer used in the Americas as obstacles to the effective administration of justice, although fully respecting national sovereignty.

7. Suggest, within this framework, that the following subjects deserve special attention among the matters being discussed during the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas:

- a) application of the obligation either to extradite or prosecute the alleged perpetrators of crimes with international dimensions;

- b) protection of witnesses;
 - c) exchange of convicted persons among the States being their nationals involved;
 - d) system of provisional surrender of individuals for prosecution;
 - e) taking into account the need to observe the due process of law, to adopt special measures to strengthen the functioning of tribunals in trials of crimes of international dimensions, and
 - f) alternative dispute settlement procedures.
9. Request that the joint rapporteurs:
- a) present a report on the Second Conference of Ministers of Justice or of Ministers or Attorneys General in the Americas at the next regular period of sessions of the Juridical Committee;
 - b) continue with the study of this topic taking account of the latest developments in order to present a further report at the next regular period of sessions of the Juridical Committee in August 1999.

This resolution was unanimously approved during the 29 January 1999 session, present the following members: Drs. João Grandino Rodas, Kenneth O. Rattray, Eduardo Vío Grossi, Sergio González Gálvez, Orlando R. Rebagliati, Brynmor T. Pollard, Gerardo Trejos Salas, and Luis Herrera Marcano.

On March 1, 2 and 3, Lima, Peru was the venue for the Second Meeting of Ministers of Justice mentioned earlier. Representing the Juridical Committee at that Meeting was Dr. Brynmor T. Pollard. Chapter IV of document REMJA-II/doc.21/99 rev.1, *Final report of the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas*, contains the Meeting's conclusions and recommendations, contained the meeting's conclusions and recommendations, divided into five points: access to justice; the preparation of judges, prosecutors and officers of the court (including the establishment of the Center for Studies in Justice of the Americas), the strengthening and development of inter-American cooperation (including the items related to cyber crime and extradition, confiscation or seizure of assets, and reciprocal juridical assistance), prison and penitentiary policy, and the venues for the third and fourth meetings of ministers of justice.

At its twenty-ninth regular period of sessions (Guatemala City, June 1999) the General Assembly adopted resolution AG/RES.1616 (XXIX-O/99) wherein it asked the Inter-American Juridical Committee to continue with its study of the various aspects of the enhancement of the administration of justice in the Americas, maintaining the necessary coordination and as much cooperation as possible with other organs of the Organization working on this subject.

At the fifty-fifth regular period of sessions of the Inter-American Juridical Committee (Rio de Janeiro, August 1999), Dr. Luis Marchand again introduced document *Administration of justice in the Americas: access to the courts and poverty in Latin America* (CJI/doc.6/99).

Dr. Marchand addressed a number of matters, such as justice and governability. He said that the main objective of modernizing the justice systems should be to put access to a reliable and fair system within reach of the entire population, especially the more needy sectors and indigenous peoples.

He mentioned the increase in poverty in Latin America, despite the global growth that the region had experienced. He noted that the reform of the judicial branch of government had to take this factor

into account so that the need to give the more disadvantaged sectors access to the courts was addressed and promoted. He also said that the major international programs were those being conducted by the IDB in Central America, Ecuador and Bolivia.

In practice, the rapporteur pointed out, decentralized justice organs have been established in heavily populated areas, whether agricultural or urban, to handle cases in family and labor law. Dr. Marchand also reported that universities were being encouraged to provide *pro bono* legal services. The results, he reported, had been very good and had lessened to some degree the mistrust in the judicial branch of government.

Some members of the Inter-American Juridical Committee expressed concern over the reference to justice in traditional forms, as opposed to greater emphasis on alternative means of settling disputes, since all too often the judicial branch of government is overburdened with cases and as a result becomes less efficient in adjudicating them. It was suggested that the Juridical Committee might well explore the alternatives.

Dr. Jonathan T. Fried, rapporteur for the topic, noted that the two topics that seemed to be generating the most interest at the present time were the independence of the judicial branch of government and access to justice.

Dr. Brynmor T. Pollard, co-rapporteur for the topic, introduced document *Improving the Administration of Justice in the Americas* (CJI/doc.34/99), which appears below:

IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS

(presented by Dr. Brynmor Thornton Pollard)

Dr. Luis Marchand Stens presented to the session of the Juridical Committee the paper entitled *Improving the administration of justice in the Americas* (OEA/Ser.Q CJI/doc.6/99), dated 20th January 1999, in his capacity as one of the rapporteurs for that subject.

Dr. Marchand developed the main theme of the paper that the effective exercise and enjoyment of fundamental human rights require that access to justice should be available particularly to the disadvantaged members of the population. He opined that particularly in developing countries of the world, there are large sectors of the population which have been and continue to be excluded from access to justice because of lack of human and other resources. In the countries of Latin America and the Caribbean there are large sectors of the population who, because of poverty, seems permanently excluded from access to the judicial processes.

Because of this, Dr. Marchand informed the meeting that there is recognition by governments of the region and by institutions, particularly the Inter-American Development Bank (IADB) that reform of the system of administration of justice in the countries of the Americas needed to be undertaken as a priority. Dr. Marchand mentioned, in particular, initiatives taken by the Inter-American Development Bank in recognising that the persistence of poverty among the population will frustrate plans for development and growth of the respective economies. There must be reliable, fair, efficient and expeditious systems, including procedural reforms, and the introduction of alternative methods and procedures for the settlement of disputes. The central goal should be modernisation of the judicial system.

Dr. Marchand contended that the fact that justice should reach the most needy sections of the population offers a challenge that can no longer be postponed. There are implications for the rule of law, for economic and human development, as well as juridical and political stability and safety which are indispensable foundations of national progress, harmony, and cohesion.

Dr. Marchand mentioned the useful role being played in some countries by the professional members of the staff of universities in providing their services in the force of consultations gratuitously.

During the discussions which followed Dr. Marchand's presentation, the query was raised whether providing greater access to the legal processes by the disadvantaged sectors of the population might not result in increasing significantly the work of an already burdened judicial system. It is for this reason that more resources should be provided by the State for the justice sector to facilitate the introduction of alternative dispute settlement mechanisms and procedures into the legal system.

It was contended that the formal nature of the courts was forbidding to certain sectors of the population resulting in mistrust of the existing system. It was suggested, for example, that consideration might be given to dispensing with the requirement to give oral testimony and, instead, relying on authenticated documentation recording the testimony of persons litigating in the courts. Reference was made to the innovation introduced into the Brazilian legal system providing for the informal hearing and determination of disputes through mechanisms and procedures provided by the State as an alternative to the formal processes in the courts. It was revealed, however, that the results have not been as satisfying and encouraging as was expected.

Disappointment was voiced during the discussions with the fact that proposals from the Juridical Committee did not seem to be given the attention and consideration they deserve by the policy-making organs of the Organisation. Reference was also made to proposals from the Juridical Committee for inclusion in the agenda of the Second Meeting of Ministers of Justice or Ministers or Attorneys-General of the Americas which the Juridical Committee considered to be of importance as to merit consideration by such an important meeting of policy-makers. It was however, recognised by members of the Juridical Committee that, for example, the organisation of the annual meeting of the General Assembly over the relatively short period of four days, one of which was traditionally allocated for ceremonials did not allow for meaningful consideration of proposals emanating from the Juridical Committee.

The possibility of providing more frequent access to the Permanent Council on a committee of the Council by the Juridical Committee or its Chairman or vice-Chairman might be explored.

Finally, the Inter-American Juridical Committee adopted resolution *Improvint the administration of justice in the Americas: protection of and guarantees for judges and lawyers in the exercise of their functions* (CJI/RES.6/LV/99). That resolution reads as follows:

IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS:

protection and guarantees for judges and lawyers in the exercise of their functions

THE INTER-AMERICAN JURIDICAL COMMITTEE,

REAFFIRMING that improving the timely and effective administration of justice in the Americas, including the independence of the judiciary and guarantees for lawyers in the exercise of their functions, is an essential element of democratic governance in the hemisphere, as set out in the *Declaration of Panama* on the Inter-American Contribution to the Development and Codification of International Law [AG/DEC.12 (XXVI-O/96)];

CONSCIOUS that, at their First Meeting, Ministers of Justice or Ministers or Attorneys General of the Americas concluded (OEA/Ser.K/XXXIV.2 REMJA/doc.32/97) that "strengthening the legal system requires the adoption of standards that will preserve the independence of the judiciary, the continued improvement of its institution's abilities to enforce the rule of law, and the training and continuous upgrading of magistrates, judges, prosecutors and public attorneys, and other officials related to the justice system, as well as lawyers", and thus recommended "to continue the process

of strengthening the legal systems of the Americas..." and "...to guarantee the independence of the judiciary and the effectiveness of prosecutors and public attorneys...";

RECALLING the commitment of Heads of Government of the hemisphere, at the Second Summit of the Americas, to "strengthen, as appropriate, systems of criminal justice founded on the independence of the judiciary and the effectiveness of public prosecutors and defense counsels...";

REITERATING the desirability of appropriate organs of the Organization undertaking on an ongoing basis an examination, through regular reports and the publication of information, of problems that could threaten the independence of the judiciary in member States or hamper the adequate protection of judges and lawyers in the exercise of their functions, as well as measures that have been adopted to cope with these problems, as set out in the report of the co-rapporteur attached to resolution CJI/RES.II-19/94 (OEA/Ser.Q CJI/SO/II/doc.42/94 rev.2 corr.1);

WELCOMING the conclusion of the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas (OEA/Ser.K/XXXIV.2 REMJA-II/doc.21/99 rev.1) endorsing the establishment of a Justice Studies Center for the Americas to provide support for the reform and modernization of justice systems in the region;

HAVING BENEFITTED from the report on the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, submitted by Dr. Brynmor T. Pollard (OEA/Ser.Q CJI/doc.23/99), an examination of a study on access to justice prepared by Dr. Luis Marchand Stens (OEA/Ser.Q CJI/doc.6/99) and on protection and guarantees for judges and lawyers in the exercise of their functions, submitted by Dr. Jonathan T. Fried (OEA/Ser.Q CJI/doc.7/99); and background studies prepared by the Secretariat for Legal Affairs on *Access to Superior Courts* (SG/SLA DDI/doc.1/98) and on *Access to Lower Courts* (SG/SLA DDI/doc.2/98);

RESOLVES:

1. To recommend that the Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas include on its agenda the following topics:

- a) guarantees for the independence of the judiciary and protecting judges and lawyers in the exercise of their functions, and
- b) improving access to justice.

2. To request that the Permanent Council forward all previous work approved by the Inter-American Juridical Committee and, in particular, its study of the independence of the judiciary in member States and the adequate protection of judges and lawyers in the exercise of their functions, attached to resolution CJI/RES.II-19/94, to the Working Group on the Improving the Administration of Justice in the Americas and other organs of the Organization responsible for preparing the agenda for the Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, with a view to:

- a) urging member States to bring to the attention of judges, lawyers, members of the executive and legislative branches and the general public the international instruments in this field; and
- b) encouraging all member States to give priority to efforts to uphold these principles.

3. To designate Dr. Gerardo Trejos Salas as the Inter-American Juridical Committee's representative at the Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas.

To continue its study of this subject, taking into account the conclusions of the Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas.

This resolution was unanimously adopted during the 14 August 1999 session, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi, and Gerardo Trejos Salas.

7. Preparation of a report on human rights and biomedicine and on the protection of the human body

At the fifty-fourth regular period of sessions of the Inter-American Juridical Committee (Rio de Janeiro, January 1999), Dr. Gerardo Trejos, rapporteur for this topic, gave an oral presentation on the subject, promising to present a written report at the next regular period of sessions. Dr. Gerardo Trejos asked for ideas from the members of the Inter-American Juridical Committee concerning the method to be used to approach this topic. He said that his inclination was to present the text of a model law on the subject or a preliminary draft convention. He had excluded the idea of preparing an inter-American declaration, as a similar instrument already existed at the international level. He also said that UNESCO had created an International Bio-ethics Committee and that within the year, that Committee would meet to list the unlawful practices now in use in this area.

Some members of the Inter-American Juridical Committee were of the view that it was somewhat premature to decide what the best course to follow –a declaration or a convention- would be. It was noted that any such decision would have to come after further examination of the subject, for a better understanding of what the limits of the study would be. Proceeding in this way, the civil and criminal implications of the subject could also be determined, as well as the need to internationalize it. It was suggested that the first step should be to compile the documents that have been done in the various countries and at the international level, with a view to preparing an initial report that would be informative in nature.

Other members were of the opinion that the preliminary report should focus on the present status of the issue on the international plane. The next step would be to examine domestic laws on the subject. The report would be very helpful in undertaking the studies within the Inter-American Juridical Committee.

Lastly, other members of the Juridical Committee pointed to the inter-relationship between the regional and global realms where this topic was concerned. They also emphasized the relationship between law and ethics, the latter being the area where the proposed topic seemed to be developing.

At the fifty-fifth regular period of sessions of the Inter-American Juridical Committee (Rio de Janeiro, August 1999), Dr. Gerardo Trejos Salas presented document *Bioethics: draft model law or legislative guide to medically assisted fertilization* (CJI/doc.31/99 rev.4).

As to the chances of producing a convention on this subject, Dr. Gerardo Trejos was of the opinion that the law was not yet sufficiently developed. He said that there was a bioethics convention in Europe, but not at the inter-American level. Dr. Trejos explained that he had presented this legislative guide on assisted fertilization, which now appeared as the second part of the above-named document.

As for the question of approach, Dr. Trejos explained that he had considered leaving aside certain issues that were, from the standpoint of ethics, very controversial. In the end, however, he had concluded that they, too, needed to be examined. One of the more controversial issues, he said, was that of excess or unused embryos in *in vitro* fertilization (the American Convention on Human Rights does not, he noted, protect the embryo). He also elaborated upon a number of concepts having to do with the right to life, the notion that *in vitro* fertilization should be reserved for heterosexual couples, and the Catholic Church's position on the matter.

Dr. Gerardo Trejos addressed several related topics and the problem they posed in international law. These included the individual's right to know his origins; life as a right from the moment of conception, and this issue's relationship to that of excess embryos in artificial insemination or fertilization procedures. He pointed out that the idea of the legislative guide was to regulate these practices, which often occurred outside the law. The ultimate goal was to protect the embryo and avoid certain practices such as surrogate maternity, *post mortem* paternity, and others. He felt that the text that he was presenting at this session was a moderate one that, while encouraging artificial insemination or fertilization procedures, also placed limits on certain aberrant practices.

The text, he said, did not encourage alternative reproduction methods such as a woman's decision to be a single mother (either as a single, widowed or divorced woman). Instead, it encouraged only therapeutic methods. This was, he felt, a very controversial topic.

Dr. Gerardo Trejos then went on to explain the legislative guide, dwelling on some of its articles.

Some members of the Inter-American Juridical Committee suggested that the title of the topic could be "model legislation on medically assisted fertilization." The general view was that this was an interesting but complex topic and that more time was needed to assimilate it and compare the draft with the domestic laws of the various countries. It was also commented that there were fundamentalist and liberal schools of thought on this issue and others that fell somewhere between the two, and that the decision to adopt one or another had to be carefully weighed. It was noted that certain sectors of the population -such as women and the gay community on one side, and religious and humanist movements on the other- have their own particular interests in this issue and would have to be taken into account.

It was also observed that some explanation would first have to be given as to why the specific issue of medically assisted insemination or fertilization was chosen within the broader topic. It was suggested that as this would be model legislation, some thought might be given to preparing a number of possible alternatives from which one would be selected. It was also commented that one approach would be to avoid the more controversial topics and prepare instead a general model law intended to complement the various domestic laws already on the books.

After hearing Dr. Trejos' presentation, the members of the Inter-American Juridical Committee congratulated him for the document and expressed their interest in this very new topic. The decision was to inform the Pan American Health Organization of the document via a letter from the Chairman of the Inter-American Juridical Committee. In that letter, the Chairman would also request background information and views on the scientific, medical and technical factors that had to be considered, and any other information or observation that PAHO might consider relevant to this matter.

The text prepared by Dr. Gerardo Trejos appears below:

BIOETHICS:

draft model law or legislative guide on doctor-assisted fertilization

(presented by Dr. Gerardo Trejos Salas)

FIRST PART

I. Introduction

Many of the achievements in science today are based on genetics. The advance in knowledge of the human genome (that is, the set of genetic data contained in the chromosome complement of an organism) is opening up new ways to influence or act upon it. This knowledge

now permits considerable progress in diagnosis and sometimes in the prevention of an ever-increasing number of diseases. It has also already facilitated the discovery of therapeutic solutions.

One of the fields where most advances are recorded in the application of biology and medicine is in the field of human reproduction. As usual, however, science progresses faster than the law and this is why the legislator and judge are frequently unsure about social realities that give rise to lawsuits to be decided by the judge, despite there being no legal solution for such disputes.

A good example of this is the decision by the Family Court, Center Section, San Salvador, at 9:30 a.m. on July 13, 1995, which was called upon to settle a dispute on doctor-assisted filiation (remember that there are no rules on this matter in San Salvador law) and stated the following:

“... there is an immediate need for States to enact laws that regulate such status since, in general, scientific progress is in front of the law, with a delay in the latter's adaptation, and this lag between science and law creates a legal vacuum with respect to concrete problems that, of course, must be legally settled, nor can children born in such circumstances be abandoned or left defenceless”.

This is why, in the absence of a legal rule in the Member Countries of the Organization of American States member countries (with the exception, as we will see, of the Province of Quebec in Canada and some States in the United States and, in some particular instances, Costa Rica and Bolivia), we prefer to limit this report to the consequences of biomedicine in human procreation and have drafted a legislative guide or model law for the purpose of providing the legislators in the Inter-American System member countries with some guidelines for preparing future legislation on this issue. We consider this line of action more practical and useful than preparing a draft declaration or American convention on the subject.

II. The techniques of artificial human reproduction

Assisted or doctor-assisted reproduction, also called artificial insemination, unlike natural reproduction, is the result of a doctor-assisted operation, either through insemination or implantation of an embryo in a woman after the ovum has been fertilized in the laboratory (*in vitro* fertilization, IVF).

Its purpose, according to the majority of those who defend the use of such techniques, is exclusively therapeutic, although the purpose of doctor-assistance is not to cure male or female sterility or infertility, but to permit the couple to procreate in spite of their status, or to avoid transmission of disease.

These techniques are based on artificial insemination and *in vitro* fertilization. In the latter, fertilization occurs outside the human body, that is, is carried out extra-corporally.³⁰⁸ These are non-sexual methods of reproduction to achieve procreation in humans.

In artificial insemination, once the semen has been extracted from the male, it is inserted into the woman's vagina either via the cervix of the uterus (intracervical insemination) or directly inside (intrauterine insemination).

³⁰⁸ Children born by this method are called “test-tube babies”. The term is incorrect because no fetus or embryo has so far been able to grow outside its natural environment, the womb.

In artificial insemination, there is a difference between the homologous method (artificial insemination with the husband's semen, in the case of a married woman) and the heterologous (where the semen is not the husband's but from a third-party donor).³⁰⁹

In the case of in vitro fertilization the ovum is taken from the woman's body in the laboratory, usually by means of laparoscopy, in the event where it is impossible for the semen to fertilize naturally inside the Fallopian tubes. Once the ovum has been fertilized outside the woman's body, it is inserted in the uterus for it to develop. That is why we speak of transferring embryos from the laboratory to the uterus for implantation.

Intratubar transference of gametes is a variation on the aforementioned technique. This is an operation that consists of depositing the recently removed ova together with the fresh or frozen semen inside a woman's Fallopian tubes using the same surgical intervention as in collecting ova for fertilization.

Artificial insemination and in vitro fertilization have led to a new phenomenon that is commonly known as "host", "substitute" or "surrogate mothers". This is the case of a woman who is inseminated with the sperm of a man married to another woman, or of a woman who agrees to gestate and give birth to an embryo produced in vitro from a couple's ovum and semen. In these cases the "surrogate mother" pledges to surrender the baby, but in the first case we give the name "host mother" to a true mother, while in the second case it might be asked which is the true mother of the newborn baby, the genetic or the gestant.³¹⁰

The draft law expressly forbids the use of this method by stating in article 5 that any form of contract for the purpose of using the human body for reproduction or gestation is null and void.

III. Artificial insemination and in vitro fertilization in the inter-American system member countries

We have already mentioned that, of the Inter-American System member countries, only Costa Rica and Bolivia (very partially) control human artificial insemination, while some States in the United States and Province of Quebec in Canada have more widespread regulations on artificial insemination and in vitro fertilization, as follows:

a) Costa Rica: Paragraph three of article 72 of the 1974 *Family code* refers exclusively to the married couple. Consequently, it does not rule on the artificial insemination of couples living together *de facto* nor of single women who wish to undergo the techniques of doctor-assisted procreation.

With regard to married couples, two situations are regulated: a) doctor-assisted fertilization with the husband's semen (homologous) and b) doctor-assisted fertilization with a third party's semen (heterologous).

The first case presents no special problem. The only peculiar point lies in the artificial form of bringing the male gametes close to the ovum. Everything else, genetic material and husband's will,

³⁰⁹ Article 16 of the draft reads as follows: "Doctor-assisted fertilization may be performed homologously or heterologously. The former results from the union of gametes from the spouses or partners who form the beneficiary couple. Heterologous fertilization describes what happens when one or both gametes have been contributed by a third party.

³¹⁰ In these hypotheses a distinction is usually made between the "genetic" and the "biological" mother, referring to whoever contributed the ovum and whoever gestated, respectively. However, this is just one more of the many incorrect terms that prevail in this area, as Maria Carcaba Fernández points out so well – "because if biological refers to the fact of giving birth, then the genetic contribution is no less biological." See *Los problemas jurídicos planteados por las nuevas técnicas de la procreación humana*. Barcelona: J.M. Bosch, 1995, p. 17, note 10.

coincides with natural procreation. Artificial insemination with the husband's semen is equivalent to biological insemination, and legally to the sexual cohabitation of the spouses. This is clearly expressed in the third paragraph of article 72: "artificial insemination will be considered equivalent to cohabitation for the effects of filiation and paternity."

Consequently, the husband cannot impugn paternity by claiming and proving his impotence to generate.

In insemination with a third party's semen (heterologous), it must be ascertained whether the husband has given his consent or not. If it is performed with the consent of both spouses, insemination can also be considered to be equivalent to cohabitation for the purpose of filiation and paternity. Nor in this case can the husband impugn paternity.

The third paragraph of article 73 states that the third party who has donated the genetic material for the purpose of fertilization does not acquire the rights and duties inherent to the condition of father.

When insemination has been undertaken without the husband's consent, the solution seems clear: the husband has nothing to do with the child even when born in wedlock, since he has played neither a genetic nor voluntary part in the procreation process.

b) Bolivia: Paragraph 2 of article 187 of the 1972 Bolivian Family Code states that the husband's failure to recognize a child "is inadmissible if the child was conceived by artificial insemination of the wife with the husband's written authorization."

The broad terms of the Bolivian precept, which is by no means restrictive, implies that artificial insemination can be performed not only with the husband's but with any other male's semen.

c) United States of America: In the United States of America³¹¹ there are about thirty states that regulate AID and in practically all of them the child born by this procedure with the consent of the husband is declared legitimate and the husband declared father, while this status and all rights with regard to the child are denied to the donor of the semen.

For example, since 1967 in the state of Oklahoma and 1968 in California, paternity of the child born through AID is attributed to the husband who consented to this method. In the state of Louisiana, present article 188 (amended in 1976) states that "the husband cannot impugn paternity of a child born as a result of artificial insemination of the mother to which he has given his consent." In Florida the law states that "the child conceived by artificial insemination shall be considered irrefutably legitimate when both spouses have given their written consent for artificial insemination." (Florida Stat., sect. 742.11 [1986]. Domestic Relations, Chapter 742). The Family Code in the State of Texas states that a) if the husband consents to artificial insemination of his wife, the offspring is the legitimate child of both. Consent must be in writing. b) If a woman is artificially inseminated, the child is not the offspring of the donor unless he is the spouse (Sec.12.03). In the State of Washington it has been established that the donor of semen in the case of AID shall not be considered the father of the child procreated in this manner, unless he and the inseminated woman have agreed in writing that the donor should be considered as father (Wash. Rev. Ann. Sect. 26.26.050 (2), (1976). And the proposal for a standardized legislation on the matter is as follows: a) If, under the supervision of an authorized physician and with the husband's consent, the husband is then held to be the father of the child thus conceived. The husband's consent must be in writing and signed by both himself and his wife... b) The donor of semen delivered to a physician and authorized to be used in insemination of a married woman other than the donor's wife shall not be considered father of the child thus conceived (Uniform Parentage Act. Sec. 5) This proposed standardized

³¹¹ A propos, see José Luis Lacruz, Francisco Sancho and Francisco Rivero. *Derecho de familia*. Barcelona, 1989. v.2, p.156-157.

legislation has been accepted and approved as State law, in some cases with minor modifications, in Alabama, Dakota, Ohio, Rhode Island, Washington, Montana and Wyoming. (For further details on these laws see J. Healey: *Legal regulation of artificial insemination and the new reproductive technologies*, in *Genetics and the Law*, Milunsky Annas, pages 141ff. New York, 1985).

d) Canada: The new reproductive technologies are regulated in the new *Civil code* of Province of Quebec in five articles (art. 538-542 *Quebec Civil code*). It states first that the following regulation in which genetic material is not enough to forge a link of filiation between the donor and the child (art. 538). ... Then the regulation that prohibits the challenge or contesting of paternity of the child born by artificial insemination goes further to the set of doctor-assisted procreation techniques (art. 539). Moreover, the regulation also rules that a man who, after having given his consent to the doctor-assisted procreation, does not recognize his child, is civilly responsible for the mother and child. Lastly, it strictly prohibits any contract referring to substitute or surrogate motherhood.

e) OAS member countries that are preparing draft laws to regulate doctor-assisted fertilization. All countries in the Inter-American System member countries have submitted to parliament draft laws to regulate doctor-assisted procreation. One such case is Argentina (five draft laws respectively called techniques of assisted human reproduction, doctor-assisted human reproduction, assisted fertility, laws applicable to establishments that use assisted human reproduction and doctor-assisted human reproduction techniques).

In Colombia, on December 15, 1990, the First Committee of the House of Representatives approved a bill by congressman Javier Farcía Bejarano, who intended to regulate doctor-assisted human reproduction, but it did not become a law. And in 1999, congresswoman Maria Paulina Espinoza López submitted a new bill that has still not become law in the Republic.

A curious detail worth mentioning is that paragraph four of article 42 of Colombia's 1991 Constitution states that "Children born in or out of wedlock, adopted or naturally procreated or with scientific assistance, have equal rights and duties". This is probably the only constitution in the world that refers to doctor-assisted procreation.

IV. Doctor-assisted fertilization in the draft model law

The techniques of doctor-assisted fertilization are reserved for heterosexual couples. A very controversial question is whether assisted fertilization techniques should be reserved for spouses or partners or if they can also be enjoyed by single women – unmarried, widowed or divorced.³¹² The draft law implicitly offers a negative answer (article 15) when it claims that "doctor-assisted fertilization treatment must be requested jointly and solely by the husbands or partners who form the beneficiary couple."

There is what we see to be a decisive argument in favor of this thesis that has been developed in detail by Prof. Gérard Cornu.³¹³

³¹² Spanish and French legislation settle the matter differently. The former, in stating in article 1-6 that any woman can receive or use the techniques regulated by the LTRA, enables single women to resort to these techniques, whereas the latter only allows husbands or partners access to doctor-assisted procreation (article 311-30 of the Civil Code). Austria's legislation speaks of "matrimony or similar relationship" (article 2.1). Swedish law demands that they "are married" or live together in a stable relationship (Law 1A of 1984). Spanish law 35/1998 refers to therapeutic objectives in article 1 and 20, yet is somewhat incoherent when it states in article 6 that "any woman can receive or use the techniques regulated by present legislation" without the requirement of sterility, thereby contradicting the therapeutic purpose clearly stated in the first article.

