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INTER-AMERICAN JURIDICAL COMMITTEE

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# ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY

# 2000

# 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 these 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).

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# INTRODUCTION

# INTRODUCTION

The Inter-American Juridical Committee has the honor to submit to the General Assembly of the Organization of American States the *Annual report* covering its activities during the year 2000. This report is submitted pursuant to Article 91f) 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-0/97), AG/RES.1669 (XXIX-O/99) and AG/RES.1735 (XXX-O/00) concerning preparation of annual reports by the organs, agencies and entities of the Organization.

During the period to which this *Annual report* refers, the Inter-American Juridical Committee's work program included such topics as the following: the juridical aspects of hemispheric security; human rights and biomedicine; improving the administration of justice in the Americas; juridical dimension of integration and international trade; international abduction of minors by one of their parents; consideration of issues suggested to the Inter-American Juridical Committee by legal advisors and representatives of OAS member States; right to information: access to and protection of personal information and data; application of the 1982 United Nations Convention on the Law of the Sea by the States of the hemisphere; democracy in the inter-American system; preparations for celebration of the Inter-American Juridical Committee centennial; inter-American cooperation against terrorism; convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI); study of the system for the promotion and protection of human rights in the inter-American sphere; the struggle against tobacco: the necessity and advisability of combating smoking; possibilities and problems of the Statute of the International Criminal Court.

Among the issues cited above, special mention should be made of data relating to the juridical aspects of hemispheric security, in respect of which the Inter-American Juridical Committee sent to member States of the Organization a questionnaire. The answers to that questionnaire will be used to prepare juridical criteria for a definition of hemispheric security. On the issue of human rights and biomedicine, the Inter-American Juridical Committee approved a draft legislative guide on medically assisted fertilization, which was transmitted to member States for their observations or suggestions. On the issue of right to information, the Juridical Committee sent member States two reports prepared by the rapporteur on this topic, reiterating the request for information on existing or proposed domestic legislation, and on the rules and policies governing access to personal information and data and protection thereof.

This *Annual report* relates primarily to progress made in the study of the topics cited above, and is divided into three chapters. The first chapter refers to the origin, legal bases and structure of the Inter-American Juridical Committee and the period covered in the *Annual report*. The second chapter elaborates upon the topics discussed by the Inter-American Juridical Committee at its regular sessions during the year 2000, and also contains the texts of the resolutions approved at both of those sessions, together with the specific documents considered. The third and final chapter discusses other activities carried out by the Juridical Committee, other resolutions approved, and

budgetary matters. Attached to the *Annual report* are appendices with a list of resolutions approved, documents prepared, an index by name and by subject, 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 held in 1912, although its most important was the Congress of Jurists held in 1927, where 12 draft Conventions in public international law were approved, as well as 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 well as the Commission of Experts, whose first meeting was held in Washington, D.C., in April 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 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 preparatory work 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. 56th Regular Session

The Inter-American Juridical Committee held its 56th regular session from March 20 to 31, 2000, in Washington D.C., at the headquarters of the Organization of American States.

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

Dr. Keith Highet chaired the session, and Dr. João Grandino Rodas served as Vice Chair.

The inaugural session took place in the Hall of the Americas, in the presence of permanent representatives and alternates of member States of the OAS. Statements were made by Messrs. Keith Highet, Chairman of the Inter-American Juridical Committee, Cesar Gaviria, Secretary General of the OAS, and James Schofield Murphy, Permanent Representative of Belize to the OAS and Chairman of the Permanent Council of the Organization. Their remarks are found in the appendices to this *Annual report*, as documents CJI/doc.19/00, CJI/doc.17/00 and CJI/doc.18/00.

The members of the Juridical Committee who were present for the 56th regular session 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*:

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

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 session of the Inter-American Juridical Committee, approved through resolution CJI/RES.12/LV/99, was as follows:

**CJI/RES.12/LV/99**

**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

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

It should be noted that during this regular session, the Inter-American Juridical Committee received a visit from the Permanent Representative of the Dominican Republic to the OAS, Ambassador Flavio Darío Espinal, Chairman of the Committee on Hemispheric Security of the Permanent Council, and from the Alternate Representative of Uruguay, Ambassador Alvaro Moerzinger, Vice-Chairman of the Commission. A visit was also received from the Permanent Representative of Peru to the OAS, Ambassador Beatriz Ramacciotti.

## B. 57th Regular Session

The Inter-American Juridical Committee held its 57th regular session from July 31 to August 25, 2000, at its headquarters in Rio de Janeiro, pursuant to resolution CJI/RES.9 (LVI-O/00). On August 21, 22, 23, 24 and 25 the Inter-American Juridical Committee met in the city of Brasília, at the invitation of the Ministry of Foreign Affairs and the Superior Court of Justice of Brazil. This decision was approved by resolution CJI/RES.10 (LVII-O/00). Both resolutions are reproduced below:

**CJI/RES.9 (LVI-O/00)**

**DATE AND PLACE OF THE
57th REGULAR PERIOD OF SESSIONS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS article 15 of its Statutes determines that two regular meetings be held annually,

RESOLVES to hold its 57th. regular period of sessions at the headquarters of the Inter-American Juridical Committee, in Rio de Janeiro, from July 31 to August 25, 2000.

**CJI/RES.10 (LVII-O/00)**

**WEEK OF THE 57TH REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE IN BRASÍLIA**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS invitations have been received from the Ministry of Foreign Affairs and the Superior Court of Justice of Brazil to the Inter-American Juridical Committee to hold its meeting in the city of Brasília;

BEARING IN MIND that, in accordance with article 105 of the *Charter of the Organization of American States* and article 13 of the *Rules of Procedure of the Inter-American Juridical Committee*, the Juridical Committee may hold its sessions somewhere

other than its seat,

RESOLVES:

1. To thank the Ministry of Foreign Affairs and the Superior Court of Justice of Brazil for their invitation.

2. To hold its meetings on 21, 22, 23, 24 and 25 August this year in the city of Brasília, DF.

During this regular session, the Juridical Committee was composed of the following members: 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 R. Rebagliati.

Pursuant to article 11 of the body's *Statutes*, the session was chaired by Dr. João Rodas, Vice-Chairman of the Inter-American Juridical Committee, because of the death of the Chairman elected, Dr. Keith Highet. Subsequently, in September 2000, the Permanent Council of the Organization elected Dr. Carlos Manuel Vázquez, of the United States of America, as a member of the Inter-American Juridical Committee to fulfill the remainder of Dr. Keith Highet's term of office, i.e., until December 31, 2003.

The inaugural meeting of this session was held jointly with the opening of the 27th Course on International Law, at the premises of the Getulio Vargas Foundation. The meeting was addressed by Dr. Jean-Michel Arrighi, Director of the Department of International Law, and by Dr. João Grandino Rodas, who paid homage to Dr. Isidoro Zanotti, director and sponsor of the Course.

The members of the Juridical Committee who were present for the 57th regular session 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*:

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

Representing the General Secretariat, the following provided technical and administrative support: Dr. Jean-Michel Arrighi, Director of the Department of International Law; Manoel Tolomei Moletta and Dante M. Negro, Legal Officers with the Department of International Law.

During the 30th regular session of the OAS General Assembly in Windsor, June, 2000, Dr. Jonathan T. Fried of Canada and Dr. Brynmor T. Pollard of Guyana were re-elected members of the Inter-American Juridical Committee and will hold office from

January 1, 2001, until December 31, 2004. Dr. Felipe Paolillo of Uruguay was also elected to the Inter-American Juridical Committee for the same period of time.

During this regular session, the Inter-American Juridical Committee elected Dr. João Grandino Rodas as Chairman and Dr. Brynmor T. Pollard as Vice-Chairman for a period of two years.

The Agenda for this regular session of the Inter-American Juridical Committee, approved through resolution CJI/RES.8 (LVI-O/00), was as follows:

**CJI/RES.8 (LVI-O/00)**

**AGENDA FOR THE**
**57th REGULAR PERIOD OF SESSIONS**
**OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

(July 31 to August 25, 2000)

**A. Priority topics**

1. Juridical aspects of hemispheric security
   Rapporteurs: Drs. Sergio González Gálvez, Luis Marchand Stens and Eduardo Vío Grossi

2. Human rights and biomedicine
   Rapporteur: Dr. Gerardo Trejos Salas

3. Consideration of topics suggested to the IAJC by Legal Advisors and Representatives of the OAS Member States
   Rapporteurs: Drs. Luis Herrera Marcano and Luis Marchand Stens

**B. Topics under preparation**

1. Right to information: access to and protection of personal information and data
   Rapporteur: Dr. Jonathan T. Fried

2. Juridical dimension of integration and international trade
   Rapporteur: Dr. Jonathan T. Fried

3. Improving the administration of justice in the Americas
   Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard, Luis Marchand Stens and Gerardo Trejos Salas

4. The application of the 1982 United Nations Convention on the Law of the Sea by States in the Hemisphere
   Rapporteurs: Drs. Keith Highet and Orlando R. Rebagliati

5. Democracy in the Inter-American system
   Rapporteur: Dr. Eduardo Vío Grossi

6. Preparation for celebration of IAJC centennial
   Rapporteur: Dr. Eduardo Vío Grossi

### C. Topics under follow-up

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 in the inter-American sphere
   Rapporteur: Dr. Gerardo Trejos Salas

4. International abduction of minors by one of their parents
   Rapporteurs: Drs. João Grandino Rodas and Eduardo Vío Grossi

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

The Committee's sittings in Brasília were attended by Ambassador Luiz Augusto de Araújo Castro, Chief of the Department of International Agencies in the Brazilian Ministry of Foreign Affairs; Ambassador Marco Antônio Diniz Brandão, Chief of the Department of Human Rights and Social Issues in the Brazilian Ministry of Foreign Affairs; Dr. Antônio Paulo Cachapuz de Medeiros, Legal Advisor to that Ministry; the Head of the OAS Division in Brazil, Counselor Lúcia Maria Maierá; the Ambassador of Chile to Brazil, Mr. Carlos Eduardo Mena; the First Secretary of the Embassy of Guyana, Mrs. Gillian Rowe; the Minister Haroldo Valladão Filho, Legal Advisor to Itamaraty; Mr. José Bonifácio Borges de Andrade, Deputy Director of Legal Affairs in the Office of the President of the Republic; Dr. Gustavo Henrique Badaró, Advisor on Criminal Matters to the Minister of Justice; Counselor Antônio Pedro, Chief of the Human Rights Division; and Ambassador Luiz Felipe de Seixas Correa, Secretary General of the Ministry of Foreign Affairs.

Members of the Juridical Committee also attended a luncheon at the Palace of Itamaraty hosted by the Minister of Foreign Relations, Ambassador Luiz Felipe Lampreia, and met with the Minister of Justice, Dr. José Gregori. Finally, they met with the President of Brazil, Dr. Fernando Henrique Cardoso.