³¹³ *La famille unilinéaire and La procréation dite artificielle et les structures de la parenté*, In: *L'art du droit en quête de sagesse*, Paris: PUF, 1998. p. 99-129.

In fact, it may happen that assisted procreation respects genealogy. It is the product of artificial insemination using the fresh or frozen sperm of the (non-sterile) husband. This is, likewise, the case of *in vitro* fertilization performed by a couple with the husband's or partner's genetic material. Assistance for the purpose of artificial procreation thus consists of a simple remanagement of the couple's genetic forces. The child conserves its natural genealogical tree without filiation being affected in any way.

In other cases, however, artificial insemination implies a different type of service. This occurs in the case of a couple or woman receiving outside genetic forces. In this case, assistance is not limited to remanaging but also involves an import. This can take place in three cases: a) when the single, widowed or divorced woman receives a man's anonymous genetic forces, directly and on her own (AID: artificial insemination with donor);

b) previously associated (*in vitro*) to female contributions from another woman (in vitro fertilization with donation of the embryo). The problem, as can be seen, involves both the sperm and ovum separately, as well as the embryo.

When this occurs the transplant deletes the ascending lines of the parentage, or one of them.³¹⁴ In its legal ascendancy the child cannot include the person who has donated the genetic material that allowed its procreation. So what is produced is a genetic transference from a producer to a user. In the three cases above, artificial procreation favors the formation of a single-parent or unilinear family.

The unique nature of these three cases is that the single woman brings into the world a fatherless child, since the donation will always remain anonymous. However, in contrast to "a woman's right to motherhood" (real or intended) is the child's undeniable right to a two-parent family, a right that cannot be at the whim of one of the parents. Reduced to having only one – unilateral – bond, the child finds itself necessarily deprived of any bond with the other parent (and, consequently, deprived of all rights to support and succession), and destined to have only one moral inheritance instead of two.³¹⁵

The objection to the above reasoning might be that the one-parent family already exists: in the situation of a widowed, divorced or legally separated woman with a child, and, above all, within a one-parent family there are in fact unilinear families: those resulting from the unilateral establishment of extramarital filiation and adoption by a single man of a child who is not his spouse's. Yet when looking closer, this kind of situation is radically different, since the unilinear family exists for external reasons (non-recognition by father, statement of abandonment of the unilaterally adopted child) other than by the mere wish of the mother. Furthermore, in some of these cases the child always has the *possibility* of one day establishing two-parent filiation through a process of investigation of paternity or by the father's recognition, thereby gaining support and successional rights, whereas in the case of fertilization of a single woman, this possibility does not exist.

These arguments above can be complemented by another three, in the opinion of the author of this report: 1. International law and constitutional law do not guarantee the right to have children. There is no right to father or motherhood (the right to procreation)³¹⁶. What exists is the desire and

³¹⁴ A propos, see GRANDSIRE, Odilie. *L'arbre généalogique: une espèce menacée*. In: *Mélanges à la mémoire de Daniel Huet-Weiller, droit des personnes et de la famille*. Strasbourg: L.G.D.J.-PUS, 1994. P. 199-218.

³¹⁵ CORNU, Gérard. *La procréation dite artificielle et les structures de la parenté*, p. 121.

³¹⁶ The author of this report acknowledges – and wishes to emphasize – that renowned jurists do consider that international law includes the recognition of a fundamental right to paternity and maternity. Most jurists who think in this way generally consider that this right derives from the right to form a family, recognized in the Declaration of Human Rights, in the United Nations Pact of Civil Rights and Policies, in the American Convention of Human Rights (art. 17.2) and in other international instruments. On the other hand, or parallel to this, many authors also talk of the "right of non-procreation".

yearning for father or motherhood, but not a right to legally protected procreation. 2. If a woman has the right to have a child on her own, then institutional courts may at some moment come to the conclusion that a man also has the right to doctor-assisted fertilization and can, therefore, lease a uterus to have a child that is his and his alone, as it would be discrimination if only women can enjoy this right. 3. It is unfair to raise parentless children from the moment of their unfair birth. Nevertheless, there are arguments that must be aired here, in favor of the theory that single women should also be allowed access to doctor-assisted procreation techniques.³¹⁷ Some such arguments are as follows:

This is a question of constitutionality: unquestionably, a woman without a mate should also be offered the constitutional possibility of procreating in equal conditions.

There are many children who would prefer not to have a father than to have one. Women who would rather have no mate than be a mate. What is unacceptable is to use the argument that if there is a mate, then this is the ideal situation for the woman to enjoy the ideal capacity of having a child. We are acting upon the utterly male-chauvinist basis that if a woman has a man then she can have artificial insemination and by the fact that she has a man she has fully permission to be a mother, whether this man leaves tomorrow or in a fortnight."

There is no guarantee that the existence of the father solves all problems, if the sociological evidence we have is that the father's presence in our society leads to a number of extraordinary problems... Statistically speaking, surveys very often have shown that the incestuous element in families are the uncles, grandfathers and even the fathers, not the mothers. The sociological reality of the world is that there are one-parent families, families with children from two or three marriages; divorced parents with a child from a previous marriage who raise children in their second marriage. Sociologically speaking, the nuclear family is in the process of disappearing. From an objective point of view, since 40% of the families are one-parent families or families that have already been through one or two marriages, to defend this image then is to defend an image and ideal of the past.

It is not an acceptable argument that a women must have a man as her mate, because the man is no intrinsic guarantee for raising this child and, moreover, it could be that we are increasingly in a world where single-parent families are able to educate and raise their children like any nuclear family. We will see functional and dysfunctional single parents, as there are functional and dysfunctional nuclear families.

But these arguments have also found a reflection in a provision that perhaps represents the prevailing way of thinking: "every child has the right to know who its parents are".

³¹⁷ JUNQUERA DE ESTÉFANI, Rafael. *Reproducción asistida, filosofía, ética y filosofía jurídica*. Madrid: Tecnos, 1998, p. 73, uses the following list of pros and cons on allowing a single woman access to this kind of motherhood. In favor: a) the frequent fact of the existence of one-parent families; b) adoption by an adult person is a legalized model; c) the desire for motherhood can be understood as a woman's right; d) some legal reports and texts accept it; e) nowadays, single mothers are not discriminated against; f) our Constitution leaves the possibility open; g) this allows more complete motherhood than adoption. Some of the arguments against are: a) the child's interests should prevail over the woman's desires; b) women do not have an absolute right to motherhood; c) with regard to one-parent families, an accidental undesired happening is not the same as the deliberate creation of the same; d) legal adoption by single adults means to repair the deficiencies of a filiation that is flawed from the start; e) there are also legal texts prohibiting this; f) the Constitution refers to protecting single mothers but does not encourage the situation; g) procreation by a single mother implies breakdown in the social sense of reproduction; h) it would be illogical for those who dispense with institutional protection to enjoy the advantages that these institutions offer; i) it seems incoherent to invoke the rights of single mothers to have children and deny them the right to surrogate maternity.

It states that it is a kind of aberration to believe that a father is essential to produce a child. Essential, of course, while there is no parthenogenesis.

The single mother, unmarried or widowed or divorced, would have something to say about who is the biological father of the creature implanted inside her. Will this child about to be born one day know who his father is or shall we turn to the image of the beehive, where the father is no more than the drone that dies after fertilizing the female? Are we promoting a culture of drones, a beehive governed by the queen bee?

Those who say that the nuclear or traditional two-parent family is in crisis are right. It is exactly because it is in crisis that it is changing, mainly because of the advance in communications technology; but we do not know where this change will lead us. So we cannot legislate on what will happen, we can only legislate on what we have now.

We cannot believe that, because of the crisis in which the world is at this moment, with this high rate of single-parent families, this pattern will eventually prevail.

We are in a transition stage, and soon humanity, like it has done several times before, returns to more patriarchal concepts or moves forward to concepts that are still unknown to us. Yet let us not endeavor to impose on future generations the concepts that do not prevail today, concepts that are struggling to prevail at a very unstable time where there is one way of thinking, on one hand, and something quite different, on the other.

We cannot base legislation on such an unstable state of evolution as ours today and, since we cannot legislate for the future family, since we know nothing about it, I would prefer that we legislate for the family that we have and know now, because it is what western civilization has been advocating and endeavoring to perfect, not only since but even before Christianity, when monogamy first prevailed. After all, there is a scientific basis for this: where did the idea of the two-parent family come from? Biology said: "For there to be a child, there must be a father and a mother". And culture added: "Now that both are responsible for what they produce, they must be responsible for as long as the child lives.

This is the kind of family that religions and societies have been imposing, enshrining and considering when legislating throughout the centuries.

The question now is whether the woman's right to have a child is a human right; I am afraid not, because she cannot appeal to any authority if she does not fulfill this right. The woman who does not find a father for her child cannot appeal to the Constitution to order some male to be at her disposal to fulfill her human right to be a mother. This is a right of another order, not a juridically protected right; it is a biological right, an inclination, yearning, desire, ambition. We can say the same about the paternal instinct, a man also has the instinct or natural inclination to be a father and if he fails to find a mother for his child, he cannot appeal to the Constitution either, to be granted this right. So the right to be a father or mother is not juridically guaranteed.

The child's right to have a father and mother lies in biology, in the Constitution and in laws. Granted that families are in a bad way because the fathers are a bunch of drunks; granted that families are in a bad way because the mothers are libertines; granted that the family is in a bad way because everyone is getting divorced. It's the fault of the crisis, of course. This period in which we live is uncertain and disturbing, a period of social change and transformation. The family reached its peak in Victorian times. The Victorian family that is questioned by today's generation, of course, but today's generation has been unable to replace the Victorian family by another just as productive. We are experimenting with test marriages. We are experimenting with

drones, with fleeting lovers, with one-night affairs to produce children; today's humanity is experimenting. But experiments are not an end in themselves, they are not valid because they are experiments, but when they produce a result.

Of the three or four hundred experiments performed by the Curies before discovering radium, only one was valid, the last one, the one that yielded the discovery; the others were interesting experiments but things cannot be judged during the experimental stage. We cannot legally freeze them while they are still in the experimental stage until we know that this is the society that is being designed for the future.

It is wiser to legislate on the remnants of institutions that for centuries have been strong rather than on the scaffolding built for institutions about whose future consolidation we know nothing or whether they will last for centuries. Let us not run that risk.

Laws reflect society, they do not order it. They order society inasmuch as they reduce to laws what society has already adopted, but laws cannot order social changes. This is why laws follow in the wake of custom, in the wake of experience and it is very dangerous to legislate before experience is consolidated.

Today as many as 40% of families are single-parent. There are also two-female families and we have still to ponder on whether biologically or culturally it is appropriate, for example, for a child to have two mothers instead of a father and a mother, or even the more complicated version of two fathers, a situation which we might face one day.

We are focusing too much on the parents or the mother and not enough on the child. Society should be concerned with seeking a way for this child to grow up in a fitting environment to ensure a solid, healthy, rather than an unwholesome upbringing that deviates from social norms. A way to socialize the child - a word whose sinful connotation has been discarded - in accordance with the society that we want to transform.

Donation or contribution of genetic material must be anonymous. Another much debated point is whether the genetic donation or contribution can be personalized or if it should remain anonymous, a question directly related to the problem of whether or not there exists a subjective right to know one's origins³¹⁸. The draft law is clearly in favor of anonymity and holds the bank of the clinic where the operation is performed responsible for "keeping the identity of the donor anonymous" (article 96). Nonetheless, the identity could be disclosed by court order in two situations: a) in the proven case of risk to the life of the mother or child to be born, whenever it seems essential to avoid this situation. In this case, disclosure of identity is restricted to the therapeutic medical environment involved, and publication is forbidden; and b) for health reasons, identity may be disclosed to the offspring born from assisted fertilization when he or she comes of age, or otherwise, to the person responsible or exerting parental authority.

Professor Cornu has outlined the respective advantages and disadvantages of personalized or anonymous donation, as follows:

³¹⁸ There is no precept in international law that gives a person the right to know his/her origins. Those in favor of this right base it on the Convention of Children's Rights, whose article 7 states that the child will have the right, as far as possible, to know who the parents are and to be raised by them. "But from this provision it cannot be deduced that a child has the right to know his/her biological origins. This logic, on one hand, is based on a precipitated likeness between "donor" and father, as if a purely biological relationship necessarily implies a social or juridical relationship. On the other hand, a right that is not exercised beyond "as far as possible", seems purely declaratory and not open to any sanction whatsoever.

A. Personalized donation presents the radical problem of knowing whether it is advisable to admit it.

- a) What characterizes the operation is that it neither solely nor principally implies a free transfer of genetic forces. First and foremost, this transfer is made from one person to another and each knows at least the other's identity. This is clearly a transfer.

Undoubtedly, the transfer is never direct, but intermediate. It always requires medical assistance, in the case of doctor-assisted artificial insemination performed in his surgery with fresh sperm, and even more so when dealing with specialized centers and laboratories. However, even in the latter cases, the link is established between producer and user if the principle of personalized donation has been adopted. Now, by the fact that the former has the voluntary intention or at least consent for the donation, then the genetic contribution is not only a material transfer, a medical operation, but also a voluntary transmission, a *juridical operation*. This clear link may exist in both the donation of sperm and donation of ovum or embryo.

- b) To accept such a procedure gives rise to major reservations (if I may be allowed to express a personal opinion). It has in its favor biological truth, as well as the principle claiming that it is everyone's basic right to know his/her origins. But to what end? What would be the outcome of identifying the progenitor, or more generally, the person who contributes the genetic material, when this contribution is made without any intent to paternity or maternity? Could a parental quality – support, succession or authority - be reasonably attributed to what is not a parental project but rather a philanthropic gesture to help procreate another? In the order of human relations, the evidence of the bond clashes with an even more sensitive objection. The idea that the donor may, if he so wishes, be calculatingly generous with his genetic forces gives the magnanimous donor a position of dominance that is barely tolerable. A shadow of a debt that is cast over the family in formation.

Last but not least, the donor's free choice for each of his genetic products would give credit to the idea that the genetic forces are, in the mind of the person who produces them, goods to be disposed of as he sees fit, that belong to him alone. And it seems essential for a contradictory analysis to prevail, that is, that genetic forces - the source of life - are not part of the patrimony of whoever creates them and that, although it is obvious that he is the owner of his own genetic property for the procreation of his own descendants, as an expression of his person and extension of his personality, he cannot consider that which is separated from him a disposable asset to be converted into genetic material intended for a procreation alien to him. The potential of these forces to perpetuate the species places them beyond the wishes of whoever decides not to invest them in his own progeny. It is a mere figure of speech to translate the idea of benevolence when we speak of "donating" semen or "donating" blood. This borrowing from the vocabulary of liberality tends only to convey gratitude for the gesture without postulating the state of patrimony of its subject, at least for whoever provides them from his own body. If the personalized donation is excluded, what then happens to the anonymous donation?

B. Anonymous donation. This type of donation is of a more discreet nature, apparently making it legitimate. Two pertinent criteria at least help to define it.

- a) First, the term anonymity implies the secret that the intervention of the operating agency establishes between donor and recipient. This secret actually does not exist at the moment the sperm or ovum is extracted, with regard to the clinic performing the operation, which keeps in its files (under professional secrecy) the data that identify the donor (especially his anthropometric data). The rule of secrecy thus means only: 1) that the personality of the person who contributes his genetic forces is not revealed to the applicant for artificial insemination or implantation after in vitro fertilization; 2) that no ulterior investigation is allowed to voluntarily or judicially establish filiation, either on the part of the donor (claiming the offspring, recognizing paternity or maternity), or by the offspring (investigation of paternity or maternity). The procedure, protected by secrecy

of the origin and by the exception of inadmissibility, avoids the inconvenience of maintaining between donor and receiver a link with dubious consequences.

- b) In a deeper sense, anonymous donation bears the mark of a second essential character to found its legitimacy: namely, its mediatory nature. The genetic contribution is not made to some person in particular but rather to an intermediary to whom it will belong. This circumstance involves a change in the purpose of the operation, that is, to both the objective destination and the underlying intention. The beneficiary of the contribution is, in a sense, the collective, society, the human species, and the intention becomes, as in the case of donating blood, an act of public generosity. The key word here is *public*. In this exchange the operation shifts from private to public law. Two related advantages become prominent. Not as a grafting *ad personam* of a genealogical tree but rather a seed tossed to the wind, the operation involves no personal relationship; it categorically cuts all juridical and human interference. It does not postulate that genetic forces pertain to commerce or patrimony; but that the operation belongs to the realm of philanthropy or patriotism. Just as some persons donate their blood, their life or their work to a foundation or to their country, others donate their genetic forces.³¹⁹

Multiple embryos. The draft law addresses multiple embryos in article 38, that is, those fertilized *in vitro* and conserved in a frozen state until they are ultimately destroyed. *In vitro* fertilization techniques actually require fertilization of a number of ova outside the mother's body to decide later, via a process of selection, which are to be implanted and which ultimately destroyed.

Doubt arises as to whether the destruction of the multiple embryos violates the consecrated right to life and physical integrity and article 4.1 of the *American convention on human rights*, which establishes the principle that human life is protected from the moment of conception.

Of course, in accordance with some laws of the Inter-American System member countries, the human being is human from the moment of conception (*ab ovo*), and not just from the moment of birth, as its birth contributes nothing specific to its human nature, which is already quite complete in the embryo and consequently in the fetus. From that moment on the human being must be respected.

Yet, as Professor Cornu aptly points out, the question is to know what this respect demands and tolerates, which is a matter of regime and measure rather than of nature. Some believe that the embryo is in full possession of the person's supposedly indivisible rights. Conception has supremacy over growth and birth, which lead to the development of the person and his/her upbringing (*actus personæ*). Others feel that due respect is compatible with certain specific cases of injury where the law grants priority to other rights and interests.³²⁰

Bearing in mind the set of values at stake, the draft law seeks to balance the rights and interests involved and favors conciliation by judging that the interests of the embryo may be harmed and that the respect due to the embryo is divisible and flexible, especially as a result of the growth and birth. Any *diminutio* of the embryo is a transaction rather than an inconsistency. The statute of the embryo is a composition rather than a lone logic of the embryo. The embryo has rights, but it is not alone in its rights and they are not superior to the point of having to sacrifice all the others. The opposition lies between intransigence (in all senses of the word) and the human and inglorious but more just transaction. Respect for the embryo cannot be raised to the heights of some supreme value to be recognized not as a person but rather as a kind of somehow sacred "super-person."³²¹

³¹⁹ Not paradoxically – adds Cornu – privatizing the donation of organs would be conceivable, since such a donation does not intrinsically involve any transference of descent.

³²⁰ CORNU, Gérard. *L'embrión humain*, *op. cit.*, p. 6

³²¹ *Ibid*, CORNU, Gérard. *op. cit.*, p. 7-8.

On the other hand, note that the principle contained in article 4.1 of the Charter on Human Rights is also not absolute in nature, expressing as it does that the right to life will be protected by law and in general, from the moment of conception.

At this stage of the discussion, one might wonder whether the protection that the American Convention on Human Rights grants to the conceived person and the physical integrity of the human being is absolute, that is, categorically applicable to all cases and situations without exception.

The answer to this question must inevitably be no. It would be to ignore the most fundamental dynamics of law to claim that one of its provisions is always a certain form in every cases that arises.

This is clearly seen in the actual right to life. If we were to adopt an unbending attitude towards its interpretation, no exceptions of any kind whatsoever would be admissible.

Situations that in normal circumstances cause paradoxes in the system, such as legitimate defense (killing an assailant in defense of one's own or another person's life), would not be permissible³²², nor would differentiated treatment for euthanasia (taking the life of another person to prevent his/her suffering), manslaughter (accidental occurrence) and so on, in which cases, albeit transgressions against the right to life, the juridical system does not act with the same severity as it does in the case of manslaughter or murder in the first degree (aggravated homicide).

Abortion (taking the life of an unborn conceived person) illustrates this situation even more clearly; some juridical systems reject it, yet admit therapeutic abortion according to which it is valid to sacrifice the life of the fetus to save the life of the mother (art. 121 of the Penal Code of Costa Rica, for example).

Note that neither legitimate defense nor therapeutic abortion (to mention only the two most widespread cases permissible in the legal system) are made exceptions to the right to life in the constitutions. Nevertheless, the system does admit and tolerate them despite the clear aforementioned protection in regard to the life of the conceived person and respect for physical integrity.

The uncomfortable position in which the above statement places us is alleviated by a simple reference to the General Theory of Law. The legal rules, being the general and abstract statement that they are, can only very schematically grasp the real wealth and depth that social life contains, if they intend to instill in society the values (ethics) on which they are based and which at the same time they strive to impose. Legal rules therefore cannot and must not aspire to be an absolute legal force.

When we apply this idea to the draft law, it is easy to draw the following conclusion: the claim that the conceived person is protected from the moment of conception (engendering, generation) and that the law on inter-American human rights as a whole aims at protecting the physical integrity of the human being until the end of his/her existence, does not necessarily imply that this right to life and integrity has to be accepted in principle in all cases and situations.

There will be some very clear cases and situations on which it is easy to take a stance (the right to life of the intra-uterine human fetus after six months of gestation, heavier penalization in the event of more serious than lighter injuries), and others where adopting a position is not so simple (selection and exclusion of extra-uterinely fertilized zygotes as the only way for some human beings

³²² In the opinion of some renowned jurists, however, legitimate defense, for instance, is not a case of transgression permitted in the constitutional regulation that defends the respect for life, but that is technically a case of a state of necessity. And even then, a series of conditions must be met so that legitimate defense can be considered grounds for justifying the seriousness of the situation where a human being must decide between his/her own life and that of another person.

to have offspring), especially if wishing to avoid serious contradictions under discussion (defending the right to life at any price and, in the case of therapeutic abortion, being obliged to accept the equally unpleasant consequences of the death of the mother, the fetus or both).

An intransigent position on this issue could lead us to paradoxical situations, such as the one above or in cases where applying the general rule should not be so strict (for example, miscarriage due to lack of care and diligence).

Donating gametes must be voluntary. That is, it always requires the donor's free and informed consent. The donation of gametes cannot be like a donation in the strict sense of the word, where the donor has no control over the object donated in benefit of the donatory. On one hand, indeed they are, in a sense, an integral part of the individual; while, on the other, represent a potential human life and are after all generally donated for a particular purpose. Gametes – as Jean Louis Baudouin³²³ puts it so well – “are neither a complete human being nor a thing. They actually belong to a special order that traditional law still has trouble in understanding, with its secular division between the right of persons and the right of property. The same obviously occurs with the embryo, which is already human but still lacks the statute of the person.”

That is why the draft law is innovative on this point when it replaces the word “donation” by “contribution” and “donor” by “contributor.”

Late mothers Another issue is the possible fertilization of post-menopause women. Access to motherhood of women over forty or fifty years old through the doctor-assisted fertilization techniques gives rise to the term “late mothers”. The draft law specifically refers to this subject in the provision in article 15 where “doctor-assisted fertilization will apply to adult women in full possession of their faculties, who have not yet entered menopause”.

This is another controversial subject. Rafael Junquera de Estéfani³²⁴ considers that “the reasons which are normally given for this late motherhood normally concentrate more on an unsatisfied desire rather than on considering the child's well-being. Thus, the following principal motives are inferred from a number of studies: second or third marriage of a couple who want a child; the loss of another child and the desire to replace it; the idea of keeping young by having a baby; seizing the opportunity that had not arisen before... As you can see, reasons that include strong doses of egoism, given that, together with several other reasons of a technical-medical nature, have led many experts to pronounce against this kind of motherhood. In fact, it seems that in these cases we are forgetting that age is a very important element in the parent-child relationship. In early childhood, the human being needs parents who have the energy and vitality to cope with this new life. Later, the child will be cared for by adults from the older generation, but who have the capacity to understand and assimilate his/her situation. It is not easy, therefore, when there is a wide age gap between parents and children, for the relationship to be the most suitable to meet the real needs of the child. As already mentioned on the subject on risks and dangers, the fact that the experts consider that the ideal age to conceive is between eighteen and thirty-five years old, involving serious risks outside this age group, must be considered as very important when taking the right decision everytime. Nevertheless, although they do not think it ideal for a sixty-year old woman to be pregnant, some authors do believe that such pregnancies should not be prohibited.”³²⁵

³²³ BAUDOQUIN, Jean Louis. *Les nouvelles technologies de reproduction: l'état du droit au Canada*. Quebec: Yvón Blais, 1993. p. 201

³²⁴ *Op. cit.* p. 76.

³²⁵ According to the Rio de Janeiro newspaper “O Globo” dated August 24, 1999, the theme “The older mother” is one of the topics that will be addressed at the Congress of the Brazilian Society for Doctor-Assisted Reproduction, to be held in Rio de Janeiro, August 26-28, 1999. One of the speakers will be Prof. Luca Berardini from Bologna University. Berardini will speak about the cases of successful deliveries of 63 year old women.

The draft law further provides that human ova can be fertilized for no purpose other than procreation of the species; it prohibits any eugenic treatment of human embryos; limits doctor-assisted fertilization to adult women in full possession of their faculties, who have not yet entered menopause and have given their free, conscious and voluntary acceptance (article 15); permits both homologous and heterologous doctor-assisted fertilization (article 16); requires that the couple applying for doctor-assisted fertilization treatment be clearly and fully informed, taking into account their level of schooling, of any other possible alternatives, such as, adoption (article 23); and that the genetic material will be donated free of charge (article 35).

The draft law also states that, for the effects of filiation and paternity, applying any of the doctor-assisted fertilization techniques, with the consent of the beneficiary couple, is equivalent to cohabitation. Moreover, the couple's consent for in vitro fertilization, freely and responsibly by apt and informed persons, will be equal to recognition of paternity and maternity (article 40).

The married father is not permitted to impugn the paternity of a child born as a result of doctor-assisted procreation, except when this action is based on the child's not being the outcome of such a procedure or when consent to doctor-assisted fertilization had been revoked before conception.

Article 5 declares null and void any form of agreement for the purpose of using the human body for reproduction or gestation, that is, it prohibits substitute maternity (gestational carrier).

In such cases as in articles 36 and 41 where the identity of the donor must be disclosed, this disclosure will in no way whatsoever extend a legal determination of the filiation between the donor and the child that is born, nor will the donor be made accountable in any whatsoever.

Two final comments can be formulated before concluding the draft law. First, in order to avoid any confusion with the civil donation agreement, the words "donate" and "donor" that are generally used in the few laws existing on the subject have been substituted by "contribute" and "contributor." The draft law obviously refers to a voluntary and free contribution, but it is necessary to underline yet again that the genetic forces are nothing but the source of life.

The draft law does not admit *post mortem* fertilization because we consider that a child cannot be genetic property or engender and establish a filiation outside any father-mother union, that is, outside a living relationship. In such cases, filiation would be none other than a figment of the imagination or the making of a cell, as Professor Catherine Labrusse-Riou³²⁶ has aptly pointed out. If it is admissible, the child would be born fatherless, thus artificially creating a status of orphanhood.

Lastly, the draft law strikes us as well balanced and moderate. It is based on the principle that doctor-assisted procreation is only acceptable inasmuch as it respects the essential structures of the family and the values encompassed in our juridical systems. It recommends effective prohibitions and sets limits on the faculty of disposing of genetic forces.