During this regular session, the Inter-American Juridical Committee also approved the agenda for its 58$^{th}$ regular session, found in resolution CJI/RES.20 (LVII-O/00), and decided, by resolution CJI/RES.15 (LVII-O/00), to hold its next regular session in Ottawa, Canada, from March 12 to 23, 2001. The text of these resolutions are reproduced below:

**CJI/RES.20 (LVII-O/00)**

**AGENDA FOR THE 58th REGULAR SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

(Ottawa, Canada, March 12-23, 2001)

**A. Current topics**

1. Juridical aspects of hemispheric security
   Rapporteurs: Drs. Sergio González Gálvez, Luis Marchand Stens and Eduardo Vío Grossi

2. Human rights and biomedicine
   Rapporteur: Dr. Gerardo Trejos Salas

3. Right to information: access to and protection of personal information and data
   Rapporteur: Dr. Jonathan T. Fried

4. Democracy in the Inter-American System
   Rapporteur:

**B. Topics under preparation**

1. Possibilities and problems of the Statutes of the International Criminal Court
   Rapporteur: Dr. Sergio González Gálvez

2. Possible additional measures to the Caracas Inter-American Convention against Corruption
   Rapporteurs: Drs. Sergio González Gálvez and Luis Herrera Marcano

3. Trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter
   Rapporteur: Dr. Sergio González Gálvez

4. Juridical dimension of integration and international trade: competition law in the Americas
   Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas

5. Preparation for the celebration of the Inter-American Juridical Committee centennial
   Rapporteur: Dr. Eduardo Vío Grossi

**C. Topics under follow-up**

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 in the inter-American system
   Rapporteur: Dr. Gerardo Trejos Salas

4. International abduction of minors by one of their parents
Rapporteur: Dr. João Grandino Rodas

5. Improving the administration of justice in the Americas
Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard, Luis Marchand Stens and Gerardo Trejos Salas

6. The application of the 1982 United Nations Convention on the Law of the Sea by States in the Hemisphere
Rapporteur : Dr. Orlando R. Rebagliati

**CJI/RES.15 (LVII-O/00)**

## DATE AND VENUE OF THE 58th REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the kind invitation made by the Government of Canada for the Inter-American Juridical Committee to hold its 58th regular session in Ottawa, on a date prior to the next Summit of the Americas, which will be held in the said country on the third week of March, 2001;

CONVINCED that holding the regular sessions of the Juridical Committee away from its headquarters contributes to the visibility of the work of the Committee and to establishing links with individuals and institutions dedicated to activities in the juridical field;

AWARE OF the fact that holding sessions away from its headquarters is provided for in article 14 of the Committee's *Statutes*, as well as in article 13 of its *Rules of Procedure*,

RESOLVES:

1. To hold the 58th regular session in Ottawa, Canada, from March 12 to 23, 2001.

2. To request that the General Secretariat, through the Secretariat for Legal Affairs, make the necessary arrangements to enable the March 2001 regular session to be held in Ottawa, Canada.

3. To forward an official letter to the Government of Canada expressing its warmest acknowledgement for the kind invitation.

# CHAPTER II

## TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING ITS REGULAR SESSIONS IN 2000

The Inter-American Juridical Committee held two regular sessions during the year 2000. The first of these took place in Washington D.C. in March, and the second in Rio de Janeiro in August. The following topics appeared on the agenda of both meetings: juridical aspects of hemispheric security; human rights and biomedicine; improving the administration of justice in the Americas; the juridical dimension of integration and international trade; international abduction of minors by one of their parent; consideration of topics suggested to the Inter-American Juridical Committee by legal advisors and representatives of OAS member States; right to information: access to and protection of personal information and data; application of the United Nations 1982 Law of the Sea Convention by the States of the hemisphere; democracy in the inter-American system; preparation for celebration of the Inter-American Juridical Committee centennial; inter-American cooperation against terrorism; convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI); study of the system for the promotion and protection of human rights in the inter-American sphere; the struggle against tobacco: the necessity and advisability of combating smoking; possibilities and problems of the Statute of the International Criminal Court.

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. Juridical aspects of hemispheric security

**Resolutions:**

CJI/RES.3 (LVI-O/00): *Juridical aspects of hemispheric security*
CJI/RES.16 (LVII-O/00): *Juridical aspects of hemispheric security*

**Documents:**

CJI/doc.9/00: *Juridical aspects on hemispheric security. Second preliminary report on the "Charter of the Organization of American States: concepts"* (presented by Dr. Eduardo Vío Grossi)

CJI/doc.4/00 corr.1: *Initial thoughts on the problems arising from the marginalization of the Inter-American Treaty on Reciprocal Assistance (TIAR), the viability of a new instrument to preserve peace in the hemisphere, and the process surrounding the new concept of security* (presented by Dr. Luis Marchand Stens)

CJI/doc.11/00 rev.1: *Towards a new concept of hemispheric security* (presented by Dr. Sergio González Gálvez )

During its 56th regular session (Washington, D.C., March, 2000), the Inter-American Juridical Committee considered document CJI/doc.9/00, *Juridical aspects on hemispheric security. Second preliminary report on the "Charter of the Organization of American States: concepts"*, presented by Dr. Eduardo Vío Grossi, co-rapporteur on the issue.

Dr. Eduardo Vío Grossi recalled that the document he had submitted to the previous regular session had limited the issue of hemispheric security to the scope of the *OAS Charter*, bearing in mind that the OAS is a political organization whose fundamental objective is to maintain peace and security; that it is a coordination body, i.e. it has no supranational powers; and that it has a flexible structure, with various bodies made up of representatives of all member States. He noted that the document submitted to the current regular session posed a second problem, relating to various concepts that are employed in the Charter without being clearly defined: peace, security, collective security, force, armed force, other measures of force, aggression, war of aggression, aggression not constituting an armed attack, armed attack, legitimate defense, legitimate collective defense, military occupation, coercive economic and political measures, defense, and fact or situation that threatens the peace. At no time does the Charter speak of hemispheric security, nor of human security, humanitarian intervention, regional peace or security. What is needed, then, is to examine whether these concepts enable the OAS in some way to speak of hemispheric security. In such an analysis, the issue of the conflict must be excluded, since despite that issue it would still be possible to have peace and security. In his paper, Dr. Vío Grossi defines the concept of peace as "the absence of aggression and/or the use of force". He also defines the concepts of "security", "collective security" and "legitimate collective defense", concluding that there is broad discretionary scope for American States to

qualify a fact or situation as a threat to peace or as constituting aggression, both of which hypotheses are legal grounds for collective action, armed or otherwise, against the offending State.

During the same regular session, the Inter-American Juridical Committee considered document CJI/doc.4/00 corr.1, *Initial thoughts on the problems arising from the marginalization of the Inter-American Treaty on Reciprocal Assistance (TIAR), the viability of a new instrument to preserve peace in the hemispheric, and the process surrounding the new concept of security*, presented by Dr. Luis Marchand Stens, co-rapporteur for the issue.

Dr. Marchand explained that this document contains a selection of stipulative texts that might be considered in an effort to devise a new inter-American instrument for hemispheric peacekeeping. The rapporteur noted that, while the concept of "integral security" has many components, they would need to be distilled into a central point of reference. Within this concept, Dr. Marchand distinguished three aspects, namely, the definition of what constitutes "integral security", the limitations and inoperability of the Rio Treaty, and the peaceful settlement of disputes. He believed it was dangerous to include under application of chapter VII of the United Nations Charter issues that were within the exclusive competence of States, and that the right of intervention for humanitarian reasons in effect nullified the principal of nonintervention. He added that the OAS currently has no specific juridical instrument for preserving peace and security, precisely because the Rio Treaty is inoperable and the Washington Protocol of Reforms to the *OAS Charter* is of another nature.

In terms of OAS work in this regard, he noted that over the past decade this had been limited to studying confidence-building measures, leaving aside the central issue for lack of uniform criteria. He felt it was dangerous not to have an instrument targeted exclusively at the issue of peace and security and to leave responsibility in this area to other regional bodies such as NATO. He therefore stressed the importance of having an instrument of this kind. As alternative routes, he suggested strengthening peaceful dispute settlement procedures, and proposing that the next Security Conference convened by the Summit of the Americas should have one single issue, the definition of matters covered by the concept of security, its scope and procedures.

During the same regular session, Dr. Sergio González Gálvez, co-rapporteur for the issue, presented document CJI/doc.11/00 rev.1, *Towards a new concept of hemispheric security*, summarizing the main points made by the rapporteur in previous sessions and the central ideas expressed by the other two rapporteurs.

Dr. González Gálvez offered a brief review of the documents that had been presented to the Inter-American Juridical Committee during its previous regular session, and offered some thoughts on what he considered to be their essential elements. In the first place, he expressed doubt that a definition of "hemispheric security" could ever be achieved, given the differences existing between the strategic military schemes developed in the region.

The co-rapporteur also noted that the concept of security had taken on new elements. He referred to the new concept of "human security" promoted by Norway and especially by Canada. He felt that this constitutes a radical change in the way the issue is addressed. The rapporteur recalled the discussion on this issue during the 30th OAS General Assembly, the statements of Costa Rica, Mexico and St. Lucia on this point, and the document that the Canadian delegation had submitted. Recalling a series of statements by various government authorities, he concluded that there is today no single, generally accepted vision on how to treat this concept as part of international security. He warned that attributing certain consequences to this new definition could lead to serious problems, with the risk of giving a certain juridical guarantee to the so-called right of intervention for humanitarian purposes, as is already being discussed within the United Nations, and on which much is currently being written. The rapporteur referred to several resolutions of the United Nations Security Council which hold that massive violation of human rights may be deemed to fall within the definition of a threat to international peace and security under chapter 7 of the UN Charter. He also indicated that the present document puts forward some ideas on this point but that he was not yet ready to make any recommendations. Nevertheless, he noted that at the next Summit of the Americas, one of the key issues would be human security, and that the Inter-American Juridical Committee would be expected to take a position on the issue.

Dr. González Gálvez also explained that the concept of human security was based on the Rio Treaty, the *OAS Charter*, and the Treaty of Tlatelolco (for the first time, he noted, it had been proposed that the Treaty of Tlatelolco should be included among the basic texts of the hemispheric security system, an approach that he thought was highly innovative).

The co-rapporteur noted that there are also other elements that are not found in the documents previously submitted to the Inter-American Juridical Committee. In the first place there was the tendency of regional agencies to redefine the concept of security. He noted that NATO had moved the furthest in this regard, and in 1991 had adopted a resolution, confirmed by the Washington Summit of 1999, establishing a new criterion called "strategic security". In his view, this was a delicate subject, since NATO had begun to consider that it could take military action beyond its borders when it felt that its interests could be affected.

The co-rapporteur also pointed to the move to constitute a new international criminal jurisdiction, although the new court was not yet in operation. He noted that a large number of countries had already begun to broaden their domestic legislation in such a way as to accommodate that universal jurisdiction: this was the case in Germany, Belgium, Spain, Ethiopia, Finland, Nicaragua, Paraguay, Portugal, Russia, Slovenia, Switzerland, among others.

Finally, the co-rapporteur referred to the Inter-American Defense Board, which he called an advisory body that could under no circumstances be given operational mandates for matters that were within the competence of the OAS.

After discussing the three documents referred to above, members of the Juridical Committee offered a series of comments on the issue.

With respect to the issue of human security, some members of the Inter-American Juridical Committee noted that this matter had gained wide support and was of great interest to the G-8, and that within the common law there are a series of cases from which a set of principles might be derived and which point to a long-standing and generalized practice reflecting a determined juridical awareness. It was suggested that instead of regarding this concept as something new in international law, it would be better to analyze it as an existing practice within the international juridical system. It was also noted that, in practice, the notion of what constitutes a threat to international peace and security has been changing over recent decades, a fact suggesting that the Inter-American Juridical Committee should undertake a much more thorough study of the matter.

Other members stressed that human security refers not only to potential physical aggression, but also to economic aggression, which is very evident in our times, when the world is undergoing globalization. Attention was also drawn to the importance of the concept of nonintervention and its impact on the concept of human security. What was at stake here was an attempt to create a system that would have integrity, that would take account of all possible dimensions, and that would lead in a clear direction, so that States could expect workable results. No one could deny the right of the international community to react against atrocious violations of human rights, but the conditions and procedures for taking such action must be clearly borne in mind, so as to ensure that the purposes and objectives of the United Nations Charter were fulfilled.

Other members of the Inter-American Juridical Committee felt that the issue of human security should include the concept of economic, food, health, personal, community, environmental and political security. The key question to address was whether or not the concept of human security requires recognition of the right of intervention, since this is the political implication of the proposal. It was noted that several Latin American countries have unfortunate memories of past interventions. Yet it must be recognized that the principal of nonintervention has evolved to include cases of humanitarian intervention. The question remains how to ensure that, in these cases, it is the interests of the universal community that are served, and not merely particular interests. If the right of intervention is handled in accordance with clear guidelines that guarantee procedural transparency within the scope of the United Nations, rather than at the regional level, this could lead to a more solid basis for action.