However, regulating doctor-assisted procreation is necessary. The facts are there to see and law cannot deny the reality or impose juridical ethics that compromises only one part of the population. Moreover, children born from doctor-assisted fertilization do and will exist, and will need protection because they cannot return to the juridical non-existence of the illegitimate children of the past.³²⁷

Note that in adoption, which is very similar to filiation from doctor-assisted fertilization (both types of filiation are based on a voluntary act and not on sexual relations) the law generally stipulates "a maximum age" as a requirement so that the child has all the environmental elements to guarantee his/ her balanced growth.

³²⁶ Vid. *Rapport français, en la vérité et le droit*, op. cit., p. 119.

³²⁷ Vid. LABRUSSE-RIOU, Catherine, op. cit., p. 124-125.

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SECOND PART

LEGISLATIVE GUIDE ON DOCTOR-ASSISTED FERTILIZATION

CHAPTER I

General Principles

Article 1 - The elements comprising the human body and its products cannot be the subject of property rights. Any agreements on this matter will be strictly null and void.

Article 2 - No one can endanger the integrity of the human species. Eugenic practices that tend to organize human selection are prohibited.

Genetic treatment for therapeutic purposes is permissible.

Article 3 - Every person has the right to conserve his/her genetic property without being manipulated in any way whatsoever, unless when applicable to therapeutic treatment in benefit of his/her health.

Article 4 - Without detriment to interventions for preventing and treating disease, malformations or deficiencies of a genetic origin, no modifications may be introduced to the genetic characteristics for the purpose of changing a person's descent or when it implies this, or for altering the genetic property of another person.

Article 5 - Any contract whatsoever that addresses the use of the human body for purposes of reproduction or gestation will be null and void.

CHAPTER II

Doctor-assisted fertilization

Article 6_- In the specific techniques of doctor-assisted fertilization that require fertilizing the ovum outside the mother's body, the designation of person to be born will be granted to the embryo from its actual implantation in the uterus until its birth. In any other doctor-assisted fertilization technique, such a designation will be given from the union of the gametes.

Article 7 - The person to be born from the doctor-assisted fertilization techniques will enjoy the following essential rights to:

- a) life;
- b) health;
- c) physical integrity;
- d) genetic, biological and juridical identity;
- e) gestation in the mother's body;
- f) birth;
- g) family,
- h) equality.

The above list does not preclude other rights and guarantees that may benefit the person.

Article 8 - Human ova cannot be fertilized for any purpose other than procreation of the human species. It is prohibited to fertilize the ovum in order to obtain parts or products of the body of the person to be born for the purpose of experiments.

Article 9 - In the doctor-assisted fertilization techniques that require fertilizing the ovum outside the mother's body, its transference to the uterus must be performed as soon as this is technically feasible. The development of any stage of gestation outside the mother's body is only permissible when the viability of the person to be born or the mother's health must be preserved.

Article 10 - When embryos are transferred to the uterus, the chosen embryo and the mother will enjoy all the necessary care to ensure their health and guarantee birth. Pregnancy cannot be interrupted except in the event of clearly demonstrated therapeutic reasons that make it absolutely essential to save the mother's life.

Article 11 - The person to be born will not be submitted to any discriminatory practice due to his or her genetic heritage, gender or race, nor to any technique aimed at altering his or her characteristics.

It is prohibited to perform any eugenic treatment on human embryos and to use doctor-assisted procreation techniques for the purpose of choosing the gender of the person to be born, unless in cases where it is necessary to avoid a serious gender-related hereditary disease.

Article 12 - It is forbidden to market female or male gamete contributions and the person to be born.

Article 13 - Doctor-assisted fertilization is considered as the application of any artificial technique conducive to producing human procreation, such as artificial insemination, intratubal transference of gametes or *in vitro* fertilization with embryonic transference, as well as any other technique that may be developed in the future for the same purpose. Doctor-assisted fertilization will only be legally admissible whenever natural fertilization is impossible.

Article 14 - A beneficiary couple will be considered as any couple united in matrimony in accordance with the laws of the Republic, as well as any couple that, in accordance with the prevailing legislation, lives in a state of free union. In both cases, the couple should be in full possession of their mental faculties.

Likewise, the couples to be considered as beneficiaries are those where one or both partners suffer from medically proven pathologies or dysfunctions that prevent them from having children naturally and who have requested doctor-assisted treatment.

Article 15 - Doctor-assisted fertilization will be applied in female adults in full possession of their mental faculties, who have not begun the menopause, are in a good state of physical and mental health, and have accepted this kind of fertilization consciously and of their own free will. Furthermore, doctor-assisted fertilization must be requested jointly and solely by the spouses or partners who form the beneficiary couple, according to the provisions herein.

Article 16 - Doctor-assisted fertilization may be applied homologously and heterologously. The former results from the union of gametes from the spouses or partners who form the beneficiary couple. Heterologous fertilization occurs when one of the gametes has been contributed by a third party. In all cases, at least one of the spouses or partners must contribute with his or her genetic material.

Article 17 - A prior condition to receive treatment of homologous doctor-assisted fertilization is that the beneficiary couple undergo thorough physical and mental examinations performed by specialized professionals who do not belong to the clinic where the doctor-assisted fertilization treatment will be carried out.

The purpose of these examinations will be to guarantee that the child-to-be enjoys a proper emotional environment and that both spouses or partners are free of any problems of consanguinity, infectious or contagious diseases, addictions capable of producing congenital disorders and mental illness. Also records must be made of their phenotypic characteristics and blood compatibility.

Article 18 - When the required examination mentioned in the preceding article shows that one or both partners may possibly transmit hereditary diseases, or that they suffer from a congenital disorder, the spouses or partners who ask for treatment must be fully informed, according to their educational level, of the nature of the hereditary illness or congenital disorder, and the reasonably predictable risks of proceeding with doctor-assisted fertilization until the birth. After being informed of this, the beneficiary couple will decide whether or not to proceed with the treatment. Their decision must be recorded in a duly notarized document to be included in the beneficiary couple's file, as stated in article 21.

Article 19 - In the event of a heterologous doctor-assisted fertilization and the husband or male partner provides the gametes, the examination required in article 22 must be performed on both partners of the beneficiary couple. However, if, in the heterologous procedure the reproductive cells are provided by the wife or female partner, she alone will be requested to perform the examination. In the event of hereditary illnesses or congenital disorders, the provision in the preceding article will apply.

Article 20 - As a requisite for receiving doctor-assisted fertilization treatment, the couple requesting it must be submitted beforehand to a socioeconomic study performed by a state institution to ensure that they have reasonable means to form a family that can properly carry out its functions. Lack of resources does not in itself constitute an impediment to being granted authorization.

Article 21 - A file will be opened on the beneficiary couple's full and comprehensive medical history, containing:

- a) medical evidence of the pathology or dysfunction carried by one or both members of the couple, and precluding or advising against natural fertilization, in accordance with the terms of article 13;
- b) indication of the technique chosen and the reasons for this decision;
- c) the results of the examination and study described in articles 17, 18, 19 and 20, wherever applicable;
- d) Medical data and personal records of the partners that may be deemed necessary;
- e) the duly notarized document containing the information, request and consent, in the form and in accordance with the terms in articles 23, 24 and 25;
- f) the date when the file was opened at the time when the genetic material used was received, registered by the bank that received it, in the event of heterologous doctor-assisted fertilization,
- g) information concerning the state of the pregnancy and the health of the mother and the embryo or fetus until birth.

Article 22 - The aforementioned file will be confidential and may only be consulted by the specialists responsible for the specific doctor-assisted fertilization treatment or the beneficiary couple involved. It may also be consulted at any moment by the child of the couple in question, when he or she comes of age, or prior to that, by someone legally appointed as guardian.

Article 23 - The couple that requests doctor-assisted fertilization treatment must be clearly and fully informed, taking into account their level of education, about the following matters:

- a) content and scope of this Chapter, especially the provisions in articles 7 and 8;
- b) possible results of the procedure that is being considered, and possible predictable risks to the mother or child when the technique is applied or during subsequent treatment;
- c) ethical, biological, juridical and economic matters relating to the technique being considered for application,
- d) other alternatives, including adoption.

Article 24 - The information referred to in the preceding article will be the responsibility of the fertilization clinics. This information must be provided and explained to the beneficiary couple by the

professionals who are directly in charge of their treatment. A notarized document will state that such information has been given and received.

It will be considered a serious breach to resort to forms to be signed without the persons involved actually receiving the information required.

Article 25 - The man and the woman who form the beneficiary couple must jointly request the application of the appropriate doctor-assisted fertilization technique for their case; and the woman, likewise, must clearly express her consent. Both acts must be recorded in the duly notarized document mentioned in the preceding article, which will be attached to the file opened as stated in article 21.

Article 26 - A woman who receives the doctor-assisted fertilization technique may ask for it to be stopped, provided that conception has not occurred. This request should be made in writing and in the presence of one of the professionals in charge of applying the doctor-assisted fertilization procedure. The couple may jointly proceed along the same lines and in the same manner.

Article 27 - Fertile individuals who must undergo surgery, medical treatment or, in general, circumstances that might cause sterility, may deposit their gametes in genetic-material banks so that, in the event of this actually happening, the conserved cells may then be used in doctor-assisted fertilization treatments that enable them to procreate. The deposited gametes must be identified in a reliable manner.

When requesting the conservation of his genetic material, the depositing individual will state whether he wishes, in the event of his death while the gametes are in deposit, them to be destroyed or registered as a contribution to the bank.

Article 28 - The bank will be responsible for the proper and effective conservation of the genetic material in its possession, as well as the evaluation of its quality before proceeding to apply the doctor-assisted fertilization technique, in the terms of the provisions in the Chapter on human genetic material contribution.

Article 29 - In the event of doctor-assisted fertilization proceedings that involve transferring gametes or conception outside the mother's body, the gametes must be implanted exclusively in the female partner of the beneficiary couple.

CHAPTER III

Human genetic material used in doctor-assisted fertilization

Article 30 - The human reproductive cells to be used in doctor-assisted fertilization treatments should have been obtained by contribution, as stated in the following chapter, and in no way whatsoever will remuneration of this act be permissible.

Article 31 - The gametes used during the doctor-assisted fertilization treatment must remain intact and unaltered in their genetic configuration. The rules governing gamete obtaining techniques and gamete quality control will be regulated by the Ministry of Health.

Article 32 - In each concrete case, the gametes to be used during doctor-assisted fertilization, whether both extracted from the beneficiary couple or the male or female gamete contributed by a third party, can only be used to procreate one child at a time, unless when there are more births from natural means.

CHAPTER IV

Contribution of human genetic material

Article 33 - The contribution of human genetic material to be used in doctor-assisted fertilization procedures may only be received through the bank of a clinic.

The contributor must be informed about the medical process of doctor-assisted fertilization as well as the provisions herein.

Article 34 - Contributors must be of age and in full possession of their faculties. Even so, they must first undergo a complete physical and mental examination conducted by specialized doctors who do not belong to the clinic which operates the bank that receives the contribution.

This examination, which is a requisite to qualify as contributor, must guarantee that the contributor is not a blood relative of the beneficiaries and is free of any addictions that could cause congenital, infectious, contagious or hereditary diseases, and must define his/her phenotype characteristics.

The contribution will not be received if there is any doubt regarding the conditions presented by the contributor's genetic material or health, which permit the inference that they could lead to major deficiencies in the descendents.

Article 35 - The contribution will be made free of charge and in a notarized document, which will remain in the file that the clinic bank will open for each contribution, or else in the file opened when the contribution is made for a specific treatment. This file must also include the results of the examinations described in the preceding article, as well as the contributor's medical and personal records that are deemed necessary.

When the contribution is deposited in a genetic-material bank, the file will also include a record of the use made of the genetic material contributed, how often it has been used and the date of the file corresponding to the doctor-assisted fertilization for which it was used.

Article 36 - The clinic's bank will be responsible for keeping the contributor's identity anonymous; this may only be disclosed by judicial order if it is proven the life of the mother or person to be born is at risk, whenever this is essential to avoid such a situation. In this case, disclosure will be restricted to the applicable therapeutic medical or judicial scope; otherwise, disclosure of identity will not be admissible. Likewise, identity may be disclosed for health reasons or by judicial order to the child born of doctor-assisted fertilization when he or she comes of age or, prior to that, to the child's legally appointed guardian.

Article 37 - In no case whatsoever can the contributor be allowed to know the end use made of the genetic material delivered to the clinic; he may only revoke his contribution in the event where, due to subsequent proven sterility, he will need the gamete contribution for himself.

Article 38 - Whenever doctor-assisted fertilization produces a surplus number of gametes, it will proceed according to the provisions on contribution herein, or they will be destroyed immediately, at the wish of the beneficiary couple.

Article 39 - The banks are authorized to receive and deposit genetic material from any person who intends to preserve it because he has to undergo surgery or medical treatment which might make him sterile. The applicant will be submitted to the same examination described in article 34 herein above to ascertain that he is free of infectious or contagious diseases and addictions that may produce hereditary or congenital disorders. In the latter case, the genetic material must be reliably identified and a file opened with evidence of the depositor's wishes and the results of the aforementioned examination. The genetic material in such conditions cannot be used for heterologous doctor-assisted fertilizations without the depositor's express authorization.

CHAPTER V

Filiation of a child born of doctor-assisted fertilization

Article 40 - For the effects of filiation and paternity, applying any doctor-assisted fertilization technique with the due consent of the beneficiary couple is equivalent to cohabitation. The consent of the couple for insemination or *in vitro* fertilization, given freely and responsibly by apt and informed persons will be equal to recognition of paternity and maternity.

Article 41 - Disclosure of the contributor's identity, as mentioned in article 36, will not imply legal determination of filiation in any way whatsoever.

Article 42 - In the event of doctor-assisted fertilization with the participation of a contributor, no filiation will be established between the latter and the child that is born. There will be no claim of responsibility of any kind whatsoever against the contributor.

Article 43 - The filiation of a child born of any doctor-assisted fertilization technique cannot be contested, unless the claim is based on the fact that this child is not the product of such a procedure, or that the consent has expired before conception by artificial means or due to defects in the consent when issued.

This comes into effect as of its publication.

8. Convocation of the Sixth Inter-American Specialized Conference on Private International Law

The Inter-American Juridical Committee did not take up this matter at its fifty-fourth regular period of sessions (Rio de Janeiro, January 1999).

Through resolution AG/RES.1616 (XXIX-O/99), adopted at its twenty-ninth regular period of sessions (Guatemala City, June 1999), the OAS General Assembly asked the Inter-American Juridical Committee to cooperate in preparing the *travaux preparatoires* for the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI).

The Juridical Committee did not examine this agenda item at its fifty-fifth regular period of sessions (Rio de Janeiro, August 1999).

9. Commemoration of the Centennial of the 1899 International Peace Conference

This year, the Inter-American Juridical Committee participated in the events commemorating the Centennial of the 1899 Peace Conference, which were held in The Hague, The Netherlands, May 17 to 19, 1999. The Inter-American Juridical Committee did not consider the topic at its fifty-fourth and fifty-fifth regular period of sessions (Rio de Janeiro, January and August 1999), and considered this agenda item finished.

10. Juridical aspects of hemispheric security

At its fifty-fourth regular period of sessions (Rio de Janeiro, January 1999), the Inter-American Juridical Committee introduced agenda items on “hemispheric security” and “the Charter of the Organization of American States: limitations and possibilities.” At its fifty-fifth regular period of sessions (Rio de Janeiro, August 1999), the Committee decided to combine the two topics under the heading of “Legal aspects of hemispheric security.” Summarized below are the discussions of the two topics –“Hemispheric Security” and “The Charter of the Organization of American States: limitations and possibilities”- that took place at the fifty-fourth regular period of sessions, and the Juridical Committee’s deliberations on the combined topic titled “Legal Aspects of Hemispheric Security” at its fifty-fifth regular period of sessions.

A. Hemispheric security

At the Juridical Committee’s fifty-fourth regular period of sessions, Dr. Sergio González Gálvez introduced document *Towards a new concept of security in the hemisphere* (CJI/doc.19/99) for the members’ consideration. He also announced that he would be presenting another paper on the topic at the Juridical Committee’s next regular period of sessions, in August 1999. He asked the Secretariat for Legal Affairs to forward to him information on the history of the topic within the OAS, and underscored the connection between this topic and the topic on “The Charter of the Organization of American States: limitations and possibilities”, also added to the Juridical Committee’s agenda at that regular period of sessions.

Dr. González Gálvez was designated rapporteur for the topic, which was added to the agenda under the title of “Hemispheric security”.

Document CJI/doc.19/99 is transcribed below:

TOWARDS A NEW CONCEPT OF SECURITY IN THE HEMISPHERE

(presented by Dr. Sergio González Gálvez)

One of the most dramatic results of the political, economic and technological changes experienced by international society is that some basic benchmarks of the international behavior of nations are becoming obsolete in light of world dynamics.

The transition into a new world era forces nations to reconsider or readjust their respective foreign policies. For example, we accept that, in an interdependent world, the concept of the scope of the exclusive domain of a State may be redefined. However, the simplistic argument that globalization did away with the validity of the principle of non intervention of a State in another’s affairs must also be rejected. A review of policies does not imply the obsolescence of the principles that support them.

The profound changes undergone by the world political and economic order can be grouped in a number of complex developments. First the breaking up of ideological blocks and, more generally speaking, the elimination of the strategic military jurisdiction among the powers. Secondly, it seems clear that the single polarism resulting from the end of the Cold War is not permanent: on the one hand, the European Union increasingly stresses its independence of criteria regarding international problems; on the other hand, the number of countries – like Asia, Africa and certainly Latin America – rejecting unilateral decisions on problems that they believe must be settled by the international community as a whole, are beginning to multiply. Thirdly, the need to assess the effectiveness of

international security schemes seems obvious, some of them dating back to the end of World War II, in order to tailor them to the new circumstances. In the American Continent, for instance, there is an obvious need to redefine the threats to security as a theme for reflection on the changes that this would entail for the relevant institutions.

Towards a new idea of security in the hemisphere

The discussion on security is closely related to two sets of problems. First, the one regarding the relationship between the global and the regional focus; second, the one regarding the compatibility between the security agencies of the various members of a given region, from which to be able to decide how far they form a “community with identity of purposes in security matters”, with common security objects and concerns, and therefore specific to this region and different from those of other regions.

Contradictory trends are currently detected throughout the American continent. On the one hand, there are certain attempts – whose feasibility is still a question mark – to establish a hemispheric space; on the other hand, subregional experiences of economic, political and military strategy interest emerge. Such subregional experiences shed some doubts on the possibility of success of a hemisphere-wide effort because of the natural difficulties in matching the interests of Latin American and Caribbean countries to those of the superpowers with whom they share the American continent. Those trends are the evidence of problems faced by countries such as Mexico, who try to extend their ties with American countries as a whole: a foreign policy centering on only one of the countless interaction plans found in the hemisphere could not fulfill its expectations.

Given this complex set of factors and realities, the countries of America should consider the possibility of an action agenda, fully hemispheric in scope, on security topics. In it, the defence of country's interests would achieve protection and feasibility within a dual context: on the one hand, the development of strategies via the schemes and from the standpoint of multilateral action of both political-economic and military strategy content, and on the other hand, the inevitable action of bilateral ties from the standpoint of mutual complementation and always subject to the international agreements in force.

Basic recognition

A new view of security in the hemisphere should start from a basic recognition: security does not stem from the defense of the continent against an inexistent threat from outside but from the joint defense of the right of every country to build its own political system based on the wishes of its people, without external interferences and ensuring the validity of the banning of the threat or use of force, promoting disarmament and arms control, the need to promote the peaceful settlement of all pending disputes, social justice, respect for human rights and the fight against drug trafficking, according to the provisions of the agreements in force in every country. A genuinely continental security will spring from the development of ties between its topics, which will be the result of a regular, systematic dialogue that enables and fosters transparency, a security not based in military power or walling borders but in openness, dialogue and negotiation.

A proposal

A new definition of security in the American hemisphere would require, in addition to the foregoing, several items of agreement among countries:

1. Regional security should be an eminently preventive process and not be based in coercive measures, except as a last resort and with the prior establishment of the circumstances in which such measures would be permitted.
2. Security includes strategic military aspects but above all economic, political and social aspects. The decision on the problems involved with the latter and the way to solve them should be ascribed to the corresponding bodies of the OAS and be based on the

Charter and relevant resolutions of that regional Organization.

4. The threats to the survival of each of the nation-States are, or can be, countless. Therefore the concepts, policies and strategies to face them are, or can be, different. So the importance of keeping frequent exchanges of views in the search for common strategy elements should be hand-in-hand with absolute respect for the sovereignty and freedom of the countries involved.

4. Consequently, the possibility of international cooperation actions in security matters within the region implies the strict observance of the international agreements in force: the UN Charter and the Charter of the OAS in particular.

Certainly, a definition of hemispheric scope such as the one intended could not co-exist with some current trends, such as the attempt by certain countries to extend the powers of the Inter-American Defense Board (IADB) or to achieve democratic advances in the hemisphere via coercive measures.

Security in the hemisphere today

The underpinnings of the establishment of a new concept of security for the hemisphere are already in place, as shown by the steps taken to boost trust and security in America in the recent past, which should certainly be complemented. However, some obstacles are still to be overcome, stemming from a misconception of security that may undermine these foundations achieved after complex negotiations.

Confidence-building measures and security

Negotiated and approved by all member States of the OAS in the Declaration of Santiago (1994), in the Declaration of Santiago (1995) and in resolution 1409 (1996), the confidence-building measures and security were intended as options which may be freely chosen by each country. The merit of trying to strengthen the security systems through measures of trust derives from the need to take into account the normal interaction among States, which is not restricted to the military field. No doubt, such interaction ultimately intends to bring about the economic, social and cultural development of the peoples and promote the eradication of poverty and of any form of discrimination in the region.

The 2nd Regional Meeting on Measures to Foster Trust and Security held in El Salvador in February of 1998 pointed out the possibility of extending the list of measures to be offered as choices to the member States of the OAS in crucial areas such as arms control, the peaceful settlement of disputes and arrangements for the solution of pending border issues, in addition to new plans for fighting drug trafficking which exclude multilateral operational actions.

Towards a new security scheme in the hemisphere

A new security scheme in the American hemisphere would imply certain changes in the very concept of security, and in the relevant conventions:

Security in the hemisphere should include the strengthening of democratic institutions, political pluralism and mechanisms to ensure the full exercise of human rights (via reciprocal commitments), as well as the strict observance of the principles of conduct contained in the *Charter* of the OAS; no use of force, except in self defence in case of an armed attack; non-intervention, either direct or indirect; priority given to efforts to achieve fairer economic relations among nations.

1. Security in the hemisphere should also include agreement on the part of the States to seek peaceful solutions, within strict time limits, for all pending border disputes between States of the region. Mechanisms in force for the settlement of disputes should be strengthened; for instance, through adding to the formulas for the enforcement of the Pact of Bogota on the peaceful settlement

of disputes, via a process of amendments promoted in its early stage by the countries parties to said convention.

2. Security in the Hemisphere should include the creation of a peace zone in the region. The Charter of the Organization of American States stresses as a core factor the need to “attain effective control over conventional weapons that allows larger amounts of resources to be devoted to development”³²⁸. This is undoubtedly a difficult task. But it is a task tagged as top priority, as in America and the world in general, more money is spent on weapons than on promoting the health of the inhabitants. The American Hemisphere should be a peace zone so that the funds currently squandered on weapons could be earmarked for development.

Agreement on this latter issue – which will have to be negotiated by the countries involved, as no-one has the right to impose constraints on others except under resolutions issued by international organization that stipulate this — could focus on demarcating the transfer and acquisition of conventional weapons of an offensive nature that are extremely costly, such as supersonic bomber aircraft, deep-draught carriers and remote-controlled medium and long-range missiles. This could also ensure the application on the continent of bans on the use of weapons “whose effects are extremely cruel or indiscriminate”, as they are called in humanitarian law; napalm, anti-personnel mines, fragmentation bombs, air-combustible explosives, projectiles that cannot be detected in the human body by X-rays, and high-speed projectiles whose unstable trajectory produces effects on the human body similar to or worse than soft-nosed bullets.

The task is difficult, due to its irremediable connection with talks on global disarmament, but it also ranks as top priority.

4. Security of the Hemisphere should include the obligation to foster a culture of peace; the educational programs linked to this drive should be directed towards eradicating all forms of violence and intolerance from people’s minds.

5. Security of the Hemisphere should encompass a joint effort to implement a common defense strategy to deal with the common scourge of drug trafficking. This strategy should include actions combating crops grown for illegal purposes, as well as production, sale, demand, trafficking and illegal distribution of narcotics and psychotropic substances, including synthetic drugs, while preventing raw materials and chemical substances from being siphoned off which are essential to the illegal production of narcotics and psychotropic substances; the struggle against crimes connected to this phenomenon should also be stepped up; money laundering and the illegal trade in weapons, ammunition and explosives, among others. This joint strategy is obviously based on the assumption that the security is seamless. This is why it cannot accept any type of unilateral qualification of the actions of other States.

A new concept of security for the Hemisphere includes acceptance that the defense of the sovereignty and territorial integrity of each State should be based on the actions of the entities designated to keep the peace, which should be strengthened. Only on an exceptional basis and solely in those cases covered by the pertinent international instruments, could the military option for settling a dispute be accepted as valid.

It is nevertheless clear that the process of establishing a central political authority at the international level which could impose peace when necessary is very slow. In the current power-plays, countries with military clout continue to be able to impose their views, under certain

³²⁸ At this juncture, special mention should be made of the two initiatives formulated by President Ernesto Zedillo at the Summit of the Group of Rio, held in Cochabamba in 1996. The first has already culminated in the approval of an Inter-American Convention on the illegal trade of arms, ammunition and explosives, while the second seeks to lay down criteria for putting self-control of armament in effect. Negotiations on this latter initiative have already been started by a committee of experts from the Group of Rio.

circumstances. This situation has always undermined the peace-keeping actions of the United Nations at the international level.

Final reflections

Carlos Rico – an academic who has successfully roamed the labyrinths of Mexican diplomacy — notes that Europe is today frequently referred to the “common home” of all Europeans; we wonder if we could speak of the American continent as the “common home” of all Americans. I feel that this the question that should guide our thinking on the links established among the various efforts under way in the Hemisphere at the bilateral and multilateral levels.

The Hemisphere is effectively our “common home”, but not with an exclusionist Pan-Americanism, as has been the case at other times in the political development of the Hemisphere. The American countries have diversified their links over the past decades; today, the Hemisphere is no longer, and should not be again, the only arena for their international political and economic actions. A “common home”, but not in an exclusive or preclusive manner.

The new world that is appearing will be the outcome of the changes under way at the political and strategic levels, as well as grassroots shifts that have taken place in the sphere of international economic relations, at least since the early 1970s. Today, economics and politics are two inseparable facets of a single international reality; this is why the international conduct of our countries should follow suit; the complementary political and economic sides on the one hand, and the universal and regional on the other, are the axes that should direct the foreign policy of the Americas.

Pursuant to the previous comments, it is suggested that the topic "Security in the hemisphere" be included in the work program of the Inter-American Juridical Committee.

B. The Charter of the Organization of American States: limitations and possibilities

At the Juridical Committee's fifty-fourth regular period of sessions (Rio de Janeiro, January 1999), Dr. Eduardo Vío Grossi introduced document *The Charter of the Organization of American States: limitations and possibilities* (CJI/doc.20/99).

Dr. Vío Grossi said that this item was added to the agenda in order to ascertain, from the legal standpoint, what types of activity were permissible under the *Charter*. In this way, the Inter-American Juridical Committee would, he said, have a voice in the debate currently underway in various different fora. Dr. Vío Grossi said that he would present a preliminary report at the Committee's August 1999 regular period of sessions.

The topic was added to the Juridical Committee's agenda.