With respect to the issue of peaceful dispute settlement, members of the Juridical Committee felt that this was a fundamental point, but that it was supplementary to the issue of the use of force, and that both were but components of the issue of security.

With respect to the Inter-American Defense Board, it was noted that this was a defense advisory body, and that it could not act beyond that scope.

Finally, on the basis of this discussion, the Inter-American Juridical Committee

adopted resolution CJI/RES.3 (LVI-O/00), *Juridical aspects of hemispheric security*, in which it decided to continue examining this issue and to give it the highest priority. Following is the text of the resolution, as well as of the three reports of the rapporteurs on this issue.

**CJI/RES.3 (LVI-O/00)**

**JURIDICAL ASPECTS OF HEMISPHERIC SECURITY**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING CONTINUED to discuss the topic "Juridical aspects of hemispheric security";

CONSIDERING the comments received on this subject from the Chair and Vice-Chair of the Committee on Hemispheric Security at a special meeting of the Juridical Committee, and from member state representatives at a special meeting of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS, held on March 28, 2000;

HAVING RECEIVED three new documents submitted by the co-rapporteurs, Dr. Luis Marchand Stens (*Preliminary thoughts on the problems arising from the marginalization of the Inter-American Treaty of Reciprocal Assistance (TIAR), the viability of a new instrument to preserve peace in the hemisphere, and the process surrounding the new concept of security* – CJI/doc.4/00 corr.1), and Dr. Sergio González Gálvez (*Toward a new concept of hemispheric security* – CJI/doc.11/00) and Dr. Eduardo Vío Grossi (*Juridical aspects of hemispheric security: second preliminary report on the "Charter of the Organization of American States: concepts"* – CJI/doc.9/00),

RESOLVES o continue to study this topic as a matter of the highest priority, in light of its importance, in the common effort to strengthen the inter-American system.

**CJI/doc.9/00**

**JURIDICAL ASPECTS ON HEMISPHERIC SECURITY**

**SECOND PRELIMINARY REPORT[1] ON THE "CHARTER OF THE ORGANIZATION OF AMERICAN STATES: CONCEPTS"**

(presented by Dr. Eduardo Vío Grossi)

**Introduction**

1. In the framework of the study undertaken, it is convenient to determine what, in accordance with its terms, the actual Charter of the Organization of American States (OAS)[2] understands as peace and security, whose maintenance and restoration is its prime objective[3].

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1 The *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), also issued as a document for discussion in the International Juridical Committee, is published in the *Annual report of the Inter-American Juridical Committee to the 1999 General Assembly*, OEA/Ser. Q CJI/doc.52/99, August 27, 1999, original: Spanish, p. 275-282.

2 OAS/Ser.G CP/INF.3964/96 rev. 1, October 6, 1997, original: Spanish. Amended by the 1967 Buenos Aires Protocol, 1985 Cartagena de Indias Protocol, 1992 Washington Protocol and by the 1993 Managua Protocol. [Provisional publication]

3 Art. 1, par.1.

2. The previous study has noted, especially, that the OAS Charter mentions the word "peace" seven times[4], while on three other occasions uses the word "security"[5] and "collective security"[6] another three. Furthermore, the preamble has four references to "peace"[7] and one to "security"[8].

3. It should also be mentioned that the OAS charter refers to the concepts of "aggression"[9], "force"[10], "armed force"[11], "war"[12], "coercion"[13], "military occupation"[14], "armed attack"[15] and "self-defense"[16].

I. Peace, absence of aggression and use of force

4. Obviously, the basic text of OAS does not define the word "peace". Nonetheless, it is not an obstacle to endeavor to decipher the meaning and scope which it adopts.

5. In this sense, it could be stated that, for the OAS Charter, peace exists to the extent that there is no aggression and/nor, in general, exercise of force in international relations.

6. In fact, both letter d) of article 2 therein states, among the essential purposes of the organization, "to provide for common action... in the event of aggression". In letters g) and h) of article 3 also therein mention is made, among the principles that the American States reaffirm, the sentence against "war of aggression" and that "aggression against one American State is an act of aggression against all the other American States". This is repeated in article 28, still in the same text, when mention is made that "every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States".

7. In its turn and on this aspect, while article 19 of the OAS charter defines that the principle of intervention excludes the use of "armed force", article 21 in the same charter states that the territory of a State "may not be the object of military occupation or of other measures of force taken by another State".

8. Lastly, article 22 of the OAS Charter establishes the general prohibition "not to have recourse to the use of force" in the international relations between the States.

II. Aggression and the use of force

9. The study goes directly to the concern with the concept of "aggression" used by the OAS Charter, and, as in the case of peace, it does not express directly anything in particular.

10. The aforementioned treaty establishes, as stated in article 28, that "every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered

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4 Arts. 1, par.1, 2, letters a), 3, letters j) and n), 23, 29 and 30.
5 Arts. 2, letter a), 23 and 30.
6 Art. 6, title Chapter VI, art. 66.
7 Preamble, par. 2, 3, 7 and 8.
8 Preamble, par. 8.
9 Arts. 2, letter d), 3, letters g) and h), 28, 29, 68.
10 Arts. 19, 21 and 22.
11 Art. 19.
12 Art. 3, letter g).
13 Art. 21.
14 Art. 21.
15 Arts. 29 and 65.
16 Arts. 22 and 29.

an act of aggression against the other American States".

11. This charter also provides in its article 29 that "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... the American States... shall apply the measures and procedures established in the special treaties on the subject."

12. From the harmonic interpretation of such rules and from the others than refer generally to aggression, it could be concluded that the OAS Charter hypothetically distinguishes, on one hand, between aggression "against the integrity or inviolability of the territory or against the sovereignty and political independence of any American State" and which does not threaten the latter and on the other hand, between aggression that is an "armed attack" and that which is not.

13. Moreover, concerning the use of force, it distinguishes between "armed force" and "any other form of interference" in the internal or external affairs of any other State[17]; between "military occupation" and "other measures of force", both taken by a State with regard to the territory of another[18]; between "force" and "any other means of coercion", to acquire territory or obtain special advantages on this matter[19] and, lastly, between the "use of force" and "self-defense", according to the prevailing treaties or in fulfillment thereof.[20]

III Security, to ensure peace

14. Nor does the OAS Charter expressly state what it understands to be "security" but, in its Preamble[21] and on three occasions[22] this word is used together with "peace", with the conjunction "and" between them, so it could be presumed that it is different in connotation to the latter.

15. Now, the only provision that could indicate the meaning and scope of the word "security" in therein is article 29 therein when it mentions that:

> 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.

16. That is to say, based on this provision and abiding by the general rules of interpretation of the treaties, it could be sustained that, for the OAS Charter, the word "security" implies a situation or fact in which "peace" would not be threatened. The general form used by the provision in question – "any fact or situation that might endanger the peace of America" – guarantees this interpretation.

17. Moreover, it could be equally sustained that, according to the written article, not only

17 Art. 19.
18 Art. 21.
19 Art. 21
20 Arts. 22, 29, 68. The last refers to "defense against aggression".
21 Paragraph 7.
22 Arts. 2, letter a), 23 and 30.

aggression and the use of force – the armed attack to which it alludes – may endanger peace. Peace may also be endangered by “an aggression that is not an armed attack” or “an extracontinental conflict” between two or more American States. In such cases, as in the case concerning “any other fact that might endanger the peace of America”, they must affect “inviolability or integrity of the territory or sovereignty or political independence of any American State”.

18. “Security” is, then, a broader concept than “peace”. The latter is, as has been mentioned, the absence of aggression and/or use of force. The former refers to any fact or situation, consisting of the use of force or otherwise, which, affecting the inviolability or integrity of the territory or sovereignty or the independence of an American State, might endanger peace, that is, even provoke or cause an aggression and/or use of force.

IV. Collective security and self-defense

19. So, in the event that the American States consider that the items in article 29 mentioned herein above occur together, that is, that politically qualify the situation as stated therein, they might apply “the measures and procedures established in the special treaties on the subject” and it is “in furtherance of the principles of continental solidarity or collective self-defense”.

20. That is, the OAS Charter refers to other treaties the establishment of the measures and procedures on the subject, without, however, implying that the Organization has no role whatsoever to play[23].

21. Yet, it is relevant for the purposes of this document that the concept of collective security used in the title of the Chapter VI of the OAS Charter is broader than the collective self-defense.

22. In fact, article 29 itself distinguishes how the American States “shall apply the measures and procedures established in the special treaties on the subject”. It might be “in furtherance of the principles of continental solidarity or collective self-defense”.

23. So, as article 22 of the OAS Charter states that “self-defense in accordance with existing treaties or in fulfillment thereof” is an exception to the principle of the prohibition of the use of force, it is logical to conclude that if any action is taken “in furtherance of the principles of continental solidarity”, it might not imply use of force.

V. Conclusion

From the brief summary on the main items of the concepts of international peace and security used by the OAS Charter, it is possible to note the broad margin given to the American States to qualify, at their discretion, the fact or situation that endangers peace or constitutes aggression, both cases legally permitting collective action, whether armed or otherwise, against the offending State.

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23 OAS may , and, in fact, in the terms of article 65 of the Charter, act “in the case of an armed attack on the territory of an American State or within the region of security delimited by the treaty in force”. In this case, “the Chairman of the Permanent Council shall without delay call a meeting of the Council to decide on the convocation of the Meeting of Consultation, without prejudice to the provisions of the Inter-American Treaty of Reciprocal Assistance with regard to the State Parties to that instrument”.

**CJI/doc.4/00 corr.1**

**INITIAL THOUGHTS ON THE PROBLEMS ARISING FROM THE MARGINALIZATION OF THE INTER-AMERICAN TREATY OF RECIPROCAL ASSISTANCE (TIAR), THE VIABILITY OF A NEW INSTRUMENT TO PRESERVE PEACE IN THE HEMISPHERE, AND THE PROCESS SURROUNDING THE NEW CONCEPT OF SECURITY**

(presented by Dr. Luis Marchand Stens)

At the 55th regular meeting of the Inter-American Juridical Committee, held in August 1999, I presented a study on hemispheric security entitled *Considerations on the current situation of the inter-American security system and mutual confidence-building measures* (CJI/doc.26/99 rev.1 corr.1).

In the main section of that document, I suggested, in connection with the problems arising from the marginalization of the *Inter-American Treaty of Reciprocal Assistance* (TIAR), that consideration be given to replacing the TIAR with a new instrument essentially geared toward safeguarding peace and security in the Americas. This new instrument would be based on a very precise selection, definition, and modification of those provisions of the TIAR, the Protocol of Amendment of San Jose, Costa Rica, and the Protocol of Cartagena de Indias that refer essentially to that same question: safeguarding and maintaining peace in the Hemisphere.

By way of illustration, I will refer to some of the arguments I presented in that August 1999 document. First, we should recall that among the repercussions of the War of the Malvinas was the political marginalization of the TIAR, which has not been invoked since that grave event of 1982.

We might also recall that, in 1975, in San Jose, Costa Rica, the OAS member countries adopted a Protocol of Amendment to the TIAR. This was the first outcome of the process of "restructuring the hemispheric system." During that process, begun in the early 1970s, the advisability of amending the treaty in light of the realities of the day became apparent. Now, although 25 years have passed, the Protocol of Amendment has never received the number of ratifications required for its entry into force. Therefore, the instrument as negotiated in 1947, though called into question and relegated to the sidelines of inter-American affairs, remains in force as a matter of law.

The issue posed by the political marginalization of the TIAR is that the OAS has no legal basis for adopting decisions that are binding upon the member states other than that multipartite instrument.

In fact, the Charter of the Organization of American States (OAS) provides no legal basis for the adoption of binding measures. Decisions taken in the contractual framework of the Charter carry the moral weight of international declarations and resolutions. But like the decisions contained in such documents, they are inherently optional when it comes to implementation.

One exception should be mentioned. The Protocol of Washington, dated December 14, 1992, introduced into that basic document of the system a new and binding commitment relating to the defense of democracy.[1/]

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1. In a world and regional environment that was different from today's, and from a different political perspective, during the years of greatest Cold War tension the inter-American system adopted numerous resolutions on the defense of democracy against

In fact, that Protocol, which deals with a realm of law and politics different from that of the TIAR, provides that a member of the Organization whose democratically established government has been overthrown by force may be suspended from exercising the right of participation in meetings of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the Specialized Conferences, and the other deliberative bodies. Such a decision requires the vote of two thirds of the member States.

But the political reality in terms of security and peace is that the inter-American security system built upon the TIAR has become ineffectual with the marginalization of that multipartite instrument–at present the only regional mechanism legally in force for the adoption of measures binding upon all the states parties thereto.

We should clarify that the membership of the TIAR is unique, since not all the states of the system are parties to the treaty. The OAS today has 34 members, of which 23 have ratified the TIAR. In other words, of the total members of the Organization, only 23 countries are bound by the stipulations of the Rio Treaty.

The legal constraints on the adoption by the OAS of binding measures outside the TIAR context came to light with the delicate situation of Haiti. The economic embargo decided upon by the Ad Hoc Meeting of Ministers of Foreign Affairs, while observed by most governments in the Hemisphere, was not obligatory, since it was based upon resolution AG/RES.1080 (XXI-O/91), "Representative Democracy", adopted by the General Assembly in June 1991 at the regular session held in Santiago, Chile, an especially important but legally non-binding document. Clearly, the Haitian situation, a matter of internal political affairs, was not within the operative parameters of the TIAR, the aim of which –like that of any future instrument on the matter– must be limited to the maintenance of peace and security.

The economic embargo against the Haitian Government became binding only when it was ratified by the United Nations Security Council on the basis of a UN resolution characterizing the Haitian problem as a threat to international security. In deliberations prior to the adoption of that resolution, attention was called to the precedent that could be set, regarding the principle of nonintervention, by the characterization of an internal matter as a threat to international security for the purposes of applying Chapter VII of the Charter of San Francisco.

The crux of the TIAR's political marginalization is that today, in terms of security and the maintenance of peace, OAS decisions are binding only when ratified by the UN Security Council.

When binding decisions are required, this means the OAS is systemically dependent on the Security Council and its legal status is diminished. Although the UN Charter outranks the basic founding instruments of the regional organizations (UN Charter, Article 103), we should remember that the regional organizations have a purview in which they are to act autonomously (UN Charter, Chapter VIII). Systemic dependency on Security Council ratification to lend binding force to certain decisions relating to peace and security[2] curtails the autonomy of the OAS and could provide a basis for the world organization to take up, on its own initiative, to the detriment of the hemispheric system, regional situations that fall within the purview of that system.

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international totalitarianism, MARCHAND, Luis, *Instituciones de derecho internacional: el sistema interamericano de seguridad y de paz.* t.II [s.l.] p.161-185.

2 These decisions are not coercible in nature, nor do they fall under article 53 of the UN Charter, except in cases of individual or collective legitimate defense as covered in article 51 of the above mentioned Charter, and until the moment when the Security Council takes the necessary measures pertinent thereto.

Moreover, such dependency on the UN Security Council means, for example, that the OAS could decide, by statutory majority, how to handle a given situation relating to the maintenance of peace, but that such a decision would become binding only upon approval by the five permanent members of the UN Security Council, all of whom have veto power.

Without a doubt this has been one of the Organization's motivations for studying the matter of international security in the light of developments and new approaches in this area, and for studying as well the implications for the OAS of the inoperative status of the Inter-American Treaty of Reciprocal Assistance–from 1947 until the 1982 Malvinas War the basis for legally binding inter-American decisions concerning the maintenance of peace and hemispheric security.

From my point of view, and looking to the future, one of these issues –the inoperative status of the TIAR– could be given a very practical medium-term solution. The other issue –the definition, scope, and content of the new approach to security– might require more time, since this new concept, now under discussion in both regional and worldwide forums, should be comprehensive in nature.

Although the primary aim of this paper is to suggest a preliminary outline for the replacement of the TIAR, I will refer briefly to the more far-reaching question: the new implications of hemispheric security.

It is a commonly accepted notion that the new international concept of security goes beyond military considerations, though they are important, to embrace diverse and complex issues such as socioeconomic development, extreme poverty, the environment, terrorism, drug traffic, and confidence-building measures. And increasing emphasis is being placed on the indivisible trilogy of security, socioeconomic development, and democracy.

Regional matters should always be approached from the broader viewpoint of world affairs and the converging and diverging trends of the day–the forces working for and against global integration, referred to by IDB President Enrique Iglesias at the democracy seminar held at OAS headquarters in Washington, DC, under the auspices of the CJI and the General Secretariat.

Examples of integrating forces are the UN system, with its principles and rules; international cooperation agencies; the end of the Cold War and of the nuclear arms race; the fall of the Berlin Wall (1989); and the globalization of information and technology. Forces working against integration include struggles between ethnic or religious groups and bloody confrontations between regions within a country; international migration; illicit arms trafficking; and drug trafficking.

Following this line of thought, we should now identify opposing pro- and anti-integration forces at the regional level. This is important, since it should guide both the content and the implications of a new comprehensive approach to security.

Such pro-integration factors include:

- The OAS and UN Charters, as international constitutional frameworks at the world and regional levels;
- The Treaty of Tlatelolco;
- International cooperation agencies, both regional and sub-regional;
- Harmonious coexistence in the Americas, based on the principles involved in the rights and duties of states: sovereignty, independence, equality before the law, nonintervention, prohibition of the threat or use of force;

- Cooperation for socioeconomic development and the struggle to overcome poverty;
- Regional and sub-regional integration;
- The strengthening of democracy and human rights;
- Mutual assistance in the event of natural disasters;
- Environmental protection;
- Mutual confidence-building measures in border areas;
- Arms limitation;
- Establishment of a zone of peace;
- Promotion of a culture of peace.

Anti-integration factors include:

- Drug trafficking;
- Terrorism;
- Illicit arms trafficking;
- The arms race;
- Tension in border areas.

From this we might draw the general, tentative conclusion that international security should be approached in a comprehensive way that promotes solidarity and trust among American nations; strengthens peace by way of timely and appropriate preventive measures; ensures respect for the fundamental rights of states established under international law and the OAS and UN Charters; promotes effective policies that support socioeconomic development in the countries of the region; and involves a commitment to active cooperation in fighting and eliminating the factors that undermine the aims cited above, including drug traffic, terrorism, poverty, illicit traffic in arms, and environmental degradation.

I have the impression–and I hope it is mistaken–that the broad scope and complexity of the issue and the diversity of perspectives among the countries of the Hemisphere on what subjects it should comprise, and what the scope of those subjects should be, have made it impossible thus far to achieve concrete results –except in the area of mutual confidence-building measures in border zones, which have been addressed at inter-American specialized meetings.

I feel, therefore, that in the near future a regional meeting should examine this entire question and adopt, by consensus, an inter-American position paper spelling out what items should be included in the new integrated concept of security and what follow-up should be given to the subjects addressed in that paper, with a view to the adoption, *prima facie*, on a sectoral basis, of basic commitments in those areas where the greatest degree of agreement had been reached–naturally without prejudice to continued and gradual efforts to reach consensus on the remaining items approved by such a regional meeting.

Obviously, the ultimate aim of such a vast and intricate process would be to produce a framework comprehensive security treaty. But that, in my view, could only be achieved gradually, on the basis of agreements on each of the items to be included in the new concept of security, of which I have suggested a tentative list. The impetus for such a process, of course, would stem from the political will of the OAS member states.

Having concluded this overview of the new comprehensive approach to security, I will now turn to what I mentioned earlier as the main point of this paper: looking for some practical way to close the gap we have at present with the inoperative status of the TIAR in terms of safeguarding peace and security. As I said earlier, this situation makes the OAS systemically dependent on the UN Security Council when binding measures are required,

despite the express authority given in Chapter VIII of the UN Charter to regional organizations in terms of preserving peace within their geographic parameters.

It is well known that the TIAR, adopted in 1947, arose in the historical context of the Cold War, with its extremely polarized ideological rivalry and the resulting military standoff under the threat of nuclear war.

Consequently, certain aspects of its conceptual structure relating to threats from without the Hemisphere have become obsolete. However, other provisions, relating to the preservation of peace and hemispheric security, are still valid for the most part.

It would be well to recall what I said earlier: the vague language of certain provisions, which led to interpretations and incidents of a political nature, was at issue in discussions in the first half of the 1970s, during the inter-American system's "restructuring process." The result was a serious effort to update the TIAR, make the text more precise to prevent ambiguous interpretation, and incorporate the economic perspective into the inter-American security framework. The effort culminated with the adoption of a Protocol of Amendment. But the Protocol has never entered into force, despite the 25 years that have passed since its signature, since only eight of the 21 signatory states have ratified it.

Although the only constant in life is change, impressive developments on the world stage over recent years, the fresh look today at the concept of security, and the manifest political indifference of OAS member states toward the TIAR and its Protocol of Amendment would seem to indicate little possibility of revitalizing the two instruments in their entirety.

Before I continue, prudence and experience would dictate that I issue a reservation. In a number of papers, I have said that, in the international arena, uncertainty is often the only certainty. Any given day, the ever-present and often surprising hand of fate can bring us events we would never have suspected the night before. This is the Achilles' heel of pontifical statements. One cannot categorically rule out the possibility that a situation might arise to disrupt peace in the Hemisphere.

For this reason, it would be advisable to explore some contractual mechanism that would expedite a solution to the gap left by the TIAR without compromising the present, more far-reaching process of establishing a new integrated approach to security. Such a mechanism would have a clear and precise aim. (1) Its contractual objective would pertain solely to the preservation of peace in the Hemisphere. (2) Its scope of application would be limited to the Hemisphere.

Before continuing, it is useful to point out, for reference purposes, that the principles concerning peaceful conduct within the Americas set forth in the TIAR and its 1975 Protocol of Amendment are, in a practical sense, included in the OAS Charter and its most recent overall amendment: the 1985 Protocol of Cartagena de Indias.

Therefore, a very precise and concrete wording of the provisions of those instruments that relate exclusively to the preservation of peace among the American nations will enable us to shape a new inter-American instrument for that purpose. I will provide an example of such language below.

As I have said, I believe such an instrument should contain only those basic provisions that are indispensable for preventing or resolving conflicts within the region. A general outline of such provisions would include:

1. The immediate convocation of a meeting at which the Permanent Council would decide whether to convene a Meeting of Consultation of Ministers of Foreign Affairs and, pending the arrival of the Ministers, would consider:

a) In the case of armed conflict: an immediate cessation of hostilities, the restoration of the pre-war state of affairs, and the establishment of mechanisms for dialogue and negotiation leading to the peaceful settlement of the conflict and promoting an atmosphere of trust.
b) In the case of grave tensions: similarly, the establishment of preventive mechanisms for dialogue and understanding, so as to forestall a heightening of tensions and move the situation, if appropriate, in the direction of peaceful settlement and an atmosphere of trust.

2. A commitment to submit any dispute to peaceful settlement processes and to work toward building trust.

3. The obligation not to resort, in international relations, to any threat or use of force that is inconsistent with the UN and OAS Charters.

4. That decisions taken by the Meeting of Consultation shall be binding, unless issued as recommendations.

5. A system of voting, including the necessary quorum, for the adoption and reversal of decisions.

6. Reaffirmation of Articles 34 and 35 of the UN Charter and Articles 24 and 131 of the OAS Charter.

7. Collective measures that could be taken in the case of unwillingness or refusal on the part of the aggressor country to resolve the conflict peacefully, in keeping with Article 53 of the UN Charter.