What follows is the text of the document presented by Dr. Vío Grossi:

THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES: limitations and possibilities

(presented by Dr. Eduardo Vío Grossi)

1. The commemoration of the fiftieth anniversary of the Organization of American States has obviously prompted collective reflection within this institution on its successes and failures, and particularly on the challenges that will arise during the foreseeable future.

2. This Hemisphere-wide dialog has so far focused on the political aspects put forward by this topic, as could only be the case, in view of the juridical nature of the Organization itself on the one hand, and on the other that it surely responds and should respond to political will of its member States.

3. However, this exchange of ideas would certainly be curtailed if the juridical facets of the issue were not involved, in at least some of its stages, and if all the organs of the Organization of American States did not participate in this.

4. Consequently and as a contribution to this discussion held under the aegis of its function as the consultative body of the Organization on legal affairs, the Inter-American Juridical Committee could - and perhaps should - undertake a study of the juridical role that the Charter of the Organization of American States plays and should play in the Inter-American System.

5. From this standpoint, this study should focus on examining as closely as possible whether the Charter of the Organization of American States is today the most adequate instrument as really desired by the States in the Inter-American System.

6. This would involve an analysis of the theory of international organizations in light of the interpretation of the Charter of the Organization of American States itself, as well as its practical application, and the limitations and possibilities of this treaty from the juridical standpoint, so as to be able to determine the probable juridical courses that could confront the community of the Hemisphere in this aspect.

7. This analysis, as outlined, would obviously not exhaust the juridical study of the Inter-American System, which also includes the community security system and the mechanisms for the settlement of disputes.

8. On the other hand, undertaking this partial reflection would not ensure *a priori* success in terms of effective suggestions or proposals.

9. Nevertheless, neither of these limitations in any way negates the need to undertake the juridical analysis of the Charter of the Organization of American States. This undertaking is amply justified not only by the time that has passed. New international circumstances also require it. More relevant still, when doing this the Inter-American Juridical Committee would not only be fulfilling the role assigned to it in the actual Charter of the Organization, but would also participate even more actively in the processes through which it is passing so actively.

10. Pursuant to this brief outline, it is suggested that the topic of "The Charter of the Organization of American States: limitations and possibilities" should be included on the Agenda of the Inter-American Juridical Committee, for which purpose the undersigned offers his services as Rapporteur.

During the Juridical Committee's fifty-fifth regular period of sessions (Rio de Janeiro, August 1999), Dr. Luis Marchand introduced document *Hemispheric security: considerations on the current situation of the inter-American security system and confidence building measures* (CJI/doc.26/99 rev.1 corr.1).

Dr. Marchand stated that his document should be regarded as an effort to collaborate with the studies already done by the rapporteur for the topic, Dr. Sergio González Gálvez.

Some members of the Juridical Committee were of the view that the concept of security had two elements: conflict-resolution methods and coercive measures. Both could be analyzed and the Juridical Committee could suggest governing norms.

The following is the text presented:

**HEMISPHERIC SECURITY:
considerations on the current situation of the inter-American security system and
confidence building measures**

(presented by Dr. Luis Marchand Stens)

Like any other armed confrontation, the war in the Falklands left certain consequences, among these the political marginalization of the *Inter-American Treaty on Reciprocal Assistance* (the *Rio Treaty*), which has not been invoked since that serious event in 1982.

By way of reference, it should be noted that in 1975 the member countries of the OAS meeting in San José de Costa Rica adopted a *Protocol of Reforms* to the Rio Treaty. This was the first result of the process of restructuring the hemispheric system that began in the early seventies, when it became advisable to change that treaty in light of the prevailing situation in those years. To date, this *Protocol of reforms* has not reached the necessary number of ratifications for it to become effective, so the instrument agreed upon in 1947, although questioned and – as has been said – marginalized from inter-American life, remains a juridical reality.

The question raised by this political marginalization of the TIAR is the fact that it is the only OAS juridical instrument as a juridical base to adopt compulsory decisions for the Member States.

In fact, the *Charter of the Organization of American States* (OAS) has no legal basis to adopt binding compulsory measures. Decisions taken within the contractual framework of this *Charter* are given the moral weight due to international declarations and resolutions, but do not transcend the non-compulsory nature that generally characterizes such documents.

It is appropriate to make a clarification. The *Washington Protocol* of 14 December 1992 introduces into the founding *Charter* of the system a new –as well as obligatory – commitment concerning the defense of democracy.³²⁹

In effect, the *Protocol* in question establishes that a member of the Organization whose democratically constituted government is overthrown by force may be suspended from exercising the right to take part in the sessions of the General Assembly, the Consultation Meeting, the Councils of the Organization, the Specialized Conferences, and other deliberative bodies. This decision requires the affirmative vote of two thirds of the Member States.

But, with the exception noted above, the political reality is that the inter-American security system sustained by the TIAR has lost its effectiveness due to the marginalization of the above-noted multipartite instrument, which for the moment, is the only legally effective regional means to adopt binding measures for all the States Party.

I stress “for all the States Party” because the make-up of the *Rio Treaty* is *sui generis*, since not all the States in the system belong to the Treaty. The OAS now has 34 members, 23 of whom have ratified this instrument. In other words, of the total members of the Organization, only 23 countries are under obligation to the stipulative framework of the *Rio Treaty*.

³²⁹ Within a world and regional context different from the present one, and from another political view, during the more intense years of the cold war the inter-American system approved many resolutions on the defense of democracy against international totalitarianism. MARCHAND, Luis. *Instituciones de Derecho Internacional. El sistema interamericano de seguridad y de paz*, t. II. p. 161-185).

The juridical limitation of the OAS to adopt compulsory measures outside the framework of the *Rio Treaty* became evident during the delicate situation that arose in Haiti. The economic embargo decided on by the *Ad Hoc* Meeting of Foreign Ministers, while observed by most of the governments in the hemisphere, was not compulsory since it was contained in resolution 1080 (AG/RES.1080 (XXI-O/91)) on the defense of democracy, adopted in June 1991 at the General Assembly of the OAS held in Santiago de Chile, a document of special importance, but lacking in compulsory legal force.

The economic embargo measure against the Haiti Government only became compulsory when it was ratified by the Security Council of the United Nations, based on a resolution that classified the Haiti issue as a threat to international order. During the deliberations prior to adoption of this resolution, observations were made about the precedent that might be set, regarding non-intervention in defining a situation of internal order –for the purposes of applying Chapter VII of the *Charter of San Francisco*– as a threat to international security.

But the main point is that for the decision taken by the OAS to gain compulsory characteristics, it had to be adopted by the UN Security Council.

Some questions arise here. If the continent boasts a general democratization, then in the (certainly very remote) hypothesis of an alteration to the constitutional system of a Member State, would the Haiti expedient have to be repeated, that is, would the matter be referred to the Security Council in case measures of a compulsory nature were called for different from those envisaged in the Washington Protocol signed in December 1992?

Although the *Charter of the United Nations* prevails over the basic constitutional instruments of the regional organizations (article 103 of the *Charter*), it has to be borne in mind that such organizations exist within a context that allows them to act autonomously (Chapter VIII of the *Charter*). Consequently, a systematic dependency on the Security Council to ratify certain decisions inherent to peace and security³³⁰ in order to render them compulsory, might lead to a loss of the OAS autonomy or else give rise to the world organization assuming control *motu proprio* of regional situations within its sphere of competence, to the detriment of the hemispheric system.³³¹

With regard to a context and scenario different from the above, that is, the preservation of peace and security, it might be of some interest to consider a stimulating hypothesis: what methods or what path should the OAS follow to resolve the paralysis of the *Rio Treaty*?

This seemingly simple question leads us to the vast, complex and vague subject of international security, today seen and debated from different perspectives both in the OAS and the United Nations due to changes in both the world and regional scenarios.

It is now common-place to say that the new concept of security transcends the military concept, and –without denying its importance– added to this concept are various complex themes such as socio-economic development, critical rates of poverty, the environment, terrorism, drug trafficking, measures of fostering trust, and so on. Further, experts underscore that security is an integral concept that therefore requires the validity of democracy and respect for human rights. In other words, security, democracy and socio-economic development form an indissoluble trilogy.

³³⁰ Of course, these are decisions of a non-coercive nature (articles 51 and 53 of the Charter of the United Nations).

³³¹ The competence of a regional organization on matters of preserving peace and security does not contradict articles 34 and 35 of the Charter of the United Nations, as it is defended not only in Chapter VIII of the Charter but also, as in the case of the OAS, in its constitutive statutes and specific instruments. Article 33 of the Charter of San Francisco is particularly elucidative about resorting to regional organizations in certain contingencies.

Aside from consideration of the theme in the United Nations, the OAS has set up a Committee on Hemispheric Security which is entrusted with dealing with this complex topic. The Inter-American Defense Board (JID) has taken part in the process of study under assignment to the Commission.

Returning to the hypothesis as to what path the OAS could follow to solve the paralysis of the *Rio Treaty*, first of all it should be borne in mind that cautiously waiting for a definition of the new guidelines on security could take a long time, that is, could defer *sine die* any effort to find a solution.

As it is perhaps unwise to leave this undeniable hemispheric problem for a possibly long and uncertain period, it might be worthwhile to entertain a hypothesis about a possible solution to follow.

This hypothesis calls for thorough clarification of a vital question: what are the future chances of revitalizing the TIAR and its *Protocol of reforms* of 1975? What kind of viability is offered by structuring a new treaty to replace them both?

Adopted in 1947, the Rio Treaty was the product of a historical context characterized by marked bipolar rivalry and the consequent tension of ideological-military confrontation.

Thus, certain aspects of its conceptual framework associated with extra-continental threats have become obsolete. On the other hand, other stipulations regarding the preservation of peace and security in the hemisphere are in general terms still valid.

It is appropriate to recall that certain vague rules, which could give rise to combined classifications or political situations, were questioned –as already noted– in the debates that were held during the first half of the seventies as a result of the process of restructuring of the inter-American system. Out of this process of restructuring arose a significant effort to update the TIAR, lend it more precision so as to avoid ambiguous interpretations, and incorporate economic matters into the context of inter-American security. This effort culminated in 1975 with the adoption of the above-mentioned *Protocol of reforms*.

Nearly a quarter of a century has elapsed since the *Protocol* was signed and to date only eight of the 21 signatories have ratified it. In order to become effective, it has to be ratified by two thirds of the signatory countries.³³²

Although the only constant in life is change, the impressive evolution of the international scenario over the last few years, the changes being made of the concept of security and the evident political disinterest on the part of the Member States of the OAS with respect to the TIAR and the *Protocol of reforms*, offer a reasonable margin of predictability that neither instrument will be revitalized.

Before proceeding, I would like to make a reservation dictated by prudence and experience. I have had the opportunity to say that on the international scene, at times the only certainty is uncertainty, because the absolute and often surprising vagueness of tomorrow may generate events that are unthinkable today. This is the Achilles' heel of pontifical statements.

It could not be categorically claimed that there is no possibility of a situation arising with characteristics that might disturb the peace of the hemisphere.

In this case the affected State would have within reach – at the multilateral level and without jeopardizing full compliance with specific treaties– two resources to appeal to for collective

³³² MERCADO JARRÍN, E. Un sistema de seguridad y defensa sudamericano. p. 160.

compulsory measures: the UN Security Council and *Inter-American treaty on reciprocal assistance* (TIAR).

It must be remembered that the *Rio Treaty* is still a juridical reality.

The second vital question now must be clarified, that is, how feasible is it to attempt a hemispheric conference for the purpose of drawing up a new security treaty to replace in full the TIAR and its *Protocol of reforms*?

As stated above, the *Protocol* has been ratified by the following countries: Brazil, Costa Rica, the Dominican Republic, Guatemala, Haiti, Mexico, Peru and the United States of America, that is, only 8 in close to 25 years.

What reasons underlie the disinterest of Latin America and the Caribbean with regard to the *Protocol of reforms*?

Apparently there are several reasons. On the one hand, perhaps some States considered that the penetration of Marxist ideology and the consequent subversive activity had been more thoroughly suppressed by the TIAR of 1947. Other States possibly felt that the military scheme, which in a way reflected the *Rio Treaty*, was not sufficiently attenuated by the protocol of 1975. There were surely other governments that felt dispirited by the ineffectiveness of the concept of collective economic security.³³³ In any case, the Falklands war finally catalyzed Latin America's disinterest in the *Protocol of reforms* - and obviously also in the TIAR.

From the above it can be inferred that a regional conference to draft a new treaty on security to replace the *Rio treaty* and the *Protocol of reforms* would hardly be feasible at present, especially if we bear in mind that ahead of the concept of security lies a long road of conceptual redefinition.

As a corollary of all the above, there arises the following concern. Since it does not seem viable in the present circumstances to draw up a wide-sweeping treaty on security, and taking into account the organic unity of the *Charter of the United Nations*, might one tentatively consider a method to alter the *Charter* of the OAS, the only indispensable and essential set of rules already established for the preservation of peace within the inter-American sphere? All this, of course, with the objective of making the *Charter* the juridical structure for the adoption compulsory provisions in view of the ineffectiveness of the TIAR.

Naturally there would have to be a more precise and concrete definition of those indispensable provisions that –without affecting or reducing the future scope and integral content of security– could be included in the *Charter* responsible for maintaining peace in the hemisphere.

The constituent instrument of the United Nations is highly illustrative of the proper juridical technique to ensure that a simple enunciation of the preservation of peace contains equally succinct definitions of the measures and action required of the regional entity, all this without prejudicing or reducing –I repeat– the process of study now underway both in the OAS and the United Nations concerning comprehensive security.

This academic hypothesis obviously rests on a two-fold presumption. It is advisable for the hemisphere at present to rely on an organization endowed with tools that lend efficacy and a compulsory tone to urgent and essential decisions. of an urgent and essential nature. Or, on the

³³³ In the *Protocol of reforms* to the TIAR adopted in 1975 was inserted a simply declarative clause stating "...that, for the maintenance of peace and security in the Hemisphere, it is also necessary to guarantee collective economic security for the development of the American States; and..." On subscribing the Protocol, the United States of America presented a reservation that it would not accept the obligation or commitment to negotiate, sign or ratify any treaty or convention on matters of collective economic security.

contrary, it could rely on the ineffectiveness of a support instrument (such as the TIAR) to make these decisions compulsory, without undermining the autonomy or regional competence of the Organization, for should there arise urgent situations that call for compulsory measures, the Security Council of the United Nations would be appealed to to ratify the decisions that the OAS might adopt.

As can easily be appreciated, these are two paths derived from the above-mentioned academic hypothesis: one that would require within a prudent period of time an appropriate solution, and another without any haste to refer the request to the Security Council of the United Nations. In any case, it will be the political factor that will decide at the moment the most appropriate path to follow.

To return to the hypothesis of introducing reforms to the *Charter of the OAS*, it should be pointed out that there is obviously another method, in the formal sense, an alternative to the one proposed above only in the formal sense.

Indeed, instead of a protocol of reforms to the *Charter of the OAS*, an additional protocol to the *Charter* could be agreed upon, restricted –as already expressed– to preserving peace in the hemisphere.

Neither of the two methodological options contradicts what has been expressed in previous pages about the difficulty of finding some inter-American response to negotiate a treaty to replace the TIAR and its *Protocol of reforms*, because this would be more than a simple exercise in overall substitution.

As a matter of fact, in both cases (a protocol of reforms or an additional protocol) one would have to choose and naturally readjust the stipulated texts relating solely to the preservation of peace at the hemispheric level and among the countries of the region, without going into aspects that deal with the new concepts of security and their content and scope, since this complex theme requires – as has been repeated so often– two guidelines that at the proper moment will emanate from the competent bodies of the United Nations and the regional system.

Merely by way of a tentative reference, it is useful to note that the statements on principle concerning peaceful inter-American conduct that appear in the TIAR and its *Protocol of reforms* are practically borrowed from the *Charter of the OAS* and its last overall reform: the 1985 *Protocol of Cartagena de Indias*.

Consequently and according to the above-mentioned tentative understanding, it would be appropriate to note that the content would be substantively the same whether it was a protocol of reforms or an additional protocol, this content being circumscribed –as also repeated so many times– by the rules that are exclusively linked to keeping peace among the nations of the Americas, such as: the “pacifying action” (article 7 of TIAR); the immediate meeting of the Meeting of Foreign Ministers in the case of some aggression or conflict (article 5 of the 1975 *Protocol*)³³⁴ and the provisional function of the Permanent Council until the Ministers meet; measures to re-establish peace (article 8 of the 1975 *Protocol*); the compulsory nature of the measures (article 23 of the 1975 *Protocol*); voting to adopt decisions (article 20 of the 1975 *Protocol*); reservation because of the rights emanating from articles 34 and 35 of the Charter of the United Nations (article 2, last paragraph of the 1975 *Protocol*).³³⁵

³³⁴ Because of its very nature and traditional role, the competent organ for the effects derived from a hypothetical additional protocol would still be the Consultation Meeting of Ministers of Foreign Affairs, dispensing with any other denomination—such as “Consultation Organ”, as used by TIAR – as being unnecessary.

³³⁵ It is wise to recall that chapter 131 of the *Charter of the OAS* contains a general qualification relating to the Charter of the United Nations, whose number 103 establishes the normative supremacy of the constitutive instrument of the world organization.

Though it might be inferred that there is no substantial difference between the two techniques proposed (normative transfer to the *Charter* by means of a protocol of reforms or adoption of an additional protocol), nonetheless some reflections should be expressed on each option.

Changing the *Charter* by means of a protocol of reforms could cause some reticence of a practical nature connected with the future development of the security theme, since this concept, along with preservation of peace, forms a solid couple. In this sense it should be said that to include now directly in the *Charter*, albeit succinctly, provisions taken from the TIAR and its *Protocol of reforms*, might later on require other changes to the text of the basic *Charter*, when the General Assembly –as a result of the work of the Special Committee on Security and the Permanent Council– releases renewed definitions of security.

This is obviously a sound argument but it has to be remarked that it would not be the first time that this happened. The *Charter* was altered in Buenos Aires in 1967, in Cartagena de Indias in 1985, in Washington in 1992, and in Managua in 1993.

Contrario sensu, in favor of an additional protocol not involving normative changes to the *Charter*, it could be said that its formally independent instrumental structure would facilitate –after a new concept on integral security and its scope have been delineated and approved– substituting or expanding the same additional protocol. In the hypothesis that, in the future, security would be concretized in a new conception, one might add to the above reasoning the argument that this instrumental technique would avoid alterations to the juridical framework of the *Charter* until the supreme organ of the system adopted the new concept and its consequent scope.

It might be supposed that the lack of interest of many countries in the region in TIAR and the *Protocol of reforms* would not stand in favor of the alternative option of altering texts or elaborating an additional protocol to the *Charter*.

I believe that the marginalization and consequent inefficacy of TIAR can be explained by the reasons expressed in the preceding pages and that consequently it would not necessarily be valid to assume that such motivations would also hinder any search for an operative solution, one as succinct and direct as possible, to repair the void that the Organization presents today in terms of compulsory binding decisions, especially if this proposal focused on the notion of preserving peace in situations of emergency or tension among the American States.

In any case –as we have said before– the political factor is what will decide at the proper moment whether it is advisable to provide the regional organization with a juridical framework that allows it to adopt compulsory measures or if, *contrario sensu*, the matter is not an urgent one, since any contingency that might require such measures would be attended by the decisions of the OAS, which would then be ratified by the Security Council of the United Nations for the effects of obligatory compliance.

In respect to what was said earlier about the paralysis of the TIAR, an instrument that for over three decades has served as a basis for the hemispheric security system, I feel that dealing at once with the theme of the confidence building measures (CBM), intended not only to control situations of high tension but also to consolidate and strengthen this trust, is especially relevant in the light of the ineffectiveness of the *Inter-American treaty of reciprocal assistance*.

The inter-American juridical system and confidence building measures

We have just mentioned that the security scheme sustained by the TIAR is inoperative as a result of its political marginalization and the change in the international situation that motivated the coordination of this treaty.

This means that confidence-building measures take on a special significance and emphasizes the advisability of promoting their application.

It is not superfluous to state that some experts have a specific conceptual view of what confidence building measures are. In fact, they see them as simple procedures and mechanisms intended to neutralize a process of tension and avoid the outbreak of conflict by accident, error or misinterpretation.

Other specialists in CBM have a broad and diversified view of their content and scope. They claim that the measures can have military, political, cultural, educational, diplomatic, academic, or other characteristics.³³⁶

This broad and expanded view obviously has a political scope, which was reflected in the extensive list adopted by the Meeting of Experts on confidence building measures held in Buenos Aires in March 1994. This list is presented at the end of the paper.

J. Child shows that a certain degree of confusion still reigns as to what CBMs are and what they can achieve. He adds that it is important to note first of all "that CBMs cannot resolve the basic causes of a conflict, nor will they lead to a Utopian situation of total disarmament. However, they can lessen the likelihood that a conflict may unfold by diminishing their chances that an accident, misunderstanding or erroneous interpretation" could lead to armed confrontations.³³⁷

M. Morris notes that many Latin-American analysts tend to define the CBMs in general terms, "a tendency that runs the risk of falling into vagaries and possibly even deviate from the core problems."

However, he adds that "the tendency in South America (and the Third World) to define security in general terms also implies a definition of CBMs flexible enough to reflect the change."³³⁸

The restricted concept that we referred to is limited to handling a situation of tension by means of CBMs. In this sense, only measures of a military nature qualify.

The broad concept is not restricted to such handling and control of a state of tension but rather attempts, through a diversified range of measures, not only to neutralize the situation that has arisen but also to gradually transform it into a stable atmosphere of peace and security.

If we accept that what generally motivates CBMs are situations of tension with a high risk of escalation and armed confrontation, then we would have to qualify those of a military³³⁹ and political nature as "basic" and denominate as "complementary or consolidating" the rest, that is, those of a socio-economic, cultural, educational, academic, etc. nature.

In other words, both the military measures adopted to control an imminent situation of tension and others that simultaneously or gradually are taken to help to deactivate such a situation and generate a climate of peace can properly qualify as CBMs.

Here it is apposite to recall that the expression "confidence building measures" has its origins in the beginning of the cold war.³⁴⁰ But though it is well known that during that somber period a

³³⁶ PALMA, H. *Confianza, desarme y relaciones internacionales*. p.96. MORRIS, H. *Medidas de confianza mutua en América Latina*, August Vara-Isaac Caro-FLACSO, p. 103.

³³⁷ CHILD, J. *Medidas de confianza mutua en América Central. Medidas de confianza mutua en América Latina*. A. Varas-I. Caro-FLACSO, p. 44.

³³⁸ MORRIS, M. *Medidas de confianza mutua en Sudamérica. Medidas de confianza mutua en América Latina*. A. Varas-I. Caro-FLACSO, p. 102-103).

³³⁹ The United Nations Report on confidence building measures, drawn up by a group of governmental experts in August 1981 contains a list of measures of a military nature. (Doc. A/36/74, p. 30).

³⁴⁰ CHILD, J. *op. cit.*, p. 47.

series of preventive provisions were taken, especially of a military nature, it is also true that sponsoring trust among the States dates from much farther back.

For example, all we need do is leaf through documents and treaties adopted since the beginning of the century by the countries of the Americas to prove that the objective of peace based on solidarity and trust is the inspiration behind a great deal of those documents.

These postulates have been expressed in different inter-American treaties, declarations and resolutions, not only as principles and rules but also as organic structures and mechanisms intended to promote friendship, solidarity and cooperation among the nations of the continent.

A quick look at three instruments of the inter-American system –the *Charter of the OAS*, the *Inter-American Treaty of Reciprocal Assistance* and the *American treaty on pacific settlement*– enables us to appreciate interesting provisions intended to promote trust among the Member States of the OAS.

To proceed systematically, we shall first of all deal with the theme of security and peace, as well as the preventive provisions for their preservation. Next, we shall offer a brief comment on the peaceful settlement of controversies and collective security.

Security and peace

The Foreword to the *Charter* establishes that juridical organization is a necessary condition for security and peace founded on moral order and justice.

Article 1 reaffirms what the American States enshrine through the constituent Charter of the Organization of American States, that the international organization they have developed aims at achieving a peaceful and just order, as well as promoting solidarity and defending their sovereignty, territorial integrity and independence.

Along with the above, it should be added that article 2 sets down among the essential aims of the Organization to guarantee peace and security in the continent (clause a).

As for the principles enshrined in article 3 of the *Charter*, it should be noted that featured among other items are: good will as a guiding element in relations between States (clause c); faithful fulfillment of international treaties (clause b); condemnation of wars of aggression (clause g); continental solidarity and collective security (clause h); and non-intervention (clause e).

Among the rights and duties of the States, the *Charter* advocates respect for the power enjoyed by the countries according to international law (article 1), and that those fundamental rights are not liable to jeopardy of any sort (article 12). The obligation is thus reaffirmed of not resorting to the use of force except in cases of legitimate defense, in accordance with the treaties in effect or in fulfillment of these treaties (article 22).

It is important to emphasize that clause h of article 2 of the *Charter* also establishes as an essential aim of the OAS, the achievement of an effective limitation on conventional arms to ensure that a greater amount of resources is allocated to the socio-economic development of the member countries.³⁴¹

Preventive provisions for maintaining peace and security

Clause c of article 2 of the *Charter* establishes as one of the essential aims of the OAS the prevention of the possible causes of difficulty and to ensure the pacific settlement of disputes that arise among the Member States.

³⁴¹ PALMA, H. In the work quoted, p. 133-140, mentions several Latin-American efforts to consolidate peace and trust.

The first paragraph of article 24 reaffirms this aim, pointing out that “international disputes between Member States shall be submitted to the peaceful procedures set forth in this Charter”.³⁴²

The second paragraph of article 24 advocates that “this provision shall not be interpreted as an impairment of the rights and obligations of the Member States under articles 34 and 35 of the *Charter of the United Nations*.”

It is also interesting to see the broad scope of clause e of article 2, which features among the essential aims of the OAS already noted: to seek the solution of political, juridical and economic problems that may arise among the member countries.³⁴³

In addition, one of the chief powers of the General Assembly is to consider any matter relating to friendly relations among the Member States (article 54).

The Meeting of Consultation of Foreign Ministers is also empowered to consider problems of an urgent nature and common interest (article 61). It acts within the framework of the TIAR as the competent consultative organ to make the appropriate compulsory decisions and measures to maintain peace and security on the Continent.

The Permanent Council, aside from its competence to act provisionally as the Organ of Consultations to the TIAR (article 83), also enjoys the power to ensure the maintenance of friendly relations between the Member States and to help them to settle disputes peacefully (article 84).

To this end the Permanent Council can establish *ad hoc* committees with the approval of the parties involved in the dispute (article 86).

It can thus, by whatever means it deems suitable, investigate the facts related to the dispute, even in the territory of either of the parties, upon consent of the respective government (article 87).

It is also timely to note that the Secretary General of the Organization is entitled to bring to the attention of the General Assembly or the Permanent Council any matter that might threaten peace and security on the Continent (article 110).

Peaceful settlement of disputes

It has already been noted that among the essential aims of the OAS is to ensure the peaceful settlement of disputes (article 2, clause c), which was reaffirmed as a principle in clause j of article 3: “controversies of an international character arising between two or more American States shall be settled by peaceful procedures.”

In articles 24, 25 and 26 of Chapter V of the *Charter*, it is reaffirmed that the obligation of the member States is to submit disputes to peaceful procedures; these procedures are listed. In fact, article 25 points out that these peaceful procedures are: “direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration and those which the parties to the dispute may especially agree upon at any time.

In general it can be said that the provisions of the *Charter of the OAS* that have been referred to correspond to the powers that the constituent instrument confers on the General Assembly, the Meeting of Consultation of Foreign Ministers, and the Permanent Council.

³⁴² Such procedures appear in articles 23 and 24 of the *Charter of the OAS* and in the Treaty of Pacific Settlement of 1948 (The Bogotá Pact).

³⁴³ It is appropriate to add that article 30 of the *Charter of the OAS* establishes that member States commit themselves to join efforts “...to ensure international social justice in their relations and integral development for their peoples, conditions essential to peace and security.”

At this point it bears mentioning that the *American treaty of pacific settlements* (Bogotá Pact) contains a comprehensive description of the procedures of peaceful settlement, including compulsory recourse of the International Court of Justice in cases where the conciliation procedure fails to reach a solution and the parties have not reached an arbitral agreement (article XXXII).

Collective Security

Collective security is based on the principle of continental solidarity, by virtue of which any aggression committed by one State against the territorial integrity or inviolability, or sovereignty or political independence of another American State shall be considered as an act of aggression against the other American States (article 28 of the *Charter of the OAS*).

Aside from the above-noted preventive provisions on peace and security in the *Charter of the OAS*, as well as what is provided for in TIAR and in the *Charter* for the immediate Meeting of Consultation of Ministers etc or the Organ of Consultation, as the case may be, the *Inter-American Treaty of Reciprocal Assistance* expressly considers the possibility of conflict between two or more American States.

The above-mentioned precept determines that refusing the pacifying action will be considered in the determination of the aggressor and the application of the measures agreed upon through the Organ of Consultation.

Article 8 of the same *Treaty* defines the measures taken by the Organ of Consultation for continental solidarity and preservation of peace and security can range from recall of the Heads of Mission and suspension of diplomatic relations, to the use of armed force.

With respect to the use of armed force, it should be mentioned that this can only be used in cases of legitimate defense until the Security Council of the United Nations adopts the appropriate decisions for maintaining peace and security.

Articles 22 and 29 of the *Charter of the OAS* and number 51 of the *Charter of the United Nations* refer expressly to self-defense. This precept of the world organization also determines the obligation to report to the Security Council and reaffirms its authority and responsibility, in accordance with the *Charter of the UN*, to exercise at any moment the action that it deems necessary.

Final comment

The set of principles and rules that has been quoted throughout this paper reflect clearly the fundamental objective of the regional organization, namely to promote solidarity, strengthen cooperation and preserve the integrity and independence of the American States within the shared purpose of establishing a peaceful and just order on the American.

Put differently, a substantial part of the inter-American juridical system is clearly aimed at promoting a framework of trust among the nations of the Americas, a *sine qua non* to consolidate peace, security and cooperation.³⁴⁴

Consequently, promoting confidence building measures has in both the *Charter of the OAS* and in other inter-American instruments not only significant support but also fertile ground for its conceptual development and progressive application.³⁴⁵

³⁴⁴ See the Report of the United Nations on confidence building measures, August 1981 (Doc.A/36/74, p.17).

³⁴⁵ Former Secretary General of the United Nations, Boutros Boutros Gahli, in the report he presented on taking office, entitled *A program of peace. Preventive diplomacy, establishing and keeping peace*, asked the regional organizations to

**ILLUSTRATIVE GUIDE OF MEASURES FOR POSSIBLE APPLICATION
TO PROMOTE TRUST AND SECURITY**

I. Of a political nature

- 1) To increase political coordination on appropriate bases to deal with matters of mutual interest.
- 2) To promote parliamentary contacts to deal with issues relating to security.
- 3) To study the appropriate means to render effective solemn commitments to peace, non-utilization of force in international relations, respect for international law and the peaceful settlement of controversies.
- 4) To reiterate that representative democracy is an essential condition for peace.
- 5) To practice political management that demonstrates the promotion of peace and inter-American cooperation in its multiple aspects.
- 6) To collaborate more in eradicating criminal activities of a transnational nature which affect peace and democracy.
- 7) To improve regional cooperation programs for natural disasters in coordination with existing bodies.
- 8) To prioritize joint development projects, especially those in border zones.
- 9) To provide proper access to knowledge of satellite remote-sensing systems.
- 10) To increase cooperation on environmental issues.

II. Of a diplomatic nature

- 1) To provide for diplomatic teaching institutions with courses on disarmament, arms restriction and related topics.
- 2) To hold academic seminars on different topics relating to the broad concept of security, with the participation of diplomatic officials and military officers.
- 3) To provide the Ministries of Foreign Affairs with workshops or special sections on this topic, and possibly making them accessible to trainee diplomatic officials from other countries.
- 4) To increase the present levels of exchange in diplomatic teaching institutions.

III. Of an educational and cultural nature

- 1) To promote studies on disarmament, security and development.
- 2) To promote regional and extra-regional support for educational and cultural studies linked to peace and development.
- 3) To undertake studies and research on issues linked to security and defense, preferably jointly with professional groups from other countries.

- 4) To hold seminars on the responsibility of the media in forming and orienting public opinion on security matters.

IV. Of a military nature

A. Measures to promote confidence and security associated with troop movements and exercises

- 1) Prior information about maneuvers of own units or from third countries, when performed at a certain distance from the coastline and borders.
- 2) Prior notification about the identification, the planned course and the purpose of military units that anticipate maneuvers beyond a certain distance.
- 3) Radio linking between border forces, through periodic communication, in order to coordinate activities performed by all the units posted in border areas in order to avoid any possibility of misunderstanding.
- 4) Meetings between Naval and Air Authorities in order to discuss issues relating to navigation.
- 5) To call upon the Armed Forces of neighbor countries to send observers of troop maneuvers and exercises carried out in areas close to the respective frontiers.

B. Measures to promote trust and security related to exchange of information

- 1) To reinforce mechanisms of information and cooperation related to search and rescue operations.
- 2) To hold periodic meetings between the Staffs of the Armed Forces.
- 3) To exchange information on military budgets.
- 4) To exchange information about production and/or acquisition of new equipment and armament.
- 5) To exchange information about military doctrine and organization.
- 6) To participate in a more active way in the United Nations register of conventional weapons, the instrument for the international standardized presentation of reports on military expenses.

C. Measures to promote trust and security related to exchange of personnel.

- 1) Visits and exchange of personnel between Military Units.

D. Measures to promote trust and security related to communications

- 1) Direct and frequent communication between authorities in order to assure exchange of information allowing an appropriate reciprocal knowledge of military activities.

E. Measures to promote trust and security related to contacts

- 1) Normal security proceedings when naval and air units are in operation, in accordance with the international agreements in force.
- 2) Reciprocal exchange of experiences on:
 - Organizations and structures of Departments of Defense and the Armed Forces

- Experiences on peace operations
 - Evaluation of specific problems of reciprocal concern.
- F. Measures to promote trust and security related to training and education
- 1) Exchange of military personnel of different rank in various matters, such as:
 - Adventure training
 - Qualification courses on trust and security measures
 - Training courses of high-ranking staff
 - Courses of military qualification, training and specialized training.
 - Exchange of cadets, students and advisors.
 - 2) Meeting of Military Academies.
 - 3) Visit and exchange programs of Heads and Units of the respective Armed Forces.
 - 4) Exchange of specialist military personnel on topics such as Personnel, Intelligence, Operations, Logistics, Civil Affairs, Computer Science and others of interest.
 - 5) Joint training operations performed among the Armed Forces.
 - 6) Participation of officers and non-commissioned officers in sports and cultural activities in the Armed Forces of other countries.

At the fifty-fifth regular period of sessions, Dr. Sergio González Gálvez, rapporteur for the topic, also presented document *Towards a new concept of security in the hemisphere: security schemes in the American continent after the cold-war* (CJI/doc.35/99). Dr. González Gálvez underscored the importance of this topic at the regional level (the legal effectiveness or ineffectiveness of some of the OAS' basic instruments) and at the global level (the possibility of amendments to the *United Nations Charter*).

Some Committee members expressed concern over the topic of self-disarmament. The rapporteur for the topic, Dr. Sergio González Gálvez, said that the presence of de-nuclearized zones (three thus far and another being negotiated in Africa) has in fact reduced the number of conflicts worldwide, demonstrating the expansive force of the treaties, even though their sphere of influence might seem small.

Other members wondered what would be the legal aspect of the topic being introduced that day that the Inter-American Juridical Committee would have to elaborate upon. The comment was made that the Juridical Committee might well study what constitutes an act of aggression under the Rio Treaty. Mention was also made of regionalization in matters of peace and security and the development of the regional mechanisms that are provided for in the *United Nations Charter*. It was also pointed out that new aspects of the security issue had to be explored, ones that had more to do with human security than with national security and domestic jurisdiction. The rapporteurs were asked to give more consideration to this matter. Other members made reference to the study on the advisability of restoring the autonomy of the regional mechanisms for peaceful settlement of disputes provided under the *United Nations Charter* and on the advisability of having an instrument in cases where peace breaks down and what its features should be have.

Dr. González Gálvez took in all these observations and suggested three alternative ways to study the topic. First, the Juridical Committee might consider the possibility of preparing a treaty on hemispheric security. His second suggestion was to establish certain elements for a definition of security, which would be referred to the Permanent Council's Committee on Hemispheric Security. The rapporteur also suggested the idea of continuing the exchange of ideas that had taken place at this regular period of sessions, in order to establish the future parameters of this topic, all within the framework of the existing instruments. He also announced that he would present another rapporteur's report reflecting the various schools of thought aired at this regular period of sessions.

The text of the document introduced by Dr. González Gálvez appears below:

TOWARDS A NEW CONCEPT OF SECURITY IN THE HEMISPHERE:

security schemes in the American Continent after the cold war

(Attached document to that presented on January 28, 1999 on this theme)

(presented by Dr. Sergio González Gálvez)

The discussion on the scope of the concept of security and the possible future options in the American Continent after the cold war are closely related to two sets of problems. Firstly, those related to the indissoluble link between the global and the regional scope in this kind of theme. Secondly, those regarding the evaluation of the agendas of the various members of a given region to enable us to decide how far they form an actual community with like purposes on security matters, different themes and concerns *vis-à-vis* the rest of the international community members. These are the two basic questions around which I will make the following comments.

REGIONALISM AND GLOBALITY

What role should be performed by the regional institutions in the area of security?

This widely discussed matter should be addressed from two angles. On the one hand, from the consideration of the very nature of spheres of regional action and the existing rules in this respect. On the other hand, from the perspective of the progress achieved in military technology as well as the appearance of so-called "new themes" in international political and strategic debate. In fact, this has been a crucial question throughout history, not only in the context of the international relationships between Latin American and the American continent in general –a world area where regionalism has a considerable tradition- but also in the creation of a more global concept. To regulate and give a satisfactory justification of regionalism, divorced from the perspective of spheres of influence and of old and new superpowers, has been a goal pursued without a great deal of success.

Not wishing to review in full the forms that this goal has assumed in the most important periods of history, it is nonetheless necessary to refer to the significant "change of period" registered by the World War II, when the theme became a fundamental issue of the negotiations which led to the creation of the Organization of the United Nations. The decisions included in the *Charter* of the Organization reflect a commitment between what international law should be (based on principles such as juridical equality) and the reality of an asymmetrical distribution of power in the world scenario.

THE FUNCTION OF REGIONAL INSTITUTIONS IN THE AREA OF SECURITY

In the field that interests us more directly, regional institutions are recognized in a framework where it is hoped that the international organization will have a monopoly on the power of decision to use force, translated into functions specific to the area of security. Two such institutions stand out as fundamental, one concerning threats to security made by countries in the region itself, the other

concerning the threats made by third States or groups of States. The former refers to the settlement of disputes that could arise between the members of a “community” in terms of security based on the existence of a particular regional agreement. The latter underlines the responsibility to support the collective defense of all members *vis-à-vis* other States or groups of States.

Latin America has played a crucial role in ensuring the recognition of the functions that regional institutions can perform in the sphere of security. However, the very development of the international events of the post-war period left a series of problems for the region that have led some countries to question the convenience of maintaining this emphasis.

Given the danger of imposing settlements, be they unilateral or collective, on any of the parties involved in a controversy between American States, some governments, including Mexico, have insisted that the role played by regional forums can by no means affect the sovereign right of carrying a dispute to the universal level, whereas others have defended their priority at least during such jurisdictions. In practice, it has proved impossible to resolve this disagreement from a strictly juridical perspective. As a result, the changing reality of the division of international power, as expressed in the oligarchic nature not only of existing military capacity but also of the mechanisms of decision prevailing in organs such as the Security Council of the United Nations, is what has for the time being resolved this debate, though we hasten to add that this situation necessarily has to change in the near future.

This prime function of regional jurisdictions on security has proved more effective when the dispute is between members of the system of relatively minor military weight and whenever the continental superpower does not participate directly.

Over the years, the theme of collective legitimate defense has aroused considerable debate, centered around two questions. In the first place, identification of what should be considered as a threat to “collective security.” During the post-war period on the American continent a broad answer to this question has often been attempted, at times even trying to bring about changes in the internal politics of Latin-American countries. This interpretation, opposed during the “cold war” by only a small group of countries, Mexico among them, unfortunately persists, nowadays allied with the illegal practice of trying to adopt coercive measures with regard to the claimed defense and promotion of democracy. The double impact of a lowered perception of extra-regional threats after the end of the cold war, and the obsolescence of notions such as “ideological pluralism” may contribute today to lend this tendency significant weight. Nevertheless, and notwithstanding the innate importance of these questions, it is not clear that political or ideological homogeneity can in itself constitute a threat to the security of the system.

The second topic for discussion concerning collective legitimate defense focuses more precisely on determining the type of activities that can be performed with this objective in mind. In this case the chief concern is the need to prevent these activities from ceasing to be defense instruments and changing into mechanisms of coercive action.

Adding this sort of problem to those commented on before in respect to the definition of what can be considered a threat to security, some countries of the Americas have openly reviewed their regionalist emphasis. Consequently today there is no true continental consensus on the effect of the specific functions of this sort of jurisdiction. The precise division between regional and global instances in the area of security is still a cause of controversy among members of the claimed community of American security. Neither pacific settlement of disputes nor collective legitimate defense nowadays generate in the region the same type of response that over 45 years ago led the Latin-American group to manage to incorporate in the *Charter of San Francisco* the same concept of regional systems of security.

The doubts that are cast today with regard to the role of the regional in the sphere of international security are multiplied by another kind of consideration. I am referring to new themes being added to a so-called new agenda, from environmental degradation to the drug trade, passing through migration flows. This phenomenon also operates against the relevance of a regionalist

outlook, since it has to do with situations of different characteristics that affect most of the members of the international community.

WHAT IS THE EXTENT AND SCOPE OF THE CONCEPT OF A SECURITY COMMUNITY?

In our continent the question between globalism and regionalism has been closely associated to another problem, that of the true specific extension, form and even content of the security community that such a regionalism intends to establish. The discussion has two sides to it. The better known lies in the question of how far the United States of America can be considered a member of a community of natural security with the countries of Latin America. However, today there is a second type of question, this one related to the practical relevance of seeing the whole of the Latin-American countries in this perspective, that is, the question of whether in this theme, as in so many others, Latin America has identical aims.

Pan-Americanism and Pan-Latin-Americanism are the two currents of opinion analyzed in their more general dimensions by the theorists, most of whom have expressed doubts as to the relevance of wanting to join together in a single "security community" both the superpower and the whole of the countries of Latin America. In practice, the very evolution of the regional security system has posited a certain type of commitment or *modus operandi*, since the superpower has been identified in various instances as a partner in situations of extra-continental threats and as a source of potential threats to security for the rest of the members of the system. In this sense, one of the most important objectives of the nations of Latin America is not only the defense of the community but also the definition of precise rules based on general principles of conduct such as non-intervention in the internal and external affairs of the States.

Not just debate at the doctrinal level but also the international behavior of the countries of the region have reflected the problems caused by the still not clearly settled tension between the functions of partner and the potential threat that at the same time can be attributed to the superpower. In the early 60s the so-called Cuban missile crisis clarified some of these dilemmas. This was practically the only example of the use of mechanisms of regional security to respond (or multilateralize a response) to a situation perceived as a security threat from a truly extra-continental source. At the same time this confirmed for the countries of Latin America the possibility of finding themselves dragged into a world confrontation as a result of a single member of the community belonging to set of security schemes and commitments of far greater geographical coverage. The result of the crisis was a definite strengthening of the preference that would characterize Latin-American actions for the rest of the decade: isolation from the potentially more disruptive aspects of a confrontation between the superpowers.

One of the main Latin-American actions driven by this objective is the initiative that led to drawing up the treaty to proscribe nuclear arms in Latin America, known as the *Treaty of Tlatelolco*. Still, it should be remembered that the negotiation of this international instrument with the United States of America was at first no easy matter. On the one hand it cannot be said that it was against its interests since it helped to prevent the North-Americans from facing a parallel situation to what the Soviet Union experienced when it saw itself closely surrounded by enemy nuclear installations. On the other hand it imposed limits on certain spheres of North-American conduct, chiefly in the transit of nuclear arms in the zone covered by the *Treaty*. What was really important for the problem under discussion, however, was that the very Latin-American rather than inter-American nature of one of the most significant initiatives undertaken by our countries in the area of hemispheric security once again touched on the problem of the true extension of security community in the continent.

This theme is still present in Latin-American discussions, even in the latest initiatives to set up a zone of peace and cooperation in the South Atlantic with some of the characteristics that helped create the *Tlatelolco Treaty*. This represents a preventive measure meant to isolate the sub-region from real and potential conflicts with other members of the international system. It is the result of a Latin-American initiative that has been espoused by countries of Western Africa. Finally, as Georges Lamaziere pointed out, it represents an attempt to seek security through political or legal instruments rather than through increasing military forces or alliances of this nature. According to

the same author, it is an example of how the major countries of South America have clearly opted to be the subjects of their own conception of security rather than lesser partners in security alliances devised by other countries for whom Latin America takes second place in any possible confrontation.

To some measure this reflected the fact that during the 80s the issue of the real extension of the security community in the hemisphere claimed revalidation. Regardless of the difficulties raised by the very origin of the conflict as to any effort that the other countries of the region could make in favor of Argentina during the war in the Falklands, the attitude of other members of the continental community cast doubts on the credibility of the pledge of collective defense which led to a significant review of the reality of regionalism in America and to the launching of a series of proposals aimed at setting strictly Latin-American jurisdictions, even on themes such as security. During the next few years the differences in outlook with regard to the best way to face the Central-American crisis sharpened the perception of the existence of limited points of real contact between the United States of America and Latin America on this sort of topic.

The difficulties that arose in this respect led South-American authors like former Minister of Foreign Affairs of Peru, General Mercado Jarrín, to suggest that the only way for the governments of South America to develop their own agenda in the field of security would be to isolate themselves from the North-American agenda. It was pointed out that South America has its own security agenda whose treatment cannot be "contaminated" by the differences that may exist *vis-à-vis* the United States of America in topics that that countries might define as priority. In practice this implied a significant distancing between the problems of the other Latin-American countries and the Northern Hemisphere. As the financial crisis of the countries of the Southern Hemisphere made it more important for them to develop a conflict-free relationship with the United States of America, this current of thought became clearer and more influential. A new question was posed: how possible is it to set up an agenda of shared security between the countries of Latin America, rather than between the United States of America and Latin America? A review of the predominant agendas for each of them in this area allows one to identify possible discrepancies.

SECURITY AGENDAS OF DIFFERENT COUNTRIES IN LATIN AMERICA

It is very difficult not to recognize that historically there have been significant differences in the security agendas of the different countries of the region. In what is now called the Caribbean Basin, the nature of the superpower's activities has historically been more immediate and concrete in content. Direct military interventions have actually concentrated in this area, which they define as a mediterranean, an interior sea, or as a basic zone of the "categorical imperative" of its national security. In practice there has not been a real response to this definition other than the often useless efforts to define an international set of rules that also applies to the United States of America.

The situation in South America has obviously been quite different. Here the competition between the different candidates to the *status* of regional power has been added to the concern to regulate the superpower's activities. Border and territorial conflicts –which are also present in more latent form in the Northern hemisphere- have here found a more direct expression at different moments, as has been the case of the arms race and the development of significant military capacities.

These are the fundamental themes of what could perhaps be called the traditional security agenda in each of these areas. As pointed out above, the immediate presence of the superpower in the North of the hemisphere has proved to be the key factor in defining this agenda for the Latin-American countries in the area. Nonetheless, this does not mean that confrontations between them have not played a significant role; indeed, the conflicts between different Latin-American countries have been an element of the utmost importance in this evaluation. However, they have been handled, as mentioned in the first part of this paper, within the dispute-settlement mechanisms that exist at the regional level. Cuba was also identified as a real threat by several States in the area, regardless of the global dimensions that involved the superpower. The need to contribute to conclude the process of Central-American pacification and to promote a peaceful transition in Cuba, constitute the most significant security themes in this sub-region.

In South America there are also latent problems of limits that doubtlessly complicate the regional agenda, which reinforces the criterion that there does not exist full coincidence in the security agendas that predominate in both parts of the Latin-American hemisphere, nor even among the countries of Latin America. However, in respect to the so-called "new agenda", today there exists quite an extensive tendency among the developed nations to focus their attention on a series of global themes such as the drug trade, migration or even environmental contamination, which on occasion are even added not only to international political-diplomatic discussions but also to the debate on the new dimensions of security in the world of the "cold war". Some of these themes, especially the drug traffic, sweep across the region from North to South and pose real threats to the countries that in one way or another become part of the transnational drug network. The coincidences and possibilities for cooperation are thus open and ready to be explored with regard to the need to define the most appropriate ways to face a true enemy in common, in strict respect for the interests of Latin-American countries, in view of the clear tendency towards unilaterality and the extraterritorial application of national legislations.

Emphasis on the so-called "new themes", from the perspective of security, is not a current of thought that is completely limited to the developments taking place among the more advanced countries. Even among the countries of Latin America these propositions have enjoyed some acceptance. We mentioned above the case of promoting democracy. This represents a good example of the tendency to place the discussion of important and real problems and valid and relevant objectives. The objective of the policy is very praiseworthy, but the arguments used are not quite convincing. They range from the intrinsic value of democratic practices to the supposition that international conflict is less likely under this type of regime. The legality of covering both this sort of situation and collective actions under the cloak of a claimed collective legitimate defense is nonetheless obviously questionable.

The new agenda thus presents both possibilities and obstacles for drawing up a security agenda shared by the countries in the hemisphere. The discussion of the very nature of what is regional in this context, which has led from exploring the differences that exist between the United States of America and Latin America to considering the security agendas of the countries of Latin America, constitutes the indispensable prerequisite of a discussion of any possible security scheme for our hemisphere in the context created by the end of the "cold war".

SELF-CONTROL IN ACQUIRING OFFENSIVE CONVENTIONAL ARMS

We submit to your consideration the need to maintain a military balance in the continent in order to control and limit armaments, thereby avoiding suspicion between neighboring countries and countries with opposed interests at any given time, which could break out in armed confrontation. On the one hand, these agreements and treaties could be meant to limit the transfer and acquisition of certain conventional (and extremely expensive) arms of offensive nature such as bomber-type supersonic planes, guided missiles, and on the other hand, to extend restrictions in the use of arms that are classified in international humanitarian law as "with extremely cruel or non-discriminatory effects". We know how difficult this work is and its irremediable connection with the commercial negotiations on disarmament. However, we nevertheless maintain the priority nature of this work. Latin America should be an area of peace and this sort of codification could be one step towards this goal.

Most developing countries, or those with limited military potential, have found or should find in the international bodies established for the purpose of ensuring international peace, a great alternative to the classic theory which defends the need to develop a military power in order to protect each sovereign State. However, we know how long it takes to create a process of a central political power at the international level capable of imposing peace whenever need be. We know too that in the play of forces the militarily powerful countries will in certain circumstances continue to impose their opinion.

**CRITERIA TO REGULATE THE RELATIONSHIP OF OAS
WITH THE INTER-AMERICAN DEFENSE BOARD**

Cooperation for hemispheric security has been a constant fact in the international action of Mexico, which is why our country participates actively in many international bodies, is founder member of the Inter-American Defense Board and member State of the *Inter-American treaty of reciprocal assistance*. Efforts born of the need to effectuate the wishes of security, peace and tranquility of American countries, as a prerequisite to achieve better levels of welfare and social harmony.

We are not impervious to changes that are happening in the international sphere, but we look on these changes convinced of the validity of the principles that have traditionally ruled our international conduct.

In this framework we feel that it is appropriate to ratify that we consider the Inter-American Defense Board as a strictly consultative body and that possible operations in order to maintain peace should only be considered in strict observance of the Charter of the OAS, of the *Rio Treaty*, and of the *Charter of the United Nations*, taking into account that by its very nature the inter-American system can not be conceived as a coercive system.

On the other hand, the Inter-American Defense Board should only act in cases where the corresponding body of the OAS so requests and provide that the action requested is based on the law.

As a result of the above, we believe it necessary to use this forum to uphold our firm rejection of the creation of standing or *ad hoc* regional military forces for any reason, since that decision goes against the spirit and the letter of the basic instruments of the inter-American system now in force.

Dr. Eduardo Vío Grossi presented document *Juridical aspects of hemispheric security: first preliminary report on the "Charter of the Organization of American States: limitations and possibilities"* (CJI/doc.38/99 corr.1). He explained that the topic for which he was rapporteur had much in common with the topic presented by Dr. Sergio González Gálvez. Dr. Vío Grossi pointed out that the OAS was charged with hemispheric peace and security and, given that fact, the relations between the OAS and the UN had very special significance (application of Chapter VIII of the *United Nations Charter* through the OAS).

The Juridical Committee decided to combine the agenda topic on "hemispheric security" with that on "The Charter of the Organization of American States: limitations and possibilities."

The following is the document presented by Dr. Vío Grossi.

**JURIDICAL ASPECTS OF HEMISPHERIC SECURITY FIRST PRELIMINARY REPORT ON
“THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES:**

limitations and possibilities”

(presented by Dr. Eduardo Vío Grossi)

Introduction

1. The fiftieth anniversary of the Organization of American States has evidently caused it to reflect collectively on its achievements and failures and especially the challenges it will face in the foreseeable future. Such hemispheric discussions, however, focus on the political aspects arising from the question. And it could not be otherwise, considering, on one hand, the juridical nature of the Organization itself and that, on the other, it certainly reflects and should reflect the political wishes of its Member States.

2. However, there would be no such exchange of ideas if it had not included, at least at some stages, the juridical aspects of the question and if not all the agencies of the Organization of American States had taken part. Consequently, and as a contribution to this discussion, based on the fact that it is the Organization's juridical advisory body, the Inter-American Juridical Committee undertakes the study of the legal role that the OAS *Charter* plays and perhaps should play in the inter-American system. From this viewpoint, the study endeavors to determine as far as possible if the Organization's Charter is currently the suitable instrument for what the States in the inter-American system will probably face in the near future.

3. In this sense, the matter to be addressed, considering the theory of international organizations as interpreted in the actual OAS *Charter* and their practical application, is the analysis of the limitations and possibilities that it has addressed from a juridical viewpoint in an attempt to determine the probable juridical leads that, in this aspect, the hemispheric community could take. Of course, the preliminary analysis will not exhaust the juridical study of the inter-American system, which also includes the collective security system and dispute-settlement mechanisms. On the other hand, undertaking the aforementioned partial reflection cannot ensure *a priori* its success in terms of effective suggestions or proposals.

4. Nevertheless, both with their limitations are by no means undeserving of the need to perform the juridical analysis of the OAS *Charter*. It is not only the past that fully justifies such efforts. New international circumstances also impose them. And even more relevant in doing so, the Inter-American Juridical Committee not only plays the role that the Organization's *Charter* has assigned it but it also participates in it more actively in the processes that the *Charter* so vigorously undergoes.³⁴⁶

5. Consequently, as a result of the above, through resolution CJI/RES.2/LIV/99, dated 29 January 1999, the Inter-American Juridical Committee included the topic *The Charter of the Organization of American States: limitations and possibilities* in its agenda.