8. The provision of information, as appropriate, to the Security Council, in accordance with Articles 52 and 54 of the UN Charter.

9. The condition that any joint assistance to a state shall require the express consent of that state.

**CLOSING THOUGHTS**

A. The Second Summit of the Americas, held in Santiago, Chile, in April 1998, convened an inter-American specialized conference that will surely be held in the course of this year. In regard to the more involved and complex matter–defining the content and scope of the new integrated approach to security–I feel it would be advisable for that conference to focus on defining such an approach and on adopting a plan of action. This would include a work plan for the gradual determination, by sector, of the content and scope of each aspect of the integrated approach to security.

This gradual, sectoral approach would seem the most realistic and viable way to reconcile the diverse proposals that will surely be made by the OAS member state governments.

In any case, a successful outcome to this multilateral harmonization exercise will also be required if the inter-American system is to have, at some point, a framework instrument–a binding one, insofar as possible–on comprehensive security within the Americas.

B. The gap produced in 1982 by the marginalization of the TIAR, in the wake of the Malvinas War, could be closed in the medium term, if the governments of the OAS countries so wished, with a new instrument pertaining solely to the preservation of peace and security within the Hemisphere.

C. Obviously, those governments must decide beforehand whether it is advisable to adopt a new regional instrument for the adoption of binding decisions or, on the contrary, to maintain the *status quo* –systemic dependency on the UN Security Council for this sort of measure, even if it curtails the authority given to regional organizations by Chapter VIII of the UN Charter and subjects any decision adopted by statutory majority within the OAS to approval by the five permanent members of that Security Council, who have veto power.

D. It bears repeating that the consideration, in that context, of a new instrument for the preservation of peace in the Hemisphere neither precludes nor interferes with the evolution of integrated approaches to security at the world level.

E. Even though the TIAR has been relegated to the political sidelines; even though the Protocol of Amendment of San Jose, Costa Rica (which was to improve the TIAR by making it more precise from a legal standpoint and more balanced in political terms) has not received the necessary ratifications for its entry into force; and despite dynamic and significant changes on the world stage since the end of the Cold War, the TIAR will remain a legally binding reality until a more suitable contractual framework is devised and must, therefore, be included among the various instruments, mechanisms, institutions, and hemispheric statements to be analyzed by the OAS as it assesses, throughout this process of studies and discussions, to what extent, and with what implications, some aspects of that varied wealth of treaties, documents, and practice could be used or ruled out, in terms of what should be included in and addressed by the new concept of regional security. It goes without saying that strengthening the regional security system is essential for strengthening both the overall system and multilateralism as a fundamental and democratic means of promoting agreement among nations in the context of an asymmetrical organization.

F. I will now present, solely as an exploratory exercise, a selection of articles from the TIAR, the Protocol of Amendment of San Jose, Costa Rica, and the Protocol of Cartagena de Indias, with some changes intended to focus their application and scope specifically on the preservation of peace and security in the Hemisphere.

## CHOICE OF STIPULATIVE TEXTS THAT COULD BE TAKEN INTO ACCOUNT TO EVENTUALLY FOSTER A DISCUSSION EXERCISE ON A NEW INTER-AMERICAN INSTRUMENT SLANTED TO THE PRESERVATION OF PEACE THROUGHOUT THE HEMISPHERE

### Article I

The High Contracting Parties formally condemn war and undertake, in their international relations, not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the Organization of American States, the Charter of the United Nations, or this Treaty.

### Article II

As a consequence of the principle set forth in the preceding article, the High Contracting Parties undertake to settle their disputes with one another by peaceful means

and to adopt preventive measures to build confidence, strengthen peace, and prevent conflicts.

The High Contracting Parties shall make every effort to achieve the peaceful settlement of disputes through the procedures and mechanisms provided for in the inter-American system before submitting them to the Security Council of the United Nations.

This provision shall not be interpreted as an impairment of the rights and obligations of the states parties under Articles 34 and 35 of the Charter of the United Nations.

Article III

1. The High Contracting Parties agree that an armed attack by any state against another state party shall be considered an attack against all the states parties and, consequently, each of them undertakes to assist in meeting any such attack, in the exercise of the inherent right of individual and collective self-defense recognized by Article 51 of the Charter of the United Nations.

2. At the request of the state party or states parties directly attacked, and until the Meeting of Consultation of Ministers of Foreign Affairs provided for in this treaty takes a decision, each of the states parties may determine, according to the circumstances, the immediate measures it may take individually in fulfillment of the obligation set forth in the preceding paragraph.

3. For the purposes of paragraph 2 of this article, on convocation by the Chair of the Permanent Council, the Meeting of Consultation of Ministers of Foreign Affairs shall be held without delay to examine such immediate measures as the states parties may have taken in accordance with paragraph 1 of this article and to agree on the collective measures that may be necessary, including any joint action the states parties may take before the United Nations, to give effect to the pertinent provisions of the Charter of that Organization.

4. The provisions of this article shall be applied in any case of armed attack against a state party or within territory under the full sovereignty of a state party.

5. In accordance with Article 51 of the Charter of the United Nations, measures of individual or collective self-defense may be applied until the Security Council of the United Nations has taken the measures necessary to maintain international peace and security.

Article IV

If the inviolability or the integrity of the territory or the sovereignty or political independence of any state party should be affected by an act of aggression or by a conflict or serious event that might endanger peace in the Americas, the Meeting of Consultation of Ministers of Foreign Affairs shall be held immediately to agree on the measures that must be taken to assist the affected state party and the measures and steps that would be advisable for the maintenance of peace and security in the Hemisphere.

The provisions of this article can be applied to any other American state that so requests.

Article V

In the case of a conflict between two or more American states, without prejudice to the right of self-defense, in conformity with Article 51 of the Charter of the United Nations, the High Contracting Parties, meeting in consultation, shall call upon the contending states to

suspend hostilities and restore matters to the *status quo ante bellum*, and shall take in addition all other necessary measures to reestablish or maintain inter-American peace and security and for the solution of the conflict by peaceful means. Rejection of peace-making steps will be considered in the determination of the aggressor and in the application of measures upon which the Meeting of Consultation may agree.

Article VI

Without prejudice to such conciliatory or peace-making steps as it may take, the Meeting of Consultation may, in the cases provided for in Articles III and V, adopt one or more of the following measures: recall of heads of missions; breaking of diplomatic relations; breaking of consular relations; partial or complete interruption of economic relations or of rail, sea, air, postal, telegraphic, telephonic, radio-telephonic, radio-telegraphic, or other means of communication. The use of armed force shall be consistent with Articles 51 and 53 of the Charter of the United Nations.

Article VII

The consultations to which this treaty refers shall be carried out by means of the Meeting of Consultation of Ministers of Foreign Affairs of the states that have ratified the treaty, or in a manner or by an organ which may be agreed upon in the future.

The Permanent Council may act provisionally as a Meeting of Consultation. Procedural decisions of the Permanent Council shall be taken by an absolute majority of the members entitled to vote.

Article VIII

The consultations shall be initiated by a request addressed to the Permanent Council by any signatory state that has ratified the treaty.

Article IX

The Meeting of Consultation of Ministers of Foreign Affairs shall adopt all its decisions or recommendations by a vote of two thirds of the states parties, except as provided in the following paragraph.

To rescind measures taken, a vote of an absolute majority of the states parties shall be required.

Article X

In the voting referred to in this treaty, only representatives of signatory states that have ratified the treaty may take part.

Article XI

In the case of a situation or dispute between American states, the parties directly interested shall be excluded from the voting referred to in the two preceding articles.

Article XII

In order to constitute a quorum for any of the meetings referred to in the previous articles, the number of states represented shall be at least equal to the number of votes necessary for the adoption of the decision in question.

Article XIII

The measures listed in Article VI may be adopted by the Meeting of Consultation in the form of:

a. Decisions whose application is binding on the states parties; or
b. Recommendations to the states parties.

If the Meeting of Consultation takes measures to which this article refers against a state, any other state party to this treaty that faces special economic problems arising from the implementation of such measures shall have the right to consult the Meeting of Consultation with regard to the solution of those problems.

No state shall be required to use armed force without its consent.

Article XIV

The measures agreed upon by the Meeting of Consultation shall be executed by way of procedures and bodies now existing or which may be established in the future.

Article XV

Any assistance the Meeting of Consultation may decide to extend to a state party shall be carried out only with the consent of that state.

Article XVI

No provision of this treaty shall be interpreted as limiting or impairing in any way the principle of nonintervention or the right of all states to choose freely their forms of political, economic, and social organization.

Article XVII

The High Contracting Parties shall immediately send to the Security Council, in accordance with Article 51 and 54 of the Charter of the United Nations, complete information concerning the activities undertaken or under consideration in the exercise of the right of self-defense or for the purpose of maintaining inter-American peace and security.

Article XVIII

The Permanent Council, in all matters concerning this treaty, shall act as an organ of liaison among the signatory states which have ratified this treaty and between those states and the United Nations.

Article XIX

No provision of this treaty shall be construed as impairing the rights and obligations of the High Contracting Parties under the Charter of the United Nations.

Article XX

This treaty shall enter into force among the ratifying states when two thirds of the signatory states thereof have deposited their instruments of ratification. It shall enter into force with respect to the remaining states when their instruments of ratification are deposited.

Article XXI

The Inter-American Treaty of Reciprocal Assistance (TIAR) shall remain in force among the states parties only until the date on which this treaty enters into force. The ratifying states shall cease to be bound by the TIAR on the date of that entry into force.

Article XXII

This treaty may be amended only at a special conference convened for that purpose by a majority of the states parties. Amendments shall enter into force as soon as two thirds of the states parties have deposited their instruments of ratification.

Article XXIII

This treaty shall remain open for signature by the OAS member states and shall be ratified in accordance with their respective constitutional procedures. The original instrument, the English, French, Portuguese, and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States, which shall transmit certified copies thereof to the governments of the signatory states for the purpose of ratification. The instruments of ratification shall be deposited with the General Secretariat.

Article XXIV

This treaty shall be registered with the General Secretariat of the United Nations through the General Secretariat of the Organization of American States.

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## TOWARDS A NEW CONCEPT OF HEMISPHERIC SECURITY

(presented by Dr. Sergio González Gálvez)

1. Principles applicable to define hemispheric security as of the XXI Century

Once the Cold War ended, all discussions covering the scope of security and the possible future options that may arise in the American Continent were closely related to two different problems. First, the one existing between the global and regional spheres covering the indissoluble relationship of these topics. Second, the assessment of the different agendas prepared by the members of a specific region that were involved in this issue, that will be useful to determine the scope of the integration reached between them in a real community. These will be based on the common identity of their purposes regarding matters related to security, and a variety of issues and concerns inherent to the remaining members of the international community.

2. Regionalism vs. universality

This widely debated issue must be approached from two different perspectives. One of them takes into account the nature *per se* of the regional and normative spheres of action

as well as their scope. While the other, from the viewpoint of the other perspective under reference, takes into account both the development reached by military technology as well as the emergence of what is usually called the "New Issues" raised during international political strategic discussions. As a matter of fact, this has been a vital query throughout history, not only within the context of the international relations between Latin America, the Caribbean and the American Continent in general – an area in the world where regionalism is fostered by a strongly-felt sense of tradition – but in creating a concept of global proportions. The objective pursued has been to rule and offer a satisfactory justification for regionalism, way beyond the perception of its sphere of influence, but the results were never very successful.

It is worthy of notice to refer to the "change of period" branded by the Second World War, without pretending to exhaustively review the essence this objective acquired during the most important moments of history, when the topic became and essential issue during the negotiations that led to the constitution of the United Nations Organization. The decisions incorporated in the Charter that constituted the Organization, mirror the existence of a commitment undertaken towards the *doit être* of international law, manifested in principles such as the juridical equality of the States, and the bare reality of an asymmetric distribution of power reigning in the world scenario.