6. Moreover, as an incentive to the first discussion that the Juridical Committee is to hold at its 55th regular period of sessions³⁴⁷, this document endeavors to identify what the main topics of

³⁴⁶ *The Charter of the Organization of American States: limitations and possibilities*. OEA/Ser.Q. CJI/doc.20/99, 27 January 1999, original: Spanish

³⁴⁷ Letter a) of Article 49 of the CJI *Rules of procedure* considers that one of the rapporteur's tasks is “to prepare a preliminary report containing an analysis of the topic, its doctrinal approach; the report may contain also the personal opinion of the rapporteur on the topic”.

the matter in question might be, so that later, probably at its next regular period of sessions, the Committee can address all or some of them in more depth and scope, considering the contributions raised in the aforementioned debate.

7. Such topics or more relevant aspects raised by the theme concern, first, the nature of an international organization, with both a general or political and coordinating purpose with which the Organization of American States was conceived. And next, with its characteristic as an international organization with a flexible or diverse structure.

I. International organization with a general or political and coordinating purpose

8. The Organization of American States was created with the principal purpose of contributing towards the maintenance and restoration of international peace and security on the continent, that is, as an international organization with a general or political mission. The first sentence in article 1 of its *Charter* demonstrates this.³⁴⁸ Also the fact is that six of the other purposes of the Organization mentioned in article 2 of the same text belong to the sphere of matters concerning international peace and security³⁴⁹ and that of the fourteen principles of the member States stated in article 3, where there is direct or indirect reference to these six purposes.³⁵⁰

9. Similarly, the whole Chapter IV of the *Charter of the Organization of American States*, entitled "Fundamental Rights and Duties of States" establishes such rights and duties with a clear or generally political content, that is, linked to the criterion of international peace and security.³⁵¹

³⁴⁸ *Charter of the Organization of American States*, article 1: "The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence".

³⁴⁹ *Charter of the Organization of American States*, article 2: "The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: a) to strengthen the peace and security of the continent; b) to promote and consolidate representative democracy, with due respect for the principle of nonintervention; c) to prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States; d) to provide for common action on the part of those States in the event of aggression; e) to seek the solution of political, juridical, and economic problems that may arise among them; f...; g)..., and h) to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States."

³⁵⁰ *Charter of the Organization of American States*, article 3: "The American States reaffirm the following principles: a) ...; b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfilment of obligations derived from treaties and other sources of international law; c) ...; d) The solidarity of the American States and the high aims which are sought through it require the political reorganization of those States on the basis of the effective exercise of representative democracy; e) Every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State. Subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic, and social systems; f) ...; g) The American States condemn war of aggression: victory does not give rights; h) An act of aggression against one American State is an act of aggression against all the other American States; i) Controversies of an international character arising between two or more American States shall be settled by peaceful procedures; j) Social justice and social security are bases of lasting peace; k) ...; l) ...; m) ...; n) The education of peoples should be directed toward justice, freedom, and peace."

³⁵¹ *Charter of the Organization of American States*, Chapter IV, Fundamental rights and duties of States, article 10: "States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law." Article 13: "The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law." Article 17: "Each State has

10. Evidently, Chapters V and VI of the aforementioned *Charter*, entitled “Pacific Settlement of Disputes” and “Collective Security” respectively, fully belong to the sphere of international peace and security.³⁵² And chapter VII of the Charter of the Organization of American States entitled “Integral Development”, although devoted to listing the rights and duties of the States concerning economic and social issues, expressly states that integral development and social justice are indispensable conditions for international peace and security.³⁵³

11. All the foregoing implies that the Organization of American States must be perceived and valued particularly in relation to maintaining and restoring international peace and security on the continent. And for this reason, this objective or sphere of action must be understood, together with the others, as expressed in the last sentence of the first paragraph in article 1354 and the first sentence of article 2 in Chapter I355, both from the *Charter of the Organization of American States*, closely related to the role of the United Nations, an organization principally in charge of international peace and security and which, in its own charter, has a special Chapter VIII concerning regional arrangements.³⁵⁶

the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.” Article 19: “No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.” Article 20: “No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.” Article 21: “The territory of a State is inviolable; it may not be the object, even temporarily, of military occupation or of other measures of force taken by another State, directly or indirectly, on any grounds whatever. No territorial acquisitions or special advantages obtained either by force or by other means of coercion shall be recognized.” Article 22: “The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof.” Article 23: “Measures adopted for the maintenance of peace and security in accordance with existing treaties do not constitute a violation of the principles set forth in Article 19 and 21”

³⁵² Chapter V – Pacific Settlement of Disputes, article. 24: “International disputes between Member States shall be submitted to the peaceful procedures set forth in this Charter. This provision shall not be interpreted as an impairment of the rights and obligations of the Member States under Articles 34 and 35 of the Charter of the United Nations.” Article. 25: “The following are peaceful procedures: direct negotiation, good offices, mediation, investigation and conciliation, judicial settlement, arbitration, and those which the parties to the dispute may especially agree upon at any time.” Article. 26: “In the event that a dispute arises between two or more American States which, in the opinion of one of them, cannot be settled through the usual diplomatic channels, the parties shall agree on some other peaceful procedure that will enable them to reach a solution.” Article. 27: “A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time.” Chapter VI – Collective Security, Article. 28: “Every act of aggression by a State against the territorial integrity or the inviolability of that territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States.” Article. 29: “If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extracontinental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject.”

³⁵³ Article 30: “The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security...”

³⁵⁴ Article 1: “...within the United Nations, the Organization of American States is a regional agency.”

³⁵⁵ “The Organization of American States, in order to.....fulfill its regional obligations under the Charter of the United Nations...”

³⁵⁶ Chapter III – Regional arrangements – Article 52 – “1. Nothing in the present precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations. 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council. 3. The

12. The foregoing, therefore, defines the relationship between the Organization of American States and the United Nations Organization concerning international peace and security³⁵⁷, principally when the former's *Charter* states that it is a regional agency³⁵⁸ of the latter and that it does not in any way detract from the rights and obligations of the Member States as stated in the United Nations *Charter*.³⁵⁹

13. In the scope of this first question, it could therefore be considered that it is feasible for the Organization of American States to provide rules, certainly obligatory exclusively to it, that regulate in its respect Chapter VIII of the United Nations *Charter*, including that which pertains to the qualification of acts concerning international peace and security and their being bound to those which configure international disputes³⁶⁰, and the future application of coercive measures as provided in the United Nations *Charter*.³⁶¹

14. Nevertheless, it is essential to bear in mind, with respect to the foregoing, that the Organization of American States is also an organization of cooperation, that is, for those who seek the joint action of the Member States, without sufficient empowerment to dictate resolutions concerning the Member States, nor even directly applicable in the territory and to their agencies and inhabitants. Thus, there is no provision whatever in the *Charter of the Organization of American States* that gives it supranational powers but rather, much to the contrary, in the first line of the 2nd paragraph of its article 1, its powers are expressly restricted^{362 363} and imposes on it the obligation of respecting the internal jurisdiction of the member States.³⁶⁴

15. On the other hand and for the same reason, practically all obligations provided in the *Charter of the Organization of American States* and, especially, those relating to integral

Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council. 4. This Article in no way impairs the application of Article 34 and 35." Art. 53: "1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state. 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been an enemy of any signatory of the present Charter." Art. 54: "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."

³⁵⁷ *La interrelación jurídica entre la Organización de las Naciones Unidas y la Organización de los Estados Americanos*. MARCHAND STENS, Luis, Política internacional. Special Edition, Revista de la Academia Diplomática del Perú, 50 Años del Perú en las Naciones Unidas, p. 151-.

³⁵⁸ See note n. 9.

³⁵⁹ *Charter of the OAS*. Chapter XIX – The United Nations. Article 131: "None of the provisions in this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations."

³⁶⁰ Bearing in mind that in Chapter V of the OAS *Charter*, together with the provision of the obligation to pacifically settle disputes, the Organization is not empowered to decide on its own international conflicts. Moreover, Article 27 states that: "A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time." Which implies that everything pertaining to the settlement of disputes is referred to another juridical text.

³⁶¹ See note n. 11, in which the provision is transcribed that mentions, among other things, that "the Security Council will utilize such regional arrangements or regional agencies, if applicable, to apply coercive measures under its authority. Nevertheless, coercive measures will not be adopted as a result of regional arrangements or by regional agencies without authorization of the Security Council, ..."

³⁶² "The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States."

³⁶³ The foregoing raises the subject of applying the theory of the powers implicit to OAS.

³⁶⁴ See note n. 17.

development³⁶⁵, would seem to belong to the so-called program contents or behavior³⁶⁶, so that it is very difficult to define their violation and thereby the institution's diligence to establish international responsibility. In this sense, perhaps a second question that arises, always with regard to the aspects concerning international peace and security, is with regard to the indispensable or essential obligations considered in the *Charter*, as already mentioned, for instance, with respect to the international juridical obligation in the sphere of effectively exercising representative democracy.³⁶⁷

16. From this standpoint, it would be useful and interesting to define, for example, the real scope of the concepts of internal jurisdiction of the States and obligations to pacifically settle disputes and cooperate towards the development, and we repeat, all to do with problems concerning international peace and security and provisions of other international juridical texts on the same subjects. Perhaps this is the only way to be able to understand the scope of responsibility that the *Charter* attributes to the Organization of American States on such clearly political issues.

II. International organization with flexible or diverse structure

17. On the other hand, always considering that the Organization of American States is fundamentally an international organization with a general or political and coordinating purpose, the former also gives rise to the logical question whether its structure permits it to be agile, fast and effective in matters relating to maintenance of regional peace and security, so that, in the terms of the United Nations *Charter*, it would be unnecessary for the latter organization to intervene.³⁶⁸

18. To answer this question, we must consider for the time being that, as a product of the system that the *Charter* foresees for its own reform³⁶⁹, not all member States are part of the changes that have been made. And it should be emphasized, bearing in mind that the Protocols containing such changes have foreseen a different prevailing system than the actual *Charter of the Organization of American States*³⁷⁰, resulting in the different versions of the *Charter* prevailing at the same time, depending on the State that is addressed. And so, of course, the structure of the Organization could become operationally different depending on the corresponding situation.³⁷¹

19. Nonetheless, it should be borne in mind that the conditions and scopes of the diligence of suspending membership that may be applied to a Member State, which would undoubtedly have repercussions on the decision-making system in the agencies of the Organization of American States.³⁷²

20. From another angle, it is also worth asking, whenever with special regard to matters of international peace and security, about the juridical role played by agencies that are practically identical in their configuration, that is, formed by representatives from all Member States³⁷³, and that, although with competence in different subjects, they are closely related so that hypothetically

³⁶⁵ Chapter VII of the *Charter*.

³⁶⁶ That is, obligations that require the State to have a certain conduct without reference to achieving a certain objective.

³⁶⁷ CJI/RES.I-3/95.

³⁶⁸ See note n. 11.

³⁶⁹ *Charter of the OAS*. Article 140: "The present Charter shall enter into force among the ratifying States when two thirds of the signatory States have deposited their ratifications. It shall enter into force with respect to the remaining States in the order in which they deposit their ratifications." Article 142: "Amendments to the present Charter may be adopted only at a General Assembly convened for that purpose. Amendments shall enter into force in accordance with the terms and the procedure set forth in Article 140."

³⁷⁰ Art. XXVI of the 1967 *Buenos Aires Protocol*; Art. 14 of the 1985 *Cartagena de Indias Protocol*; Art. VIII of the 1991 *Managua Protocol*; and Art. V of the 1992 *Washington Protocol*.

³⁷¹ ARRIGHI, Jean-Michel. *Les reformes à la Charte de l'Organisation des États Américains: problèmes de droit des traités*, Paris: A.F.D.I., 1997, p.93-.

³⁷² See MARCHAND and ARRIGHI, *op.cit.*

³⁷³ General Assembly, Consultative Meeting of Ministers of Foreign Affairs, Permanent Council of the Organization and Inter-American Council for Integral Development.

they could adopt conflicting resolutions, signifying consequently structural repetition. The existence of Specialized Conferences³⁷⁴ must be added to all the aforementioned. It is therefore not unusual to ask if it is worth continuing with some distinctions that, after all, perhaps differ from each other in name only.

21. Nor can there be no reference to instances that are undoubtedly increasing in importance and frequency, but that are not expressly mentioned in the *Charter of the Organization of American States*. They are the Ministerial meetings in a large number of areas³⁷⁵ and the Summits of Heads of State and Government of the member States.³⁷⁶

22. So it would not be outside these topics to ask if it would be worthwhile for the Organization of American States to simplify its structure even more, so that, on one hand, it would recognize a single plenary instance made up of State representatives, whose level would vary according to the importance of the matters to be addressed on each occasion.

23. On the other hand, considering the aforementioned concerning the ratifications of the amendments to the Charter of the Organization of American States, such as interdependence between the political, economic and social aspects, and bearing in mind the duplicated efforts currently arising in the hemisphere according to the specific features of the regions therein, it would by no means be unsuitable that the charter consider not only its amendment but also its modification³⁷⁷ so that the Organization itself is an institution role model for other Treaties³⁷⁸ as well as organizations and thus effectively coordinates all their actions, cutting down the costs and undertaking the synthesis necessary for political action.

III. Conclusion

24. In short, it is therefore concluded that the subject in question is to determine, with basis exclusively on the terms in the *Charter of the Organization*, including its practice, if the Organization of American States, as an organization without supranational facilities or powers and with a structure formed basically of plenary instances consisting of representatives of all Member States, can effectively play the main role assigned to it, that is, maintain international peace and security in the hemisphere.

25. The outcome, therefore, is that the analysis is partial but by no means without significance, since the purpose is to know and define the approach that OAS may adopt in terms of maintaining international peace and security, in accordance with its own regulations, without which the terms of Chapter VIII of the UNO Charter and other treaties relating specifically to matters of peace and security in the hemisphere would not be fully understood.

Now that the topic on “legal aspects of hemispheric security” had been included in the agenda, some members of the Juridical Committee were of the view that the Committee should focus on the more general issues of hemispheric security and leave examination of the more specific topics, like human security, for later. The Juridical Committee would still have time to discuss a topic like “human security” at its August regular period of sessions and with that make a contribution to the upcoming Summit of the Americas, as one of its more important topics was precisely that of human security.

³⁷⁴ *Charter of the OAS*. Chapter XVII

³⁷⁵ For instance, the Ministers of Justice meetings.

³⁷⁶ A process from which, in fact, the current OAS mandates arise.

³⁷⁷ Part IV of the *Vienna Convention on the Law of Treaties*.

³⁷⁸ As happens, for instance, with ALADI.

The general consensus was that this regular period of sessions should establish which points would be addressed under this item on the agenda. The Juridical Committee had before it document *The Charter of the Organization of American States, hemispheric security, globalism and regionalism: points to develop in relation to these three themes* (CJI/doc.46/99) and designated Dr. Sergio González Gálvez, Dr. Luis Marchand and Dr. Eduardo Vío Grossi as rapporteurs. Document CJI/doc.46/99 appears below:

**THE CHARTER OF THE ORGANIZATION OF AMERICAN STATES,
HEMISPHERIC SECURITY, UNIVERSALISM AND REGIONALISM:
POINTS TO DEVELOP IN RELATION TO THESE THREE THEMES**

(presented by Dr. Sergio González Gálvez)

- I. Links of the UN and the Inter-American System to Chapter VIII of the World Organization Charter (possible jurisdictional disputes).
 - a) peaceful settlement of disputes;
 - b) exercising legitimate defense (individual and collective);
 - c) application of coercive measures.
- II. Impact of recent actions by other regional organizations or by regional collective defense organizations in interpreting the articles of the *Charter of the Organization of the United Nations* and Inter-American System.
- III. Compatibility between the security agendas of the different countries on the Continent, a necessary element in preparing a "community with an identity in favor of security".
- IV. System of Hemispheric Security and the following instruments and resolutions:
 - a) Amended OAS Charter;
 - b) Amended Inter-American Treaty for Reciprocal Assistance;
 - c) Tlatelolco Treaty and its Protocols;
 - d) Treaty of Democratic Security of Central America;
 - e) Inter-American Defense Council;
 - f) Inter-American Defense Board;
 - g) Confidence and Security-Building Measures;
 - h) Actions of the Group of Rio on the subject;
 - i) Measures against conventional arms build-up;
 - j) Development and codification of International Humanitarian Law;
 - k) New concept of Human Security;
 - l) Defense of democracy and human rights, according to instruments on the latter subject.
- V. Elements of a new concept of hemispheric security in light of the dynamic international situation:
 - a) It must be an essentially preventive process, not based on systems involving coercive measures;

- b) It includes strategic-military aspects but, first and foremost, economic, political and social aspects;
- c) The strengthening of democratic institutions, ideological pluralism and the mechanisms to ensure full enforcement of human rights;
- d) Creation of a zone of peace on the Continent;
- e) Encouraging a culture of peace.

NOTE: The above list is not exhaustive.

11. Study of the system for the promotion and protection of human rights in the inter-American sphere

The Inter-American Juridical Committee added this topic to its agenda at its fifty-fourth regular period of sessions (Rio de Janeiro, January 1999) and designated Dr. Gerardo Trejos as rapporteur. The latter was to present a report on the subject at some forthcoming regular period of sessions.

12. The fight against tobacco: the need and advisability of combating the tobacco habit

The Juridical Committee added this item to its agenda at its fifty-fourth regular period of sessions and named Dr. Gerardo Trejos as rapporteur. The latter said he would present a rapporteur's report on the subject at a future session.

13. International abduction of minors by a parent

Through resolution AG/RES.1691 (XXIX-O/99), adopted at its twenty-ninth regular period of sessions (Guatemala City, June 1999), the OAS General Assembly requested an opinion from the Inter-American Juridical Committee, as requested of it in resolution CD/RES.10 (73-R/98), adopted by the Directing Council of the Inter-American Children's Institute at its 73rd Regular Meeting.

The Juridical Committee named Dr. Eduardo Vío Grossi and Dr. João Grandino Rodas as rapporteurs for the topic. The Secretariat was asked to supply information on relevant domestic laws and other international documents.

CHAPTER III

OTHER ACTIVITIES

1. Activities carried out by the Inter-American Juridical Committee in 1999

A. Presentation of the Annual Report of the Inter-American Juridical Committee

Dr. Brynmor T. Pollard introduced document *Annual Report (1998) of the Inter-American Juridical Committee of the OAS to the General Assembly at its twenty-ninth regular period of sessions (Guatemala City, June 6-9, 1999)* (CJI/doc.32/99).

B. Course on International Law

At its fifty-third regular period of sessions (Rio de Janeiro, August 1998), the Inter-American Juridical Committee approved resolution *XXVI Course on International Law* (CJI/RES.24/LIII/98). That resolution reads as follows:

XXVI COURSE ON INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the twenty-sixth Course on International Law will be held in the city of Rio de Janeiro in 1999, organized annually with the collaboration of the General Secretariat of the OAS;

WHEREAS the Course on International Law must be based on a core theme that allows attention to be concentrated on a matter of current international importance and that also offers sufficient flexibility to attract lecturers and students with different interests in public and private international law,

RESOLVES:

1. To determine that the XXVI Course on International Law be held from 2 to 27 August 1999 on the core theme of *The new challenges of public and private international law*.

2. To establish that during this Course the topics for the working groups will focus mainly on the study of the juridical system for natural resources.

This resolution was adopted unanimously at the session held on 27 August 1998, in the presence of the following members: Drs. Keith Highet, João Grandino Rodas, Olmedo Sanjur G., Luis Herrera Marcano, Gerardo Trejos Salas and Jonathan T. Fried.

With the help of the Secretariat for Legal Affairs, the Inter-American Juridical Committee organized the XXVI Course on International Law. Held from August 2 through 27, 1998, participating in the course were 28 professors, 28 OAS fellowship recipients selected from over 100 applicants, and 9 students who underwrote their own expenses.

The central theme of the course was "The new challenges of international public and private law". The course program was as follows:

Monday, August 2

10:00 - 12:00: Opening ceremony
Sergio González Gálvez, member of the Inter-American Juridical Committee
Tribute to Dr. Antonio Gómez Robledo

Tuesday, August 3

9:00 - 11:00: Jean-Michel Arrighi, Director, Department of International Law of The OAS General Secretariat
The changes in the structure of the international legal order

11:00-13:00 Orlando Rebagliati, member of the Inter-American Juridical Committee
The Antarctic treaty system, including the regime of living resources and natural resources I

Wednesday, August 4

9:00 - 11:00 Patrick Dallier, Professor of International Law, University of Rennes, France
Regionalism and globalization I

11:00 - 13:00 Orlando Rebagliati
The Antarctic treaty system, including the regime of living resources and natural Resources II

Thursday, August 5

9:00 - 11:00 Patrick Dallier
Regionalism and globalization II

Friday, August 6

9:00 - 11:00 Patrick Dallier
Regionalism and globalization III

11:00 - 13:00 Brynmor T. Pollard, member of the Inter-American Juridical Committee
Structure and legal bases of CARICOM

Monday, August 9

- 9:00 - 11:00 Juan Aníbal Barria, Head of the Disarmament Department of Chile's Foreign Ministry
The Convention on Chemical Weapons: its nature, features and the chief problems that its domestic application poses
- 11:00 – 13:00 Juan Aníbal Barria
Human security and its place in international law
- 15:00 - 17:00 José Angelo Estrella Faria, Legal Officer, International Trade Law Subdivision, United Nations Office of Legal Affairs (Secretariat of the United Nations Commission on International Trade Law – UNCITRAL)
A general description of the work of UNCITRAL and the current project on E-commerce

Tuesday, August 10

- 9:00 - 11:00 Sergio González Gálvez, member of the Inter-American Juridical Committee
The International Criminal Court: possibilities and problems
- 11:00 - 13:00 Eduardo Vío Grossi, member of the Inter-American Juridical Committee
International responsibility: current status of codification
- 15:00 - 17:00 Gerold Herrmann, Secretary of the United Nations Commission on International Trade Law (UNCITRAL) and Head of the Sub-division on International Trade Law, Office of Legal Affairs of the United Nations (Secretariat of UNCITRAL)
International commercial arbitration

Wednesday, August 11

- 9:00 – 11:00 Cecilia Siac, Attorney
Mining Law: an approach between common law and civil law I
- 11:00 – 13:00 Luis Marchand, member of the Inter-American Juridical Committee
The new concepts of security in the regional sphere
- 15:00 – 17:00 Cecilia Siac
Mining law: an approach between common law and civil law II

Thursday, August 12

- 9:00 – 11:00 César Parga, Consultant, OAS Trade Unit
The legal framework of foreign trade
- 11:00 – 13:00 Jaime Aparicio, Director, OAS Office of Summits Follow-up
The process of hemispheric summits I

Friday, August 13

- 9:00 – 11:00 César Parga
The ALCA process
- 11:00 – 13:00 Jaime Aparicio
The process of hemispheric summits II

Monday, August 16

- 9:00 – 11:00 Roberto Volterra, Attorney
States and international judicial settlement of disputes: recent developments and future trends I
- 11:00 – 13:00 Diego Fernández Arroyo, Professor of the Universidad Complutense de Madrid
Inter-American private international law: evolution and prospects I

Tuesday, August 17

- 9:00 – 11:00 Roberto Volterra
States and international judicial settlement of disputes: recent developments and future trends II
- 11:00 – 13:00 Diego Fernández Arroyo
Inter-American private international law: evolution and prospects II
- 15:00 – 17:00 Galo Leoro, former Minister of Foreign Affairs of Ecuador
The juridical-political development of the peaceful settlement of disputes in the one hundred years since the establishment of the Permanent Court of Arbitration at The Hague in 1899, I

Wednesday, August 18

- 9:00 – 11:00 Galo Leoro
The juridical-political development of the peaceful settlement of disputes in the one hundred years since the establishment of the Permanent Court of Arbitration at The Hague in 1899, II
- 11:00 – 13:00 Diego Fernández Arroyo
Inter-American private international law: evolution and prospects III
- 15:00 – 17:00 Jorge Renán Segura, Permanent Representative of Costa Rica to the OAS
Minorities and international law

Thursday, August 19

- 9:00 – 11:00 Henry Dahl, Attorney
Natural resources and protection of the environment and human health in international law I
- 11:00 – 13:00 Jean-François Olivier, Regional Delegate in Brasilia of the International Committee of the Red Cross
The role of the International Red Cross
- 15:00 – 17:00 Jorge Renán Segura
Legal analysis of the various minorities recognized under international law

Friday, August 20

- 9:00 – 11:00 Henry Dahl
Natural resources and protection of the environment and human health in international law II

11:00 – 13:00 Sylvia Ospina, Regional Director of Regulatory Affairs for Latin America, ICO Global Communications Services Inc.

International telecommunications via satellite and the use of natural resources I

15:00 – 17:00 Sylvia Ospina

International telecommunications via satellite and the use of natural resources II

Monday, August 23

9:00 – 11:00 Amb. Aurelio Pérez Giralda, Chief of the Office of International Legal Services of the Ministry of Foreign Affairs of Spain

The sectorialization of international law and diplomacy I

11:00 – 13:00 Dr. Enrique Candiotti, member of the United Nations International Law Commission

The challenges of public international law from the perspective of the United Nations International Law Commission I

15:00 – 17:00 Dr. Alberto Ninio, World Bank

The evolution of environmental law in Latin America I

Tuesday, August 24

9:00 – 11:00 Dr. Aurelio Pérez Giralda

The sectorialization of international law and diplomacy II

11:00 – 13:00 Dr. Enrique Candiotti

The challenges of public international law from the perspective of the United Nations International Law Commission II

15:00 – 17:00 Dr. Alberto Ninio

The evolution of environmental law in Latin America II

Wednesday, August 25

9:00 – 11:00 Luis Miguel Díaz, Mexican Director of the Mexico-United States Conflict Resolution Center, Las Cruces, New Mexico

Mediation and negotiation to settle legal disputes I

11:00 – 13:00 Antonio Paulo Cachapuz de Medeiros, Legal Advisor with the Ministry of Foreign Affairs of Brazil

The peaceful settlement of international disputes at the dawn of the twenty-first century

15:00 – 17:00 Luis Miguel Díaz

Mediation and negotiation to settle legal disputes II

Thursday, August 26

9:00 – 11:00 Antonio Paulo Cachapuz de Medeiros

New ways of concluding international treaties

11:00 – 13:00 Luis Miguel Díaz

Mediation and negotiation to settle legal disputes III

- 15:00 – 17:00 Juan Colaiácovo, OAS expert
Negotiation and conflict resolution: different approaches
- Friday, August 27
- 9:00 – 10:00 Remarks by Ambassador João Clemente Baena Soares
- 10:00 – 11:00 Remarks by Ambassador Didier Operti
- 11:00 Closing and presentation of diplomas

At its fifty-fourth regular period of sessions (Rio de Janeiro, January 1999), the Inter-American Juridical Committee approved resolution *XXVII Course on International Law* (CJI/RES.1/LIV/99), wherein it resolved to hold that course from July 31 to August 25 of the year 2000, the main theme being “Regionalism and globalism.” The following is the text of that resolution:

XXVII COURSE ON INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the twenty-seventh Course on International Law organized annually with the collaboration of the General Secretariat of the Organization of American States will be held in the city of Rio de Janeiro in year 2000;

CONSIDERING the need for the Course on International Law to be based on a core theme that allows attention to be concentrated on a matter of current international importance and that also offers sufficient flexibility to attract lecturers and students with different interests in public and private international law,

RESOLVES:

To determine that the XXVII Course on International Law be held from July 31 to August 25 of 2000 on the central theme of *Regionalism and universalism*.