3. Contributions towards a new concept of hemispheric security

During the OAS General Assembly held in Santiago de Chile in 1991, the OAS member States expressed their decision to start a consultation process on hemispheric security in the light of the new regional and world circumstances, with the common goal of sharing an integrated perspective of security and disarmament.

Thus, after receiving the report drafted by the Working Group on Hemispheric Security, the XXII General Assembly held in 1992 approved resolutions AG/RES.1179 (XXII-O/92) and AG/RES.1180 (XXII-O/92) that entrusted the Permanent Council with the mission of discussing the issue further, without adopting any decisions on the essence of the problem.

4. Attempts to define "hemispheric security"

a) Inter-American Defense Board

Through the text of a Note dated October 12, 1993, the Chairman of the Council of Delegates of the Inter-American Defense Board, submitted a document entitled *Contributions to define the concept of hemispheric security* to the consideration of the Permanent Council, which was based on resolution AG/RES.1240 (XXIII-O/93) issued by the General Assembly.

The IADB document proposes the following definition for the hemispheric security concept:

> The security of the American Continent is an essential right of its society. As such, it is understood as a permanent condition of peace, freedom, justice and development that must be pursued by governments and regional international organizations alike, under the framework of the law, in order to achieve continental objectives while strongly balancing within a global scope, the interests of the American States with those of the Continent, safekeeping continental territorial integrity and guaranteeing the full exercise of sovereignty and independence to all the countries of the Hemisphere.

b) Special Committee on Hemispheric Security

In May 1993, the President of the Special Committee on Hemispheric Security also presented a document on this matter, with the purpose of having it assessed during the XXIII OAS General Assembly (June 1993) although, due to a variety of circumstances this was not done. Notwithstanding the above, it is worthy of notice to reproduce some of the concepts of this proposal.

Several definitions on security, defense and collective security are given in the first section of this document, and have been used as a foundation to state that the establishment of a new hemispheric security system presupposes the existence of shared interests and values. Maintenance of peace, promotion of human rights, strengthening and consolidation of democratic regimes, economic and social development and the preparation of efficient mechanisms to ensure hemispheric integration, the common will to protect them and collectively prevent any situations that may result in any type of aggressions against them. As regard the military dimension of hemispheric security, the perceptions held are mentioned below.

Security is a concept based on the promotion and strengthening of measures of trust among the States that endow their relationships with greater transparency, in addition to the application of general policies intended to achieve the total ban on weapons of mass destruction, including chemical and bacteriological warfare: self-limitations on conventional weapons seeking to limit the exercise of the right of legitimate defense of each State; participation in multinational forces for the establishment, maintenance and consolidation of peace, and introducing confidence and security building measures.

Consequently, security —according to this theory— should be a “system of inter-state interactions that, coordinating government policies, prevent and curtail threats to national interests and avoids the possibility that the perceptions held about them by the States may turn into tensions, crises or open confrontations”.

The above-mentioned theory urges the search for consultation formulas instead of confrontation; security and trust instead of dissuasion, transparency instead of concealment; prevention instead of correction and inter-dependence instead of imposition.

c) Other suggestions

On the other hand, in December 1994, FLACSO-CHILE and the WILSON CENTER in Washington D.C., jointly presented a document to the Summit of the Americas held in Miami, that contained some suggestions in the field of security, outstanding among which are the following:

a) creation of a post-Cold War hemispheric security system protecting peace in the hemisphere. In this case, it is necessary to phase-in gradual changes working towards new criteria;

b) define security as a system of inter-state interactions that prevent and curtail threats to national interests, and thus avoid tensions, crises and open confrontations emerging between the States;

c) for the practical application of this concept, it is suggested that measures be adopted in the fields of: crises prevention, regional balance, confidence building measures, control and curtailment of weapons and disarmament, *ad hoc* security systems in sub-regions, responses to bilateral crises that may jeopardize peace, and methods to ensure the participation of the United States

of America and Canada in a hemispheric security system without adversely affecting the sovereignty and territorial integrity of the Latin American countries and the Caribbean nations;

d) the recommendations presented by both institutions in the section covering the institutional nature of hemispheric security, indicate that these efforts should be seen as multi-dimensional, which implies the creation of a new system within which new security systems may co-exist. The rising coordination of policies at the global, hemispheric and regional level will open up higher-level possibilities to achieve bilateral cooperation.

5. A proposal addressed to the XXI century

Although these definitions contain elements that should be taken under consideration in a new definition of security on the American continent, among other basic elements, they should necessarily include the following aspects:

a) regional security should be an essentially preventive process and should not be based on coercive measures except in exceptional cases that have been previously defined;

b) there is no doubt that security covers not only strategic military aspects, but to an increasing extent also includes economic, political and social matters. The determination of the problems linked to these latter topics and the manner of dealing with them must be assigned to the corresponding entities of the OAS and be based on its constitutive Charter;

c) threats against the survival of each of the nation States vary widely, or may do so. This is why the conceptions, policies and strategies for dealing with them are, or may be very different. Consequently, it is important to maintain frequent interchanges of viewpoints on these matters, in the quest to find common elements in these strategies that must go hand in hand with full respect for the sovereignty and freedom of action of the countries involved;

d) it would be a mistake to turn the OAS into a supra national entity with the capacity to judge and rate or classify the political conduct of its members, far less for the purpose of sanctioning them. The Inter-American system is based on voluntary cooperation among the States, in order to achieve certain very precise objectives. An organization that imposes its decisions would be seen rather as a threat than as a factor of confidence. Consequently, the creation of permanent or *ad hoc* regional military forces should be rejected, regardless of the purposes for which they are set up, as these actions are deemed contrary to the spirit and the letter of the basic instruments of the inter-American system;

e) within any context whatsoever, transparency should be fostered in matters of defense through the exchange of information on defense expenditures and a broader-ranging civil military dialogue

In August 1995, FLACSO and WILSON CENTER published a document within the framework of the program for peace and security in the Americas. Among other points, they stressed that the multi-lateral approach to removing threats to security should begin among small groups of nations, meaning with a sub-regional approach, and should gradually expand until reaching the regional level, which in our case is applicable to the Americas. Nevertheless, we feel that this specific approach is inadequate, and does not respond to some of the concerns listed in the previous paragraphs.

6. General mechanism for applying the new concept of hemispheric security

a) Charter of the OAS – amended;
b) Inter-America Treaty on Reciprocal Assistance – amended;
c) American Treaty on Pacific Settlement (Pact of Bogota);
d) Treaty for the Prohibition of Nuclear Weapons in Latin American and the Caribbean (Treaty of Tlatelolco);
e) Treaty for the Democratic Security of Central America;
f) Inter-American Defense Board;
g) Confidence and security building measures, adopted at the two regional conferences of the OAS on this topic;
h) possible future measures for self-control of conventional weapons in Latin America and the Caribbean, according to the proposals submitted at the Group of Rio;
i) possible supplementary agreements on specific aspects of a new security system, including agreements substituting the existing pacts.

7. Preliminary analysis of the theses that could have an impact on a new hemispheric security system: the so-called right of intervention for humanitarian purposes

The most controversial tropic on the global scene with regard to the development of Humanitarian International Law, is the so-called right of intervention for humanitarian purposes. This thesis consists of justifying armed intervention, either claimed or actual, for humanitarian reasons. Nevertheless, under law, this possibility must be subject to the rules covering the legality of the exceptional use of armed force in international relations, meaning *jus ad bellum.* We recall that the non-intervention of a State in the internal or external affairs of another is the cornerstone of the foreign policy of our nations, and that by opening the door to foreign armed intervention, even for humanitarian purposes, when not within a clearly-defined juridical framework could revive claims such as that of fair and unfair wars, as in general terms, intervention is the worst threat to the autonomy and self-determination of the peoples.

There are authors such as Marc Trachtenberg[1] who state that theories are now reappearing which urge the "right of intervention", but that instead of protecting a common good, they attempt to forcibly implement the values of a groups of countries. According to the author, this is the way of handling the relationship between the countries that consider themselves as part of the "civilized" world, compared to the rest of mankind. We accept that in the new global agenda, the rights of the individuals play an increasingly important role alongside the right of the States. Nevertheless, this should not turn into an excuse for improper interventions by some States in the affairs of others. It is unacceptable to allow the end of bipolarity to be merely reduced to the disappearance of one of the poles and the unopposed emergence of a capacity to impose the specific forms that values shared by all of us should assume in each particular case, or – worse still - that other objectives should be confused with these values.

If we were to analyze the scenarios in which armed intervention could take place, regardless of its purpose, the following factors should be listed:

Initial hypotheses - the intervention of one State in the internal affairs of another, which is banned by the Charter of the United Nations and International Law; second, this would be the intervention of a group of States in one or more other States, which is also banned under International Law and the Charter of the United Nations, the Charter of the

1 TRACHTENBERG, Marc. Intervention in historical perspective. In: REED and KAYSEN. Emerging norms, 16.

OAS, the Inter-American Convention of the Rights and Duties of the States, and without doubt is also included in the Charter of the regional entity to which we belong, where this principle achieves its most complete description, stating:

> 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.
>
> No State may use or encourage the use of coercive measures of an economic and political character in order to force the sovereign will of another State to obtain from it advantages of any kind. [2]

Subsequently the General Assembly of the United Nations approved the declaration entitled "Declaration on the unacceptability of intervention in the Internal Affairs of these States and Protection for their Independence and Sovereignty", on December 21, 1965, which reaffirmed the universal nature of the principle of non-intervention.

The third hypothesis would appear on the occurrence of armed intervention by a regional entity without the authorization of the United Nations, which is illegal under the UN Charter and should be banned under any circumstances whatsoever, as otherwise this would result in global anarchy that would accept the existence of regional "boundary markers", which would obviously be dominated by the strongest nations in each region, or armed actions by regional entities in countries that are not even members of this entity, as already covered in the documents approved by NATO, entitled *Strategic concept of the alliance,* at the Washington Summit held in April 1999.

The fourth and final hypothesis covers the intervention undertaken by a regional entity with the authorization of the Security Council of the General Assembly of the United Nations, or by the world organization itself, a situation when there is no doubt that the requirements should be analyzed and approved as needed to undertake an action of this nature. For instance, it is clear that there is a trend towards shifting the scope of the concept of international security, which is the concept triggering the action mechanism under Chapter VII of the UN Charter, which characterizes threats to peace and security, by including, for instance, what some people call "Human Security", which is a new and controversial thesis attempting to alter the link among sovereign States through a series of measures designed to protect the individual; this means the human person, including the possibility of using armed force when violations of human rights occur in a specific country, even without the authorization of the territorial authorities.

We feel that this trend should be assessed with much care, not because we should remain unmoved by human suffering, but rather to ensure the stability of the world on a fair and equitable basis. Furthermore, the consequences of a change in the State of law should also be analyzed, as this regulates the international community today.

a) Scope of the term "humanitarian"

Let's begin with the word "humanitarian", as this is claimed as a justification for armed intervention, and the many interpretations that this concept may have in theory. The broadest includes the possibility of taking action prompted by any kind of human suffering caused by floods, hunger, war, civil conflicts or dictatorships; and the most limited one, which is only typified when the action taken is not carried out with any specific political,

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2 *Charter of the Organization of American States*, Art. 19 and 20.

military; or economic interest, regardless whether this involves attempting to assist some other people; this is based on the assumption that the humanitarian nature of an intervention is lost when the objectives include interests of this type on the part of the intervening nations, or when they take the side of one of the parties in an existing conflict, or if there is some selection process for the beneficiaries, or – worse still – if it threatens to cause suffering or death in the name of "protecting human rights" or peace.