This resolution was adopted unanimously at the session held on 29 January 1999, in the presence of the following members: Drs. João Grandino Rodas, Kenneth O. Rattray, Eduardo Vío Grossi, Sergio González Gálvez, Orlando Ruben Rebagliati, Brynmor T. Pollard, Luis Marchand Stens, Gerardo Trejos Salas, and Luis Herrera Marcano.

At its fifty-fifth regular period of sessions (Rio de Janeiro, August 1999), the Inter-American Juridical Committee approved resolution *XXVIII Course on International Law* (CJI/RES.13/LV/99), which appears below:

XXVIII COURSE ON INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the twenty-eighth Course on International Law organized annually by the Inter-American Juridical Committee in collaboration with the General Secretariat of the OAS will be held in the city of Rio de Janeiro in the year 2001;

CONSIDERING the need for the Course on International Law to be based on a core theme that allows attention to be concentrated on a matter of current international importance and that also offers sufficient flexibility to attract lecturers and students with different interests in public and private international law,

RESOLVES:

To determine that the XXVIII Course on International Law be held from July 30 to August 24 of the year 2001 on the central theme of "The human being in contemporary international law".

This resolution was adopted unanimously at the session held on August 21, 1999, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Eduardo Vío Grossi, and Gerardo Trejos Salas.

C. IV Joint Meeting with Legal Advisors from the Ministries of Foreign Affairs of the Member States

At its fifty-fifth regular period of sessions, the Juridical Committee decided that the IV Joint Meeting with Legal Advisors from the Ministries of Foreign Affairs of the OAS member States would be held on Thursday and Friday of the first week of business of the Juridical Committee's fifty-sixth regular period of sessions. It also decided that the theme of the meeting would be an examination of the inter-American legal agenda. The Inter-American Juridical Committee adopted resolution CJI/RES.11/LV/99, wherein it affirmed its decision, took note of the General Assembly resolution and established that the meetings would be held every three years.

FOURTH JOINT MEETING WITH LEGAL ADVISORS OF THE MINISTRIES OF FOREIGN AFFAIRS OF THE OAS MEMBER STATES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the provision in article 103 of the *Charter of the Organization of American States*, articles 3 and 31 of the Statutes of the Inter-American Juridical Committee, and articles 3, 7 and 21 of its *Rules of Procedure*;

BEARING in mind that article 12, letter e) of its Statutes authorizes it "to establish cooperative relations with universities, institutes, and other teaching centers, with bar associations and other associations of lawyers and with national and international committees, organizations, and entities devoted to the development of codification of international law or to the study, research, teaching, or dissemination of information on juridical matters of international interest";

TAKING INTO ACCOUNT the important experience gained from the three previous Joint Meetings with Legal Advisors;

CONSIDERING the result of the General Assembly in its 29th regular period of sessions in the city of Guatemala in June 1999, which, through resolution AG/RES.1616 (XXIX-O/99), acknowledges with satisfaction and recognizes the advisability of the meetings of the Inter-American Juridical Committee with legal consultants and advisors of the Ministries of Foreign Affairs of the Organization's Member States in order to further the good relations between them,

RESOLVES:

To invite the most senior officer in the international juridical field of the Ministry of Foreign Affairs of each Member State of the Organization of American States to the 4th Joint Meeting of Legal Advisors to be held in Washington, D.C., March 23-24, 2000, during the 56th regular period of sessions of the Inter-American Juridical Committee.

To establish that the theme or topic of the aforementioned meeting is to be the analysis of the inter-American juridical agenda.

To remember that the participation of the guest senior officers will be on a personal basis, their opinions will not compromise their respective States, and that their travel and accommodation expenses will not be to the account of the Organization of American States.

To request the General Secretariat to send the invitations from the Chairman of the Inter-American Juridical Committee and provide the cooperation required to organize and hold the meeting, as well as to obtain the necessary funds for this purpose.

1. To decide on the advisability in the future of holding the aforementioned meetings every three years.

This resolution was approved at the session of August 25, 1999, the following members voting in favor: Drs. Luis Marchand Stens, Jonathan T. Fried, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, and Gerardo Trejos Salas; Drs. Sergio González Gálvez and Eduardo Vío Grossi voting against, and Luis Herrera Marcano abstaining from voting.

D. Relations and forms of cooperation with other inter-American organs and agencies and with like regional or world organizations

- The Inter-American Juridical Committee's participation as an observer with various organizations and conferences

The following members of the Inter-American Juridical Committee were observers with various international fora and organizations in 1999:

- Dr. Brynmor T. Pollard, an observer at the Second Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas (Lima, Peru, March 1-3, 1999) (CJI/doc.23/99, *Report of the Observer of the Inter-American Juridical Committee on the Second Meeting of Ministers...*).
- Dr. Keith Highet, in his capacity as Chairman of the Inter-American Juridical Committee, at the OAS Permanent Council, March 25, 1999 (CJI/doc.22/99, *Report by the Chairman of the Inter-American Juridical Committee to the Permanent Council of the Organization of American States*).
- Dr. Luis Marchand, an observer at the 51st regular period of sessions of the United Nations International Law Commission (CJI/doc.27/99 rev.1), *Report of the observer of the Inter-American Juridical Committee to the 51st period ...*).
- Dr. Keith Highet and Dr. Eduardo Vío Grossi, observers at the Joint Meeting on International Law at The Hague, as part of the commemoration of the Centennial of the 1899 Peace Conference, held in The Hague, The Netherlands, May 17 through 19.

- Dr. Brynmor T. Pollard, representing the Inter-American Juridical Committee at the twenty-ninth regular period of sessions of the General Assembly (Guatemala City, June 1999), on the occasion of the presentation of the *Annual Report (1998) of the Inter-American Juridical Committee of the OAS at the twenty-ninth regular period of sessions ... (CJI/doc.32/99)*.
- Dr. João Grandino Rodas, representative at the twenty-sixth Rome-Brasilia Seminar, held in Brasilia, August 19 to 21, 1999, where the main theme was the juridical integration of Latin America and globalization.
- Dr. Orlando Rebagliati, representative at the 74th Regular Meeting of the Directing Council of the Inter-American Children's Institute, held in Buenos Aires, Argentina, September 20 and 21, 1999.
- Dr. Keith Highet, the Juridical Committee's representative at the Sixth Committee of the United Nations General Assembly, in New York, in October 1999.
- Dr. João Grandino Rodas, the Juridical Committee's representative at the International Law Workshops held in Montevideo, Uruguay, October 18 to 20.
- Dr. Luis Herrera Marcano, the Juridical Committee's representative at the Meeting of Experts to study the draft declaration on the rights of indigenous peoples, held in Washington, D.C., November 1 through 5, 1999.
- Dr. Gerardo Trejos, representing the Juridical Committee at the Seminar on the Inter-American System for the Protection of Human Rights on the eve of the XXI Century, organized by the Inter-American Court of Human Rights in San José, Costa Rica, November 22 to 27, 1999.

The texts of the reports prepared on the occasion of those presentations are transcribed below:

**REPORT OF THE OBSERVER OF THE INTER-AMERICAN JURIDICAL COMMITTEE
ON THE SECOND MEETING OF MINISTERS OF JUSTICE OR OF MINISTERS
OR ATTORNEYS-GENERAL OF THE AMERICAS**

(Lima, Peru, 1st to 3rd March, 1999)

(presented by Dr. Brynmor Thornton Pollard)

I attended the Second Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas from March 1st to 3rd in Lima, Peru, on behalf of the Inter-American Juridical Committee with observer status. The agenda of the meeting is at pages 7 and 8 of the preliminary version of the *Final report of the meeting* (OEA/Ser.K/XXXIV.2 REMJA-II/doc.21/99 rev.1) which has been circulated already to members of the IAJC. A copy is attached at Appendix I hereto for easy reference.

The Minister of Justice of Peru, Dr. Carlota Valenzuela de Puellas, was elected to chair the Meeting. The Attorney-General of Trinidad and Tobago, Dr. Ramesh Lawrence Maharaj and the Minister of Justice of Costa Rica, Dr. Mónica Nagel, were elected First Vice-Chair and Second Vice-Chair, respectively.

The inaugural session of the Meeting was addressed first by Dr. Cesar Gaviria Trujillo, Secretary-General of the OAS who stressed the need to provide mechanisms to facilitate access to justice as well as to make more extensive use of alternative methods to settle disputes, for example, arbitration. The key-note address was delivered by the President of the Republic of Peru, Alberto Fujimori, who formally opened the Meeting.

The central theme of the President's speech was that there can be no stable development of democracies (within the Americas) until society acknowledges that access to justice, including economic and social justice, is assured. With the permission of the Chair, I made a statement to the Meeting on behalf of the IAJC a copy of which is at Appendix II.

Heads of Delegations in their general statements in the Plenary Sessions of the Meeting reiterated and re-affirmed the requirement for judicial officers to enjoy security of tenure after their appointment and to enjoy favorable terms and conditions of service as contributory factors in ensuring and preserving their independence in exercising their functions. Providing greater access to justice for the disadvantaged sections of the population was also a recurring theme.

An important conclusion of the Meeting is to establish a Justice Studies Centre for the Americas, with the following objectives: -

- a) the training of personnel in the justice sector;
- b) the exchange of information and other forms of technical co-operation;
- c) to support the reform and modernisation of justice systems in the region.

Also of importance are the decisions of the Meeting:

- i. to establish procedures for strengthening and developing inter-American co-operation in areas of special concern, for example, terrorism, money laundering and other transnational activity;
- ii. to establish an inter-governmental group of experts within the framework of the OAS to carry out investigations into aspects of Cyber Crime and to report its findings and recommendations to the Third Meeting of Ministers of Justice or Ministers or Attorneys-General of the Americas scheduled to be held in Costa Rica;
- iii. to promote the exchange of national experience and technical co-operation in prison and penitentiary policy matters within the framework of the OAS.

The conclusions and recommendations of the Meeting are set out in Chapter IV of its *Final report*, the preliminary version of which has been circulated. For easy reference the conclusions and recommendations are in Appendix III.

In my statement to the Meeting, I referred to operative paragraph 8 of the Juridical Committee's resolution tabled before the Meeting identifying some areas which the Committee deemed merited consideration by the Ministers and Attorneys-General.

APPENDIX I

1. Access to justice

- 1.1. Legal aid and defense services
- 1.2. Initiatives for the legal protection of minors
- 1.3. Incorporation of alternative conflict settlement methods in national administration-of-justice systems

2. Training of judges, prosecutors, and judicial officials

- 2.1. Experiences acquired in basic, advanced, and specialized training of judiciary personnel
- 2.2. Mechanisms to promote judicial independence and effectiveness of public prosecutors or attorneys general
- 2.3. Creation of a center for judicial studies in the Americas

3. Prison and penitentiary policy

- 3.1. Modernization of the sector and the improvement of new legal frameworks
- 3.2. New developments in criminal procedure
- 3.3. Regional cooperation mechanisms

4. Strengthening and developing inter-American cooperation

- 4.1. Fighting organized crime and transnational crime, including cyber crime (domestic legislation, degree of effective application and implementation of international instruments in this area, procedures, and national experiences, etc.)
- 4.2. Legal and judicial cooperation (inter-American treaties; other mechanisms; extradition; information sharing; submission of documents and other types of evidence; witness protection agreements, etc.)

Conclusions and recommendations

APPENDIX II

Madam Chairperson, I would like to take this opportunity to congratulate you on your election to preside over this Meeting of policy-makers, which I venture to suggest augurs well for fruitful discussions of the issues before it and its successful outcome. Congratulations must also be extended to the Vice-Presidents elected by acclamation evidencing the high esteem in which they are held.

Madam Chairperson, the Inter-American Juridical Committee of the Organization of American States considers it a privilege and a signal honour to have been invited, with observer status, to this Second Meeting of Ministers of Justice, or of Ministers or Attorneys-General of the Americas here in Lima, Peru, and wishes to convey to this meeting the deep appreciation of its Chairman and members for the invitation extended.

Madam Chairperson, I wish also to convey thanks and appreciation to the Government of Peru and the organising committee, including the many persons involved, for the excellent arrangements which have been made for the hosting of this Meeting and for the many courtesies extended to us which, without doubt, will contribute to the successful outcome of this meeting.

Madam Chairperson, the IAJC conscious of its origin as the oldest juridical body of the inter-American system, having been established in 1906 by resolution of the III American Conference held in Rio de Janeiro, as well as its functions conferred by its Statutes, *inter alia* to serve the Organisation of American States as an advisory body on juridical matters, to promote the progressive development and codification of international law and to study juridical problems related to the integration of the hemisphere, is pleased to be associated with the deliberations at this Meeting of Ministers and Attorneys-General and, at its 54th regular session held in Rio de Janeiro, Brazil, during the period January 18-29, 1999 adopted the resolution which is a document before this Meeting (document OEA/Ser.K XXXIV.2 REMJA-II/doc.7/99 rev.1, dated 17 February 1999).

With regard to the topic entitled Mechanisms to Promote Judicial Independence included in the agenda of this Meeting, it is to be noted that the IAJC commenced an investigation into the subject and presented a preliminary report of its findings as a result of which the General Assembly, by resolution AG/RES.1561 (XXVIII-O/98), instructed the Committee, in collaboration with national and international institutions involved, to continue its work on the improving the administration of justice in the Americas. The IAJC is therefore pleased to note that the topic of mechanisms to promote juridical independence is included in the agenda of this meeting.

The study embarked on by the IAJC investigates those mechanisms and procedures in place in member States intended to enhance the administration of justice by, *inter alia*, guaranteeing the independence of judicial officers and members of the legal profession in exercising their respective functions. This activity engaging the Inter-American Juridical Committee's attention necessarily involves an examination of existing procedures relating to the appointment of judicial officers and the security of their tenure of office, including also the establishment of satisfactory procedures and mechanisms for the determination and maintenance of the adequacy of their remuneration and other conditions of service.

Madam Chairperson, in the course of the deliberations on this subject of the administration of justice, members of the IAJC expressed concern over particular related issues, which the Juridical Committee considers need to be addressed urgently at the national level, namely, providing better access to the legal processes by the disadvantaged members of our societies and undue delays experienced in the delivery of legal services to the public thereby echoing the adage "Justice delayed is justice denied". There are repeated calls for the extension and improvement of legal aid services and the establishment of more informal systems and procedures for the settlement of disputes. As a consequence of the inevitable march towards globalisation and the thrust towards privatisation as a vehicle for achieving and maintaining economic growth, the Juridical Committee has identified the need to provide for the accountability of the new privatised agencies which will provide essential services to the public, services which hitherto were the responsibility of public sector entities, for example, water and electricity.

Madam Chairperson, having regard to the information which has been given to this Meeting as a result of the interventions of the heads of delegations, the IAJC will be pleased to learn that a number of the concerns highlighted in its study of the administration of justice in the Americas and also as identified in operative paragraph 8 of its resolution of January 1999 (OEA/Ser.Q CJI/RES.4/LIV/99) are already implemented or in the course of being implemented in a number of the member States.

Madam Chairperson, I wish to refer to operative paragraph 8 of the IAJC's resolution before this Meeting, identifying some areas which the Ministers and Attorneys-General might consider merit consideration. As stated in operative paragraph 1 of the IAJC's resolution (CJI/RES.4/LIV/99), the Juridical Committee offers its firm support to and collaboration with this meeting in the furtherance of the resolutions which this Meeting may adopt.

Thank you.

APPENDIX III

CONCLUSIONS AND RECOMMENDATIONS

At the conclusion of its discussions of the various items on the agenda, the Second Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas convened under the aegis of the OAS reached the following conclusions and recommendations:

I. Access to Justice

To continue with the exchange of experiences regarding measures and initiatives adopted at the domestic level, as well as progress achieved and obstacles encountered by the OAS member states in

relation to the problem of access to justice in their respective countries; improvement of legal aid and defense services; legal protection of minors; and incorporation of alternative dispute resolution methods in national administration-of-justice systems.

To further those ends, clear identification will be made of the applicable cooperation mechanisms in these areas, and the following actions, *inter alia*, undertaken: compilation of the legislation in force regarding these matters, with a view to creating a database; comparative studies; and preparation of a list of countries and institutions that are in a position to provide international cooperation in these areas.

II. Training of judges, prosecutors, and judicial officials

A. Justice studies center for the Americas

With a view to the establishment of the Justice Studies Center envisioned in the Plan of Action of the Second Summit of the Americas; and taking into account the different legal systems in the Hemisphere, it is decided:

1. That the objectives of the center will be to facilitate:
 - a. The training of justice sector personnel;
 - b. The exchange of information and other forms of technical cooperation;
 - c. Support for the reform and modernization of justice systems in the region.
2. That a group of government experts, open to participation by all delegations, will be formed to:
 - a. Prepare draft by-laws;
 - b. Prepare a work plan;
 - c. Identify public and/or private institutions working in this area;
 - d. Establish appropriate links with international organizations in order to secure the necessary technical support for the Center's operations.
3. That the Center's work plan, in the initial phase, will focus on criminal justice matters.
4. That the group of experts shall conclude its work before September 21, 1999.
5. To request that the OAS provide the necessary support for the work of the group of experts.

B. Regional courses, workshops, and seminars

To continue to cooperate with the General Secretariat by organizing regional or subregional courses, workshops, and seminars to train and develop the legal skills of officials in charge of the justice systems in the OAS members states in collaboration with international or national, governmental or nongovernmental institutions.

III. Strengthening and developing inter-American cooperation

A. To strengthen international cooperation, in the framework of the OAS and other institutions, in areas of special concern, such as the struggle against terrorism, combating corruption, money laundering, drug trafficking, forgery, illicit trafficking in firearms, organized crime, and transnational criminal activity.

B. Cyber Crime

Because of the importance and difficulty of the issues presented by cyber crime, and the spread and potential magnitude of the problems it poses for our countries, it is recommended to establish an intergovernmental expert group, within the framework of the OAS, with a mandate to:

1. complete a diagnosis of criminal activity which targets computers and information, or which uses computers as the means of committing an offense;
2. complete a diagnosis of national legislation, policies and practices regarding such activity;
3. identify national and international entities with relevant expertise; and
4. identify mechanisms of cooperation within the inter-American system to combat cyber crime.

The intergovernmental expert group should present a report to the Third Meeting of Ministers of Justice or Ministers or Attorneys General of the Americas.

C. To continue working in an effective and flexible manner to strengthen mutual legal and judicial assistance among the OAS member states, particularly with respect to extradition, requests for delivery of documents and other forms of evidence and the establishment of secure and prompt channels of communications between central authorities.

D. To evaluate the application of inter-American conventions in force in the area of legal and judicial cooperation, in order to identify measures for their effective implementation or, if appropriate, to determine whether the existing legal framework in the hemisphere should be changed.

E. To urge OAS member states that are parties to treaties for legal and judicial cooperation to appoint Central Authorities where they have not yet done so, to ensure the effective implementation of these treaties.

F. To recommend that the OAS convene a meeting of central authorities in due course to strengthen cooperation among those authorities in relation to the various conventions on the subject of legal and judicial cooperation.

G. Extradition, forfeiture of assets, and mutual legal assistance

Recognizing the need to strengthen and facilitate legal and judicial cooperation in the Americas with regard to extradition, forfeiture of assets and mutual legal assistance, and to enhance individual and international efforts against organized crime and transnational criminal activity through improved intergovernmental communication and understanding, we commit ourselves to exchange information, through the OAS, on the following matters in order to deal with them at the Third Meeting of Ministers:

1. Extradition "checklists", glossaries of commonly-used legal terms, and similar instruments of simplified guidance and explanation on extradition and related processes;
2. Sample forms for intergovernmental requests for mutual legal assistance;
3. Instructional materials on the best methods for securing bilateral and international assistance in the area of forfeiture of assets.

In order to facilitate this work, we will immediately begin to compile a list of contact points for information on extradition, mutual legal assistance, and forfeiture of assets.

IV. Prison and penitentiary policy

To reiterate the need to promote the exchange of national experience and technical cooperation in prison and penitentiary policy matters within the framework of the OAS.

V. Venue of the Third and Fourth Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas

A. To accept with gratitude the offer of the Government of Costa Rica to host the Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas and agree that the agenda for that meeting should be prepared within the OAS.

B. To accept with gratitude the offer of the Government of Trinidad and Tobago to host the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas and agree that the agenda for that meeting should be prepared within the OAS.

**REPORT BY THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE
TO THE PERMANENT COUNCIL OF THE ORGANIZATION OF AMERICAN STATES**

(Washington, D.C., 25 March 1999)

(presented by Dr. Keith Highet)

The Chairman of the Inter-American Juridical Committee gave an oral presentation of the *Annual report* for 1998, which contains the topics discussed by that body at its two regular sessions, held during the year in Santiago, Chile (March 1998) and Rio de Janeiro (August 1998).

First, the Chairman of the Juridical Committee drew the attention of the CAJP (Committee on Juridical and Political Affairs) members to the IAJC's agenda for the 54th regular session, held in Rio de Janeiro in 1999, which reflects the Juridical Committee's efforts at simplifying its agenda.

The Chairman then reported on the activities covered in the *Annual report*. He noted that the Inter-American Juridical Committee had conducted a series of studies on topics such as the proposed American Declaration on the Rights of Indigenous Populations; had issued an opinion on the draft protocol of amendment to the OAS Charter and the draft resolution on amending the American Declaration of the Rights and Duties of Man; and had taken up the following topics: inter-American cooperation to cope with terrorism; international cooperation against corruption, illicit enrichment, and transnational bribery in the countries of the Hemisphere; the role of the Juridical Committee as an advisory body of the OAS; democracy in the inter-American system; the right to information, access to information, and the protection of personal data; enhancement of the administration of justice in the Americas; the juridical dimension of integration and international trade and the most-favored-nation clause; convocation of the Sixth Inter-American Specialized Conference on International Private Law (CIDIP-VI); and celebration of the centennial of the 1899 Peace Conference. The Chairman further explained that the *Annual report* of the Juridical Committee has three chapters and primarily describes how the studies on the above-mentioned topics have been developing. The first chapter discusses the origin, legal bases, and structure of the Inter-American Juridical Committee and the period covered by the Annual Report. The second chapter discusses the topics addressed by the Inter-American Juridical Committee at its 1998 sessions and contains the texts of resolutions adopted at both sessions and specific accompanying documents. The third chapter refers to other activities carried out by the Juridical Committee, includes resolutions of acknowledgment, tribute, and appreciation that have been adopted, and addresses budgetary matters. He also explained that certain attachments to the *Annual report* list the resolutions adopted and documents issued for quick reference thereto in the *Annual report*.

Having completed that presentation, the Chairman of the Juridical Committee turned to the content of the agenda for the IAJC's 54th regular session, to be held in August 1999. He reported that the IAJC had completed its work in connection with the drafting of a model law on transnational bribery and illicit enrichment and was now ready to receive any subsequent mandate regarding

these matters. He also reported that, at the 55th regular session, the Juridical Committee would try to complete discussion of the topic "Right to information: access to and protection of information and personal data," and that the IAJC expected to receive further comments from its members on the topic "Enhancement of the administration of justice in the Americas." He also expressed his hope that the Juridical Committee might provide a concrete opinion on the topic "Inter-American cooperation to cope with terrorism," and announced that a brief report would be presented on the application by the states of the Hemisphere of the United Nations Convention on the Law of the Sea, and on the interesting new area of human rights and biomedicine. He also expressed the interest and expectations of the IAJC members with respect to developments regarding the convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI).

The Chairman of the Inter-American Juridical Committee also reported that, in May 1999, he would be representing that Juridical Committee as chairman of the dispute settlement group that would meet on the occasion of the centennial of the 1899 Hague Peace Conference. He further said that he would inform the Juridical Committee of any request from that group to continue the work begun at the Third Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of OAS Member States (August 1998), which had discussed three topics: international humanitarian law, disarmament, and the peaceful settlement of disputes.

The Chairman of the Juridical Committee also indicated that it was attempting to improve the organization of its activities and its procedure for considering the various agenda items. He noted that it was studying the possibility of two three-week regular sessions instead of the one two-week session and one four-week session it has been holding until now. He also took the opportunity to thank the Organization for keeping the IAJC's budget at a reasonable level.

The Chairman of the Inter-American Juridical Committee also discussed the role of the IAJC as an advisory body of the Organization. He underscored the need for both the General Assembly and the Permanent Council to keep in mind that the Juridical Committee must decide on the legal aspects of topics assigned to it, meaning that the political bodies should be able to distinguish between the political and legal aspects of every question before them and should seek the IAJC's opinion only on the legal issues. The Chairman indicated that the time is right for the Organization to reconsider the possible role of the Juridical Committee, within the potential limits derived from the technical capabilities of its members, the support of the Secretariat for Legal Affairs, and the budget allocated by the Organization. Accordingly, he said that, in the future, it would be advisable for the Organization to make greater use of the IAJC's services, but mainly in matters of a general nature not involving the resolution of specific issues. In this way, the IAJC could serve the Organization's political bodies more efficiently and effectively.

**REPORT OF THE OBSERVER OF THE INTER-AMERICAN JURIDICAL COMMITTEE
TO THE 51st PERIOD OF SESSIONS OF THE UNITED NATIONS
INTERNATIONAL LAW COMMISSION**

(presented by Dr Luis Marchand Stens)

In order to comply with the task assigned to me by the Chairman, Dr. Keith Highet, and the members of the Juridical Committee, I attended the session of the United Nations Commission on International Law on May 18th as an observer from our institution. The session devoted two hours to the presentation of the material presented below and to the exchange of opinion which followed.

After hearing the kind words of welcome addressed by the President of the Commission, Dr. Zdzislaw Galicki, I proceeded to thank him and the other members of the Commission, on behalf of the Juridical Committee, for the opportunity to report on some of the latest activities undertaken by our entity.

I gave special emphasis to the importance attached by the Juridical Committee to maintaining active cooperation with the ILC .

I began my presentation by noting that, in accordance with the *Charter of the OAS*, the Inter-American Juridical Committee has the status of an Organ of the Inter-American System, along with the General Assembly, the Meeting of Foreign Ministers, the Permanent Council and the Inter-American Commission on Human Rights. I underscored the technical autonomy and independence that the Juridical Committee enjoys. I added that this is the oldest regional specialized body, dating almost as far back as the very birth of the hemispheric organization; more precisely, the OAS was registered in 1889, while the Juridical Committee was set up in 1906.

To illustrate this point, I mentioned that the objective of the Juridical Committee is to serve as the inter-American consultative organ on juridical matters, to promote the progressive development and codification of international law, and to study the juridical problems inherent in the integration of developing countries of the continent and the possibility of standardizing their regulations.

I stressed that this has meant that prominent juridical institutions of regional scope that have been gradually adopted since the beginning of the century owe their structural design to the Juridical Committee, including many draft conventions in the field of private international law aimed at facilitating integration.

I next explained that the backbone of the inter-American juridical system bears the stamp of the Juridical Committee and constitutes solid proof of its noteworthy history and its contribution to the improvement of the institutions of the Hemispheric System.

I outlined how the Juridical Committee has been the source of innumerable draft instruments and declarations that conform to this backbone in issues of peace, security, peaceful solutions, human rights, democracy, rights and duties of States, non-intervention, proscription of threats and the use of force, asylum, extradition, etc.

Accordingly -I stated- one may emphasize the Juridical Committee's contribution to the efforts of integration on both the regional and sub-regional level through studies and projects aimed at the progressive development and codification of private international law at the commercial, procedural and civil levels, which has helped with the adoption of specific multilateral instruments by the Specialized Inter-American Conferences on Private International Law.