However, even among those stressing the need to "do something" at the international level to "protect the physical integrity, moral dignity and political freedom of all individuals", little agreement exists on the measures to be adopted. For instance, Bernard Kouchner[3] indicates four options for possible humanitarian action, namely: a) the International Red Cross stage, which is strictly limited to helping the suffering, being particularly careful to avoid taking sides in a conflict in a country and not acting in fields that correspond to the territorial government; b) the groups known as "doctors without borders" that attempt to reach victims wherever they may be, including when opposed by the territorial authorities, particularly if they tolerate anarchy and violence; c) a claimed new "right" based on some precedents in UN practice, in order to ensure access to the victims wherever they may be, establishing "humanitarian corridors" or "security zones"; d) and the intervention to free persons oppressed by a government with violations of human rights, using all available means.

On the other hand, when examining the objectives of claimed humanitarian intervention, a distinction must be made between the final objective and the intermediate measures.

Initially, this concept of "humaneness" means compassion and the need to struggle against those imposing physical harm on human beings, particularly civilians, but some questions immediately arise on whether humanitarian intervention should have the purpose, not defined in time, of attempting to foster the progress of a democratic process as the best way of protecting human rights; or a more limited and modest objective which will consist in struggling against the obstacles blocking this process, such as hunger and genocide, or alleviating the effect of human catastrophes, whether natural or caused by man.

Nevertheless, the subjectivity of all these criteria makes it almost impossible to establish parameters for a possible future decision by the United Nations, which is the only organization empowered to authorize armed intervention with strictly humanitarian purposes. Furthermore, if we acknowledge that persuasion and convincing arguments are preferable to coercion; the pressure of diplomatic blockades and embargoes; the punishment of the leaders of international crimes under the treaties in effect, and indiscriminate bombardment of the civilian populace.

Not even the guidelines suggested by J. Bryan Hehir[4] to justify armed intervention, which is "declared a humanitarian objective" even consisting of a "last resort", would persuade us to reconsider our reservations in supporting this attempt at mediation, far less the universal validity of the principle of non-intervention and the fact that the UN Security Council has adopted several resolutions since 1991, that to a certain extent support that a humanitarian crisis can in fact constitute a threat to international peace and security (Resolutions 688 and 794), basically because in practice for these cases (the Kurds in Iraq, Somalia, Rwanda and former Yugoslavia), have proven the difficulty of ensuring intervention

3 Mentioned in the article by HASSNER, Pierre. From war & peace to violence & intervention. *Hard choices; moral dilemmas in humanitarian intervention*. Oxford: Jonathan Moore, Rowman & Littlefield, 1998. p.20

4 HEHIR, Bryan J. Military intervention and national sovereignty: recasting the relationship. *Hard choices: moral dilemmas in humanitarian intervention*. Oxford: Jonathan Moore, Rowman & Littlefield, 1998. p. 29-53:

with solely humanitarian purposes that do not include any type of strategic, military, political or economic considerations, ratifying the illegality of these actions.

b) Brief overview of the struggle in Latin America to enshrine the principle of non-intervention

It should be recalled on this topic that we are not dealing with a new problem arising from the recent acknowledgement of the importance of human rights in international relationships, but rather that this is a new expression of a phenomenon against which our countries have struggled for years.

Within this context, it should be reiterated that Latin America has historically been the most fertile field for intervention. We entered independent life when the “euro centric” concept of international society was at its apogee.

During much of the XIX century, the so-called community of “civilized nations” expanded only to include the huge democracy in North America. The few independent nations in Asia and Africa and the countries of Latin America were still living on the outskirts of this community, at least with regard to the application of the principle of equal sovereignty of the States; inequality of powers, inequality of treatment, real inequality of rights: these were relationships that prevailed among the major powers of this time and the young Latin American republics.

This explains that there are two different and opposing concepts of the principle of non-intervention. One, establishes a distinction between legal and illegal interventions, with the former including those whose purpose was the financial control of insolvent debtor States, the intervention for humanitarian causes, the intervention to protect the assets of its nationals in another country, and the intervention in the interests of maintaining the regional or sub-regional power balance.

In the opposite sense, almost since independent life began, the statesmen of Latin America have warned of these hazards and rejected all types of intervention, as even when Santander challenged the historic call of Bolivar the Liberator in 1825, he used unequivocal terms on this matter. Quite naturally, the most characteristic formulations appear at times of crises. Benito Juarez formulated his immortal apothegm on *To respect the right of others is peace,* when Mexico was fighting against foreign intervention. Drago proclaimed the illegality of collecting debts *manu militar* as the reason behind the tripartite intervention against Venezuela in 1902; and when Mexico was once again subject to constant interventions prompted by a turbulent revolutionary struggle, the clear voice of Carranza was raised to enunciate non-intervention in words that the Latin American community have made its own almost *verbatim* some five years later. In 1915, he said: "no country should intervene in any manner whatsoever, and for no reason whatsoever, in the internal affairs of any other, and all should be strictly subject and without exception to the universal principle of non-intervention”.

During this century, the efforts of Latin American nations to firm-up non-intervention have become entwined and institutionalized. The history of Pan-Americanism is above all a harsh and extended struggle that has freed the Latin American nations to ban intervention on the American Continent. This struggle erupted in a crisis at the historical Inter-American Conference at Havana in 1928, when the Latin American trend crashed with the intransigent stance of the U.S. Secretary of State, Charles Evan Hughes, who even then attempted to distinguish between intervention and what he called “interposition of a temporary nature”.

A few years later, Franklin D. Roosevelt became president of the United States and introduced his “good neighbors policy” when, for the first time, a categorical formulation of

this principle was accepted unanimously at the Conference of Montevideo in 1933, although he general U.S. reservation limited its application. It was the Inter-American Conference held in Buenos Aires in 1939 that played the role of affirming the acceptance of this principle. The Additional Protocol on non-intervention which was then approved unanimously and with no reservations whatsoever, stated the following: "The Highest Contracting Parties declare intervention to be inadmissible in any of them, whether directly or indirectly, and regardless of the motive thereof, in the domestic foreign affairs of any other of the Parties". At the Conference of Lima in 1938, and Chapultepec in 1945, this principle was reiterated and this entire lengthy process culminated in the Conference of Bogotá in 1948, which formulated the principle of non-intervention in the strictest and most complete manner that had yet been achieved anywhere, whether regional or global; we are referring to the pertinent articles in the constitutive Charter of the Organization of the American States.

The long and patient efforts of all the countries on the American Continent to reconcile opposing interests and positions, and the final confirmation of a formula acceptable to all of them, which has served as the basis for fruitful cooperation among the American States has constituted a valuable experience that our continent cannot abandon now, but could rather be offered to the international community, where a clash of similar interests is occurring. The oppositions that we have overcome and the problems and difficulties that we have resolved are no different nor any greater than those facing the United Nations in preparing Resolution 2131 of the General Assembly on non-intervention, which ratified the universal level of the existence and the effectiveness of this precept.

8. Application of coercive measures through the regional organizations

Mexican jurist and diplomat Antonio Gómez Robledo published one of the best works on jurisdictional conflicts between the United Nations and the Inter-American System[5], as a member of the Inter-American Juridical Committee of the OAS in 1974, which we feel is very pertinent for establishing the criteria through which a regional entity may impose coercive measures, regardless of the reasons for doing so. From his excellent study, we have taken some basic ideas, adding some comments and conclusions.

Pursuant to Article 53 of the UN Charter, the regional entities may not impose coercive measures other than with the authority or authorization of the Security Council, with the Council itself taking the initiative in the former case, and the regional entity in the latter case. In fact, the Security Council may either "deploy" the regional entities to undertake the "action" agreed by the former, or may simply authorize the measures agreed by the regional entity.

In brief, what is known as the Right of Armed Intervention with Humanitarian Purposes lacks a solid base under law and, applied without strict controls, may turn into yet another tool for establishing or preserving political hegemonies in the world, without achieving the purpose that allegedly inspired these actions, although we acknowledge that the international community today cannot remain unmoved by massive violations of human rights in a specific country, particularly when they are openly endorsed by the Government in power. Furthermore, although it is difficult for us to endorse the use of armed force in cases not covered by the UN Charter, unless the international security system, including the Security Council, is restructured drastically to reflect the interest of the community and nations as a whole in a more adequate manner.

If at any time it seems feasible to approve alterations to the UN Charter, it may be possible —together with the restructuring of the Security Council and constraints on the right

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5 See GÓMEZ ROBLEDO, Antonio. *Naciones Unidas y sistema interamericano: conflictos jurisdiccionales*, [s.l.i.], January 1974. p.47-54

of veto— to establish an exception system for humanitarian crises that require a recommendation from the General Assembly to take steps in situations of this nature, which must be approved by two-thirds of the votes of its Members, and the corresponding decision of the Security Council, according to Chapter VII, establishing constraints whereby initially the Council may only adopt the measures listed in Article 41 of the Charter, meaning coercive measures of a non-military nature. To make use of armed force, the General Assembly must take this topic under consideration yet again, and specifically recommend the use of force to the Council. Additionally, in order to avoid any delay in situations of real emergency, peremptory periods may be established for the Assembly to take decisions on specific cases at both levels.

Should the use of force be approved under an exception system, this must be done in specific terms, following the stages listed by Bernard Kouchner and limited only to the first two.

We know how difficult it is to bring this proposal into practice. Nevertheless, we are unwilling to conclude our comments on this controversial issue without making a firm suggestion that must initially be analyzed in the light of the parliamentary situation of the United Nations at the time it is presented.

Recommendation:

1. **Taking into account** resolution AG/RES.1704(XXX-O/00) dated June 5, 2000 of the current year, which states that the Committee should continue its studies on the juridical aspects of Hemispheric Security focused on an analysis of the current status of the Charter of the OAS, the Inter-American Treaty of Reciprocal Assistance (TIAR) and the American Treaty on the Pacific Settlement (*Pacto de Bogotá*).

2. **Recalling** the reports presented on this topic by Drs. Luis Marchand, Eduardo Vío and Sergio González Gálvez, and the important exchange of viewpoints on this topic within the Committee during the following sessions …………..

The Inter-American Juridical Committee,

**Resolves** to request the member States through the appropriate channels to advise their opinion on the following points:

a) Do the member States consider that a revision of the TIAR and the American Treaty on the Pacific Settlement should be undertaken, as well as the Charter of the OAS, in order to reflect the changes that have taken place as regard the scope of the concept of hemispheric security?, or

b) Do the member States feel that the characteristics of the international situation require that negotiations for a new agreement on hemispheric security should be started?

c) Is there a need to create new regional mechanisms to apply security criteria other than those already in existence?

d) Should they deem it convenient, could the member States issue a statement on the basic elements of the draft definition included in document CJI/doc.11/00 rev.1 (item 5). A proposal addressed to the XXI Century.

It should be noted that the 30th General Assembly of the OAS (Windsor, June, 2000), requested the Inter-American Juridical Committee, through resolution AG/RES. 1704, to continue its studies with a focus on examining the current status of the OAS

Charter, the Rio Treaty and the Inter-American Treaty on Pacific Settlement (Pact of Bogota).

Acting on these instructions, the Inter-American Juridical Committee approved, at its 57th regular session (Rio de Janeiro, August, 2000), resolution CJI/RES.16 (LVII-O/00), *Juridical aspects of hemispheric security*, with the abstention of Dr. Eduardo Vío Grossi, in which it requested the General Secretariat to distribute to member States of the Organization a questionnaire on the issue, and in which it decided to give priority, on the basis of the responses to the questionnaire, to preparing juridical criteria for a definition of hemispheric security.

The text of the resolution approved by the Inter-American Juridical Committee is reproduced below:

**CJI/RES.16 (LVII-O/00)**

**JURIDICAL ASPECTS OF HEMISPHERIC SECURITY**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN FULFILLMENT OF the instruction of the OAS General Assembly that the Inter-American Juridical Committee continue its studies on the topic related to hemispheric security, concentrating "on the analysis of the current status of the Charter of the OAS, the Inter-American Treaty of Reciprocal Assistance (TIAR) and the American Treaty on Pacific Settlement (Bogota Pact);"

TAKING INTO ACCOUNT relevant hemispheric instruments, including the Charter of the OAS, the Treaty on Inter-American Reciprocal Assistance, and the Treaty on Pacific Settlement (Bogota Pact), as well as recent States practice, such as the confidence and security-building measures adopted at the Conference of Santiago and El Salvador, the activities of the OAS in respect of specific causes and relevant sub-regional practices,

RESOLVES:

1. To request the General Secretariat to send the following questionnaire to the Member States of the Organization:

   a) Does your government consider that the above-mentioned international instruments reflect the necessary concept of hemispheric security to face the dynamics of the international situation in the 21st century?

   b) If not, does your government consider that one or more of the following is required?