I also referred to the Juridical Committee's contribution to regional efforts to suppress corruption, which enabled the countries of America to sign a multilateral agreement on the subject in 1996, which is in effect.

With respect to the members of the Juridical Committee, I noted that it is composed of eleven jurists, currently presided over by Dr. Keith Highet, with Dr. João Grandino Rodas as Vice-Chairman. Besides the undersigned, the other members are: Luis Herrera Marcano, Eduardo Vío Grossi, Jonathan Fried, Brynmor T. Pollard, Gerardo Trejos Salas, Kenneth O. Rattray, Sérgio González Gálvez and Orlando Rebagliati.

After concluding this brief report on the Juridical Committee's institutional objectives and its permanent contribution to the American juridical framework, I noted that the Juridical Committee has many subjects on its agenda, but bearing time in mind, I would only refer briefly to some of the work carried out in 1998 and at the start of the current year, such as:

- a) American declaration on the rights of indigenous peoples;
- b) Improving the administration of justice in the Americas;
- c) Inter-American cooperation in the struggle against terrorism;

- d) Democracy in the inter-American system;
- e) Inter-American cooperation to suppress corruption in the countries of America: illicit enrichment and transnational bribery;
- f) International Law Course.

At this point in my presentation, I felt that it might be wise to explain that my opinions did not represent those of the Committee, but that they were personal.

- a) American declaration on the rights of indigenous peoples

I noted that the Permanent Council of the OAS requested the Juridical Committee to study, during its meeting in March 1998, a *Draft declaration on the rights of indigenous peoples*, drawn up by the Inter-American Commission on Human Rights.

In this regard, I mentioned that the Juridical Committee had previously examined certain instruments which, while not specifically referring to indigenous peoples, did contain illustrative clauses, such as: *Universal Declaration of the Rights of Man*; the *International Pact on Civil and Political Rights* (article 18, paragraph 1; article 23, paragraphs 2 and 27); the *International Pact on Social, Economic and Cultural Duties* (article 1 and 13); and *Agreements 107 and 169 of the WTO*.

I added that a draft of the Sub-Committee on Prevention of Discrimination against and Protection of Minorities of the Economic and Social Council of the United Nations was also under consideration, noting that it was still being analyzed and discussed.

I expressed that the legal understanding shared by the members of the Juridical Committee, reflected in a text for consideration by the Permanent Council of the OAS, was based on the need to promote full enjoyment of human rights on the part of those people on the American Continent who have preserved the cultures that existed since before European colonization, and the need to contribute to the preservation of these cultures as a vital part of the cultural heritage of America.

I also said that the members of the Juridical Committee shared the understanding that a large proportion of the people who have preserved these cultures are in more unfavorable social and economic conditions than the rest of the population, and that it was therefore necessary and urgent to correct this situation.

Given the interest in this theme expressed by the ILC, I felt that it was opportune to refer to some of the points of the illustrative text mentioned. I began by saying that the preamble demonstrates the juridical understanding just mentioned, and underlines the right of indigenous peoples to achieve their development in the same conditions as the rest of the population without having to sacrifice their cultural heritage.

The declarative portion notes that indigenous populations are defined as the group of people who have preserved, to date, essential features of a culture that existed prior to European colonization, such as: language, beliefs, traditions, customs, forms of communal government, artistic expression, and their own forms of subsistence. The condition of indigenous persons can never be based on racial considerations. I also noted their right to full and effective enjoyment of human rights, and consequently their effective and equal participation in the decision-making processes of the State to which they belong. In addition, I noted their right to belong freely to another culture existing within the State, without restriction or discrimination.

I deemed it relevant to state that indigenous peoples that inhabit a physical space separate from other cultures have the right to the integrity and conservation of that space, and not to be disturbed in their traditional use and exploitation of the land and natural resources. I emphasized that the State must respect this right and have it respected by third parties.

In closing, I mentioned that the illustrative text contained other statements aiming at ensuring the rights of indigenous people, but that in the interests of time, I had limited myself to stressing the most salient.

b) Improving the administration of justice in the Americas

I began this theme by pointing out that since 1985 the Inter-American Juridical Committee has included the complex theme of the administration of justice among its most important activities and that within the scope of this subject, it has distinguished several topics worthy of further study, such as: facilitating access to justice and simplifying judicial procedures; human rights and the slowness of justice; the appointment of magistrates and justice officials; and protection and assurance for judges and lawyers in the exercise of their duties.

I referred to two important seminars held in Rio de Janeiro under the sponsorship of the Inter-American Juridical Committee. As a result, it was proposed that a private inter-American association be set up to work closely with governmental and inter-governmental agencies and with the General Secretariat of the OAS.

I also mentioned that within the ambit of the OAS, two meetings of Ministers of Justice and Attorneys General were held, the first in Buenos Aires in 1997, and the second in Lima, in March 1998.

I described how, as a result of this concern of the Juridical Committee, exhaustive studies have been prepared on the subjects mentioned, and that the report presented by the rapporteur, Dr. Jonathan T. Fried, on protection and assurances to judges and lawyers in the exercise of their duties, was sent to the Permanent Council of the OAS, with the recommendation that that entity should consider the advisability of maintaining a constant examination through periodical reports and the publication of information, of the problems in Member States that can affect the independence of magistrates and lawyers in the performance of their duties.

I opined that although the reform of judicial power represents a task ranging from the independence, honesty and stability of the judiciary, the financial autonomy of the justice sector, legal and procedural reforms, simplified alternative methods for solving conflicts, all the way to the infrastructure and proper location of premises, efficiency of judicial information and statistics, and so on, the core objective of modernizing and improving should in essence also be to make available to everyone -especially the poorer segments, including the indigenous communities in several American countries- real access to a reliable, just and efficient judicial system.

I alluded to the fact that for someone of Andean extraction, educated in law school and concerned with inter-American issues, as in my case, the socio-economic reality of Ibero-America could not be separated from the legal studies regarding the improvement of the administration of justice.

Indeed, as I pointed out, the Achilles heel of Latin-American democracies -save for few exceptions- is the critical poverty that affects the great majority of people for whom access to the system of justice is today practically impossible. I mentioned that two of the outstanding figures in Peruvian diplomacy, Ambassador Carlos Alzamora, former Under-Secretary General of the United Nations and Ambassador Oswaldo de Rivero, former Permanent Representative of Peru to the International Organisms of the United Nations, recently published two important books on the economic problems of Ibero-America.

In the first, entitled *The capitulation of Latin America*, Ambassador Alzamora, with the experience gathered during his mandate as Secretary General of the Latin-American Economic System (SELA), analyzes the serious impact of foreign debt on the region's development. I added that -as I saw it- reading this well-documented work was fundamental for an understanding of Latin-American reality.

In the second book, which bears the suggestive title of *The myth of development*,

Ambassador Oswaldo de Rivero offers sweeping, documented research into the economic situation of Third World States in general, and of Latin-American countries in particular. Based on studies and statistics of the World Bank, the United Nations Program for Development, and the FAO, the author shows how crucial it is not only for Latin America's present but also for its future to find a solution to the poverty that in most countries affects a segment of the population that oscillates between 30-50% of the total number of inhabitants.

I also referred to a recent study published under the title *The Inter-American Development Bank and the reduction of poverty*, edited by the Director of the Unit on Poverty and Inequality of that regional organization, Dr. Nora Lustig, in which she points out that during the last decade poverty grew in most Latin-American countries and that there has been no marked reduction of this social scourge.

I commented that this economic reality means that in some countries of the region, 50% or even more of the inhabitants have no access to judicial power, since they lack the necessary resources, and that, save for some pilot projects that the Inter-American Bank is developing Central America, the programs and projects promoted by international organizations are geared towards generally modernizing the system of justice, but the problem of access to justice for poor people does not constitute the main focus of these projects and programs.

Next, I stated that among the matters relating to the justice sector, the Juridical Committee is examining the topic "Facilitating access to justice and simplifying judicial procedures", and that one study presented to the Committee entitled *Access to justice and poverty in Latin America*, which wrote, recommended attracting the attention of agencies that work on projects on this vital problem which, together with the urgent need to improve the living standards of economically marginalized sectors, is of fundamental importance for the consolidation of democracy and full enjoyment of human rights.

I mentioned that in this same study, certain measures are suggested that could be adopted in the short run to improve access to justice for the poorer segments of the population.

c) Inter-American cooperation to confront terrorism

I began this topic by pointing out that in 1994 the Juridical Committee reinstated the theme of terrorism on its agenda, and that through periodical reports it has been studying the various aspects of this serious problem.

I mentioned further that in the following year - 1995 - the First Summit of Presidents of the Americas stressed that the subject was a priority for the OAS, and that based on the mandate of the Summit, the regional organization held in 1996 the First Specialized Inter-American Meeting on Terrorism, which adopted a *Plan for Action* against the scourge. I felt it a duty to mention that both in reactivating the issue within the OAS and in bringing about the Conference, the Peruvian Ambassador to the OAS, Beatriz Ramacciotti, played a decisive role.

I likewise expressed that the results of this First Specialized Conference and a specific mandate from the Second Summit of the Presidents of the Americas led to a Second Specialized Meeting that proposed the creation of an "Inter-American Committee against Terrorism." I added that the core document adopted by that meeting expressly requests our Committee's juridical collaboration in preparing studies to strengthen judicial cooperation to confront terrorism, including extradition.

I commented that, as some experts on the topic have indicated, prosecutions based on international juridical cooperation may be limited by specific clauses written in extradition and asylum agreements, which generally omit the right to classification of the criminal nature of the crime, leaving the power to the requested State. In other words, a State may, on the one hand, deny extradition if it considers that the imputed crime is political or is linked to some political act, and on the other hand grant political asylum if it considers this appropriate.

I made specific reference to the fact that the States of Latin America have maintained this power in various regional instruments, both as protection for people who could be considered as potential victims of political contingencies, and for reasons from their own internal circumstances.

In closing, I stated that the reporting on this topic was shared with a distinguished Venezuelan jurist, Dr. Luis Herrera Marcano.

d) Democracy in the inter-American system

On this subject, which attracted the special interest of the ILC, I started by saying that the Juridical Committee lends special importance to studies related to the progressive development of international law regarding the effective exercise of representative democracy, bearing in mind that the constituent *Charter of the OAS* mentions democracy four times.

I mentioned that the first two references appear in the Foreword to the *Charter*, which reads:

"... representative democracy is an indispensable condition for the stability, peace and development of the region" and "the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man."

I added that the other two statements appear in articles 2 and 3 of the *Charter*, dedicated to the Nature and Purposes of the Organization and to the Principles of the American States, in the following terms:

Article 2 – b) Purposes: To promote and consolidate representative democracy, with due respect for the principle of nonintervention.

Article 3 – d) Principles: The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.

I made special mention of the fact that as a result of follow-up on this theme and to proceed with the matter in the regional system, the Juridical Committee adopted an important report prepared by Dr. Eduardo Vío Grossi, former Chairman of the IAJC. This document states:

... the Charter of the Organization of the America States has established in respect to democracy, international juridical obligations both for the Member States and for the Organization itself. For this very reason and considering that the doctrine is in agreement that this matter is not the exclusive domestic jurisdiction of a State if this State is regulated by International Law, it can be firmly maintained that in the Inter-American System, democracy is no longer a matter within the internal, domestic or exclusive jurisdiction of the States. Nowadays, democracy on the American Continent is a matter regulated by International Law.

Proceeding to quote from Dr Vío Grossi's report, I pointed out that with regard to the achievements just mentioned and observing the principle of non-intervention, it can therefore be stated that "the States and the very Organization, faced with a violation of a democratic obligation and in view of the re-establishment by the offending State, can only engage in actions that entail solely and exclusively the exercise of a specific function recognized under international law." "Thus, the States can only undertake acts that emanate from the exercise of their own sovereignty, and do not affect that of third States or that of the violator."

To offer a precise example –and within the context of the above-mentioned report- I underlined that in the particular case of the OAS, the regional organization is supported in actions confronting breaches of democracy, by the mandates that it has been granted. One such mandate -I

said- springs from the general rules that govern the OAS, pursuant to which one can gather knowledge of the matter and adopt cooperation resolutions whose execution would require the consent of each State. To this end, the Organization has provided a mechanism for the preservation of democracy, contained in a specific resolution [AG/RES.1080 (O-XVIII/91)], approved in the General Assembly of June 1991.

The other mandate is of a binding juridical nature as it emanates from a contractual instrument: the *Protocol of Reforms to the Charter of the OAS* adopted in 1992 and in effect since 25 September 1997, called the *Washington Protocol*. This Protocol enables the General Assembly to suspend any OAS member States whose democratically constituted government is ousted by force from participating in the various departments and conferences of the hemispheric system.

I also mentioned that the Juridical Committee, in its concern to promote academic studies and activities on the matter, had sponsored an important seminar on Democracy in the headquarters of the OAS in Washington, D.C.

The Juridical Committee also proposed to the Organization that this kind of seminar should be held periodically, as well as round-tables and other forms of debate that promote consolidation of the democratic system.

I added that the Juridical Committee, by special assignment by the General Assembly of the OAS, continues to develop and debate studies on democracy in the inter-American system, the consolidation of which, in the case of most Latin American countries and as stated expressly in articles 2 and 3 of the *Charter of the OAS - Proposals and Principles* - calls for the elimination of the critical poverty that affects a considerable proportion of the population of these countries.

I went on to express that, with regard to this crucial socio-economic problem, a notable and prestigious Mexican intellectual, Carlos Fuentes, wrote an article published on the occasion of the Fiftieth Anniversary of the Charter of the OAS, summarizing the importance of the situation in these few lines:

The big danger for Latin America at the close of the century is that after obtaining unheard-of levels of democratic organization, if democracy is not translated into well-being for the majority, Latin America will revert to the authoritarian tradition that has marked its history.

e) International cooperation to suppress corruption in the countries of America

In the interests of clarity, I began by saying that, as I had demonstrated at the beginning of my presentation, the Juridical Committee's agenda contains other important themes to which I would not expressly refer because of the late hour, but that I would like to state that one of these other themes is international cooperation against corruption in the Americas, the contractual framework of which is the *Inter-American convention against corruption* signed in Caracas on 29 March 1996, for which the initial project came from the Juridical Committee. I explained that the Committee's *Annual report* - which will be available to the ILC - features a study of the subject as well as a document prepared by the Juridical Committee on the request of the General Assembly, entitled: *Model legislation on illicit enrichment and transnational bribery*, adding that the purpose of this document is to help the OAS Member States apply the above-mentioned *Convention* by adopting appropriate internal legislation.

I also mentioned that in view of the diversity of legal systems, the juridical technique used by the rapporteurs of the Juridical Committee in structuring this document make it a "guide to the legislator", in the sense that the term "legislative guide" is used by the United Nations for international commercial law.

f) Course on international law

I mentioned briefly that for some years now the Juridical Committee has been engaged in teaching activity, by means of the organization of an annual *Course on International Law* that takes

place in Rio de Janeiro, where the institution has its headquarters. The Course lasts one month, and is attended by about 50 professionals from all the American States, 30 with scholarships, and the classes being conducted by professors both from universities in the region and from outside the continent.

I closed my presentation by saying that I was especially pleased to reiterate the unanimous desire of the Juridical Committee not only to maintain active cooperation with the ILC but also to strengthen the existing links as much as possible.

g) Comments formulated by members of the ILC

After the eloquent words of the Chairman of the ILC, Dr. Galicki, thanking our institution for its mutual interest in maintaining an active relation between our entities, as evidenced by my presence on behalf of the Juridical Committee. Ambassador João Clemente Baena Soares then took the floor to express his admiration of the work undertaken by the Inter-American Juridical Committee and also to reiterate the importance of this relationship, asking me how it could be expanded.

In answer to the Ambassador's query, I noted that the yearly exchange of representatives of both institutions was in itself already extremely useful and that a periodical meeting of the Presidents of both institutions would be of special importance. In this manner, I pointed out, a fluid exchange of documents and reports could be fostered. I added that the fact that Ambassador Baena Soares resided in Rio de Janeiro should facilitate in tightening the institutional ties, and that on some occasion perhaps an academic forum might be sponsored by both entities.

Professor Igor Lukashuk then intervened, focusing on the theme of access to justice for poor segments of society, and emphasizing that those who find themselves economically marginalized - which in many countries amounts to the majority of the population- are generally even unaware of their most basic rights.

He went on to say that he attached great value to the Juridical Committee's concern for the topic of access to justice, since this constitutes a problem that affects nations of different geographical regions.

Agreeing with the document on access to justice which I presented to the Juridical Committee, Professor Lukashuk referred to the need for the governments of countries where some sectors of the population were prevented from having access to justice for economic reasons, to set up civic and cultural programs to disseminate information on both the opportunities available to such sectors, and the rights that they can exercise before the Judiciary.

Another member of the ILC, Professor Guillaume Tchivounda expressed the opinion that the issues presented opened for the ILC a wide array of valuable and universally crucial questions, both for their juridical content and for their social importance.

He requested that the undersigned cast some light on the inter-American standards that facilitated surveillance of democracy and human rights, and what method should be followed with respect to rules of private international law.

The undersigned described the development of the three regional normative areas mentioned by Professor Tchivounda, relating to democracy, human rights, and the progressive codification of private international law through the CIDIP.

The Vice-President of the ILC, Professor Raúl Goco, underlined the juridical tradition that distinguishes Latin America, and stated that when he was listening both to the juridical presentation and the problems being confronted by the normative efforts of the Inter-American Juridical Committee, he felt that he shared this reality in his own country. He stressed the advisability of a permanent exchange of studies and reports among both institutions.

Finally, the President of the ILC, Professor Galicki, who also referred to the juridical tradition of Latin America, expressed his thanks for the presentation by the Juridical Committee and underscored the importance of maintaining an active link between both institutions.

Repeating my gratitude for the cordiality and attention shown to me, I delivered to President Gállicki the *Annual Report of the Inter-American Juridical Committee* for the year 1998, both in Spanish and English. I also offered him two copies of the publication *Democracy in the inter-American system*, as well as the latest edition of the Course on International Law.

In conclusion, I would like to report that on two occasions I met with the Latin-American members of the ILC with a view to exchanging opinions and commenting on some of the Juridical Committee's activities. I also consider it appropriate to mention that the parties involved kindly offered me lunch on both occasions.

**ANNUAL REPORT (1998) OF THE INTER-AMERICAN JURIDICAL COMMITTEE
OF THE OAS TO THE TWENTY-NINTH REGULAR PERIOD OF SESSIONS
OF THE GENERAL ASSEMBLY
(June 6-9, 1999, Guatemala City, Guatemala)**

(Presented by Dr. Brynmor T. Pollard)

At the invitation of Dr. Keith Highet, Chairman of the Inter-American Juridical Committee (OAS), I attended the twenty-ninth regular period of sessions of the General Assembly of the OAS on behalf of the Juridical Committee during the period June 6 to 9, 1999 in Guatemala City, Guatemala, in the unavoidable absence of the Chairman and Vice-Chairman (Dr. João Grandino Rodas) of the Juridical Committee in order to present the *Annual report* of the Juridical Committee for 1998 to the General Assembly.

At the invitation of the Chairman of General Committee of the Assembly, Ambassador Quiñonez of Guatemala, I made a brief presentation of the Juridical Committee's *Annual report* for 1998. I expressed the Juridical Committee's gratitude for affording me the privilege, as its representative, of presenting the *Annual report* and conveyed the regrets of the Chairman and the Vice-Chairman for their inability to attend the session in order to present the *Report*.

I took the opportunity to highlight some of the Juridical Committee's significant activities during 1998 in response to mandates from the organs and other bodies of the Organization and on its own initiative. In particular, reference was made to the following matters:

- a) the Juridical Committee's deliberations on the manner of implementing in member States of the OAS the *Inter-American convention against corruption: illicit enrichment and transnational bribery* and in the finalising of recommendations by the Juridical Committee in the form of model legal provisions for enactment in Member States;
- b) the submission of comments by the Juridical Committee on the draft American Declaration on the Rights of Indigenous Peoples;
- c) consideration of the topic Improving the administration of justice in the Americas;
- d) consideration of the subject of Inter-American co-operation against terrorism;
- e) consideration of the topic Right to information;
- f) Democracy in the inter-American system;

g) Juridical dimension of integration and international trade: the most favored nation clause.

Reference was also made to:

i. the convening in August 1998, at the Itamaraty Palace, in Rio de Janeiro, of the Third Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Members States of the OAS which provided the opportunity for a useful exchange of opinions on certain matters of international and regional interest;

ii. the discussions at the August 1998 regular period of sessions of the Juridical Committee with representatives of the co-sponsors of the Conference being planned to commemorate the Centenary of the 1899 Peace Conference to be held at the Hague and in Saint Petersburg in 1999.

The opportunity was also taken to inform the General Committee of the maintaining and developing of relationships by the Juridical Committee with other international juridical bodies notably the International Law Commission.

I re-affirmed the Juridical Committee's commitment to cooperate with the other organs and bodies of the Organization to advance the objectives and work of the Organization.

The Chairman, on behalf of the General Committee of the General Assembly, expressed thanks for the presentation and extended best wishes to the Juridical Committee.

I wish to express my thanks and appreciation to Dr. Enrique Lagos, Dr. Jean-Michel Arrighi and Mr. Dante Negro for their ready assistance enabling me to fulfill the mandate entrusted to me.

Other business

A. Other resolutions approved by the Inter-American Juridical Committee

At its fifty-fifth regular period of sessions (Rio de Janeiro, August 1999), the Inter-American Juridical Committee approved resolutions *Absence of Dr. Keith Highet at the regular periods of sessions held in January and August 1999* (CJI/RES.5/LV/99), and *The 56th regular period of sessions of the Inter-American Juridical Committee* (CJI/RES.7/LV/99), where the Committee decided to hold its next regular period of sessions at the headquarters of the Organization in Washington, D.C., March 20 to 31, 2000. Those resolutions appear below:

**ABSENCE OF DOCTOR KEITH HIGHET
AT THE REGULAR PERIODS OF SESSIONS
HELD IN JANUARY AND AUGUST 1999**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND that Dr. Keith Highet, Chairman of this Committee, has been unable for health reasons to attend the last two regular periods of sessions held in January and August 1999;

WHEREAS article 9 of its *Statutes* makes provision for the consequent vacancy of the position in the case of absence of a member for two consecutive periods, unless the Juridical Committee considers the absence fully justified;

AWARE that the reasons for Dr. Highet's absence are of a temporary nature,

RESOLVES:

To declare, for the purposes of article 9 of the *Statutes*, that Dr. Highet's absence is fully justified.

To reiterate to Dr. Highet our best wishes for a speedy recovery, with the assurance that he will be able to resume his activities as Chairman and member of the Inter-American Juridical Committee at the next regular period of sessions.

This resolution was unanimously adopted during the 14 August 1999 session, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi, and Gerardo Trejos Salas.

**THE 56th REGULAR PERIOD OF SESSIONS OF
THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

The General Assembly of the American States and its Permanent Council have requested the Committee to study a number of important topics;

The General Assembly met in the city of Guatemala in June 1999, and through resolution AG/RES.1616 (XXIX-O/99), resolved in special cases to recommend periods of sessions of the Inter-American Juridical Committee in the headquarters of the Organization or in the Member States, in order to increase the knowledge and dissemination of the work it does with a view to playing a more active role in the Inter-American Juridical Committee and in the juridical activities of the Organization;

In the aforementioned General Assembly it was reiterated that it is necessary to establish closer ties between the CJI and the political organs of the OAS and, in particular, with the Committee on Juridical and Political Affairs of the Permanent Council;

As stated in article 105 of the OAS *Charter*, and in articles 14 of the *Statutes* and 13 of the Bylaws of IAJC, although its seat is the city of Rio de Janeiro, it may on special occasions hold sessions in another country; and

The 4th Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States will be held on February 24-25, 2000, at the 56th regular period of sessions of the Inter-American Juridical Committee,

RESOLVES:

1. To hold its next regular period of sessions at the Organization's seat in Washington, D.C., February 21-March 3, 2000.

2. To ask the General Secretary for support to fulfill this decision and, for this purpose, to send it a list of necessary services, bearing in mind that the expenses will be charged to the account of the budget items assigned to the meeting in Rio de Janeiro.

This resolution was unanimously approved at the session of August 18, 1999, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi, and Gerardo Trejos Salas.

The Juridical Committee also approved decision *Library of the Inter-American Juridical Committee* (CJI/DI//1/LV/99), which reads as follows:

**DECISION ON THE LIBRARY OF
THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

EMPHASIZING that it is absolutely essential to maintain comprehensive archives of the work

of the Inter-American Juridical Committee and to ensure that its members have access to legal materials necessary to permit the Juridical Committee to fulfill its mandate;

REGRETTING that important collections of the Inter-American Juridical Committee's Library have been irreparably damaged by water;

NOTING that the publications budget of the Inter-American Juridical Committee is grossly inadequate to permit the library to provide services to the students of the Course on International Law or other members of legal communities in the Americas;

EXPRESSING ITS GRATITUDE to the Government of Mexico for the significant contribution of legal materials on the prevailing laws of that country, donated through Dr. Sergio González Gálvez at the 55th regular period of sessions of the Inter-American Juridical Committee to its Library;

CONFIRMING its intention to maintain a library committee, comprising Drs. Orlando R. Rebagliati, Luis Herrera Marcano, Jonathan T. Fried, and a representative of the Secretariat for Legal Affairs to oversee the Inter-American Juridical Committee's Library;

DECIDES:

1. To confirm that the primary functions of the Library of the Inter-American Juridical Committee are to:

a) act as the repository for all documents and records relating to the Inter-American Juridical Committee, indexed by subject; and

b) provide members of the Inter-American Juridical Committee with timely access to legal materials necessary for the Juridical Committee to fulfill its mandate.

2. To request the Secretariat for Legal Affairs that at least the following materials are accessible and readily searchable, and are kept up-to-date in hard or soft copies:

a) all documents and other records of the Inter-American Juridical Committee, indexed by subject;

b) all official documents of the Organization of American States;

c) decisions and annual reports of the International Court of Justice and the United Nations International Law Commission;

d) texts by renowned specialists, particularly from the Americas, on public and private international law;

e) major reference works, including legal dictionaries;

f) publications such as the *Recueil des Cours of The Hague Academy of International Law*, *American Journal of International Law*, *International Legal Materials*, and others journals as the Inter-American Juridical Committee may from time to time recommend, and

g) basic legislation of member States.

And to ensure that achieving these results is given priority over all other library-related activities.

3. To request the Secretariat for Legal Affairs, in fulfilling this mandate, to:

a) make maximum use of information technology, including by electronic access to the Columbus Library and other collections, obtaining material in electronic or machine-readable form

(for instance, the CD prepared by the Secretariat containing the minutes and documents of the Inter-American Juridical Committee) or by facsimile, whenever possible, and posting updated material from the Inter-American Juridical Committee to its home-page on the Internet;

b) ensure the closest possible cooperation and coordination between the Library of the Inter-American Juridical Committee and the Columbus Library of the OAS; and

c) request the Secretariat to prepare a list of the Library's publications that are deemed irrelevant to be considered by the Inter-American Juridical Committee at its next regular period of sessions.

4. To send a letter of appreciation to the Government of Mexico for the donation of legal material on that country's prevailing laws.

5. To request the Secretariat for Legal Affairs to report to each regular session of the Inter-American Juridical Committee on the fulfillment of this decision by the Secretariat.

This decision was unanimously adopted during the 18 August 1999 session, in the presence of the following members: Drs. Luis Marchand Stens, Sergio González Gálvez, Jonathan T. Fried, Luis Herrera Marcano, Brynmor T. Pollard, João Grandino Rodas, Orlando R. Rebagliati, Eduardo Vío Grossi, and Gerardo Trejos Salas.

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