      - amendments to the Charter of the OAS;
      - amendments to the Inter-American Treaty of Reciprocal Assistance;
      - amendments to the Treaty on Pacific Settlement (Bogota Pact);
      - a new agreement on hemispheric security that might be included in a treaty or a solemn declaration.

2. To grant priority, based on the answers to this questionnaire, and in coordination with the Committee on Hemispheric Security of the OAS Permanent Council, to working towards preparing juridical criteria to achieve an appropriate definition of hemispheric security to face the

challenges of the $21^{st}$ century.

## 2. Human rights and biomedicine

**Resolution:**

CJI/RES. 18 (LVII-O/00): *Draft legislative guide on medically-assisted fertility*
Annex: CJI/doc.33/00 rev.3: *Draft legislative guide on medically-assisted fertility*
(presented by the Inter-American Juridical Committee)

During the $56^{th}$ regular session of the Inter-American Juridical Committee (Washington, D.C., March, 2000), Dr. Gerardo Trejos Salas, rapporteur for the issue, gave a verbal progress report, in which he described a legal problem that had arisen recently in his country. Chamber IV of the Supreme Court of Costa Rica had declared unconstitutional an executive decree establishing requirements for *in vitro* fertilization. By overruling that decree, the court had opened the field to genetic manipulation, in the rapporteur's view. In terms of the inter-American system for the protection of human rights, Dr. Trejos noted that the court's ruling of unconstitutionality was based essentially on the idea that any decree or law in this area is contrary to the American Convention on Human Rights, which protects life from the moment of conception. The problem that arises, he said, is that the scope of the Convention may be given different interpretations in different countries, and a mechanism is therefore needed within the inter-American system, similar to the appeals remedy for annulment of domestic laws, that would allow such discrepancies to be resolved.

Members of the Inter-American Juridical Committee then expressed their viewpoints. In considering to what extent the embryo is or is not a subject of international law, they agreed that it was appropriate not to address the issue of abortion, because of its highly charged political connotation in some countries of the hemisphere. The rapporteur indicated that neither of these issues should pose an obstacle to the Juridical Committee's work, if it adopted the viewpoint that human life begins at the moment of conception. It was only at this point that the question arose as to the scope of the right of one embryo versus that of others, alluding directly to the problem of surplus embryos that are discarded during in vitro fertilization, once positive results have been achieved with one of them. He maintained that if a pro-life position were adopted, this would make it easier to defend the mechanism of *in vitro* fertilization, while avoiding potential abuses, without discarding the possibility of further legislation in this important area.

Other members of the Inter-American Juridical Committee declared that one fundamental task was to determine at what moment a distinction should be made between life and the human person. A number of useful definitions were contributed during the debate. The word "person" was held to have both juridical and ethical connotations, and the fetus should be considered to have a legal personality for all purposes that favor it, but only on the condition that it is born alive and viable. It was also said that the *in vitro* fertilization procedure consisted of fertilizing several eggs at the same time, and that once one of these had achieved viability the others were destroyed

as surplus, thereby presenting a serious problem, since in each case there had already been conception. It was also suggested that the most practical approach would be to prepare a legislative guide, as the rapporteur had initially intended. In contrast to a model law, a legislative guide had the advantage of identifying problems without taking a specific position on the issue.

Several members of the Juridical Committee noted that the previous report submitted by the rapporteur had focused essentially on domestic law, while the present report extended the scope to international law, and specifically that of the American Convention on Human Rights. It was noted that, within the scope of that Convention, the right to life was enshrined (covering the entire issue of abortion, as well as in vitro fertilization), and that within this framework, the Inter-American Juridical Committee must define what was meant by that right, before pursuing its study of the issue as had been agreed. It was noted, however, that any study of the issue within the framework of the Convention would be limitative, since that Convention did not apply to all OAS member States, and reference would therefore have to be made to other instruments such as the American Declaration on the Rights and Duties of Man.

It should be noted that the 30th General Assembly of the OAS (Windsor, June, 2000) requested the Inter-American Juridical Committee, by means of resolution AG/RES.1704, to continue its studies in this area, with the initial focus on determining, in coordination with the Pan American Health Organization (PAHO), the current status of international law and the principal trends of legal thought on the subject.

During its 57th regular session (Rio de Janeiro, August, 2000), the Inter-American Juridical Committee considered the document CJI/doc.33/00 rev.3, *Draft legislative guide on medically assisted fertility*, presented by Dr. Gerardo Trejos Salas, summarizing the opinions expressed by members of the Juridical Committee during the 56th and 57th regular sessions. Dr. Gerardo Trejos Salas reviewed the status of the issue, noting that last year the Juridical Committee had decided to drop the idea of preparing a convention or declaration, and to work on a legislative guide rather than on a model law on medically assisted fertility, setting out the various possibilities of regulation and explaining the consequences that would flow from adopting any one of them.

On the question of substance, the rapporteur believed that there could be said to be a right to maternity and to paternity deriding from the two rights recognized in conventional international law: the right to establish a family and the right to life itself (which implies as well the right to give life and to maintain the human species).

Members of the Juridical Committee considered that the legislative guide should not seek to be a comprehensive guide, but that it should leave room for other types of considerations. It was suggested that this guide should be considered a draft for distribution for comment by member States. As well, it would be interesting to address the problems of international law that the issue evokes, such as for example where the persons involved in the proceedings, or the places in which they occur, are subject to different jurisdictions, including any commercial aspects that may be implied. Given the complexity of the issue, it was advisable at least to acknowledge the existence of this

problem. On the other hand, it was suggested that, because of the moral complexity of the issue, the Juridical Committee should make clear that it was addressing solely its juridical aspects. As well, mention was made of possible limits on access to all or some forms of assisted fertilization, as in the case of unmarried women, widows or divorcees.

The Inter-American Juridical Committee decided in the end to approve a resolution to accompany the documents submitted, incorporating the comments made during the regular session. That resolution, CJI/RES.18 (LVII-O/00), *Draft legislative guide on medically-assisted fertilty,* approved the draft legislative guide on medically assisted fertilization; requested the General Secretariat to send the draft to member States and invite them to submit their observations or suggestions by January 31, 2001; and thanked the rapporteur, Dr. Gerardo Trejos Salas, for his important contribution to the Committee's examination of this issue and requested him to continue his study in light of any observations or proposals received from member States. It also decided to give priority consideration to the issue at its next regular session. Following is the text of the resolution and the document in question.

**CJI/RES.18 (LVII-O/00)**

**DRAFT LEGISLATIVE GUIDE ON MEDICALLY-ASSISTED FERTILITY**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING CONSIDERED the new report made by the rapporteur, Dr. Gerardo Trejos Salas, entitled *Draft legislative guide on medically-assisted fertility* (OEA/Ser.Q CJI/doc.33/00 rev.3),

RESOLVES:

1. To approve the *Draft legislative guide on medically-assisted fertility* attached to this resolution.

2. To request the Secretary General to send said draft to the member States so that they can remit their respective observations or proposals, before January 31, 2001.

3. To thank the rapporteur, Dr. Gerardo Trejos Salas, for his important contribution to the study of this topic within the Juridical Committee and request him to continue his study of the topic in the light of the observations and proposals offered by the member States .

4. To grant priority status to the topic at the next period of sessions.

**CJI/doc.33/00 rev.3**

## DRAFT LEGISLATIVE GUIDE ON MEDICALLY-ASSISTED FERTILITY

One of the fields where major advances have been 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, Central 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 States of the Organization of American States (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 for the purpose of providing the legislators in the inter-American system member States 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.

### I. 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.[1] 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

1 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.

insemination) or directly inside (intrauterine insemination).

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).[2]

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.

Intratubal 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.[3]

## II. Artificial insemination and *in vitro* fertilization in the inter-American system member States

We have already mentioned that, of the inter-American system member States, only Costa Rica and Bolivia (very partially) control human artificial insemination, while some states in the United States and the 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, coincides with natural procreation. Artificial insemination with the husband's semen is equivalent to biological insemination, and legally to the sexual cohabitation of the

2 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.

3 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.

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 America[4] 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 uniformed 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 legislation has been accepted and

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4 A propos, see LACRUZ, José Luis, SANCHO, Francisco and RIVERO, Francisco. *Derecho de familia.* Barcelona, 1989. v.2, p.156-157.

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 HEALEY, J. *Legal regulation of artificial insemination and the new reproductive technologies*. In: ANNAS, Milunsky. *Genetics and the Law.* New York, 1985. p. 141 and ff.).

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 States that are preparing draft laws to regulate doctor-assisted fertilization. At least two member States in the inter-American system 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 García Bejarano, who intended to regulate doctor-assisted human reproduction, but it did not become a law. And in 1999, congresswoman María 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 hemisphere that refers to doctor-assisted procreation.

The progress achieved by biomedicine, as previously pointed out, has produced situations not provided for by the legal structures of different countries. The process of adapting the legislation in effect, or creating a new legislation, is usually a slow and complex matter.

The lack of proper legislation can sometimes lead to serious difficulties and even to moral and economic suffering on the part of the people who find themselves in situations created by the application of the new medical techniques, or else find themselves without access to such.

At times the process may be delayed because of other priorities or because it raises controversies of a moral or religious nature.

However, in other cases the process may be affected by delays due to lack of sufficient information or clarity on the matter to be regulated and the juridical problems involved.

The contribution prepared by the Juridical Committee aims to facilitate the task of the legislators on this matter, with the purpose of offering them a scenario of the existing problems in an analytical and informative fashion.

This paper by no means prejudges what might be the best solution to each of these

cases. It merely points to the issues that deserve to be taken into account by the legislators, without issuing any kind of value judgment. By no means should the inclusion of a topic in the list of relevant issues be interpreted as adopting a position on the part of the Juridical Committee as to whether legislation should be enacted on the matter, nor as to the content of the legislation that may eventually be adopted. In particular, this document should by no means e viewed as adoption of a position with regard to questions of an ethical or religious nature that may rise.

The Juridical Committee has given the following document the profile of a simple draft in the hope that with the opinions and comments that may be received from the governments and other entities concerned with the matter, a guide may be adopted of utmost utility to the States that wish to form legislation on the question.

**III. Draft legislative guide**

1. Definitions. This paper uses the terms listed below with the specific meaning expressed in each case:

- Assisted fertility: any form of fertility other than that produced by the sexual act. This does not include treatment designed simply to promote the couple's fertility.

- Artificial insemination: any operation designed to fecundate the ovule inside the progenitor's body. This may take place by using spermatozoids produced by the husband or a third party. The spermatozoids may have been conserved by freezing.

- *In vitro* fecundation: an operation by means of which one or more ovules extracted from the progenitor are fertilized in a laboratory to be implanted inside the womb. Both the ovules and the spermatozoids used may originate in the couple or in third parties.

- Surrogate womb: this consists in implanting inside the womb of a third person an embryo obtained by means of *in vitro* fecundation for development until birth.

- Genetic manipulation: this consists in modifying the genetic code of the ovule or spermatozoid using suppression, modification or implantation of genetic material.

- Cloning: this consists in producing an embryo from the genetic material of a single person. The embryo produced in this way is implanted inside the uterus of a woman (who may or not be the provider of the genetic material), where it remains until birth.

- Provider: the person, whether or not a member of the couple, who provides the genetic material, either in the form of ovules, spermatozoids or partial genetic material.

2. Extension of the law. The law may cover one or more of the following aspects:
   - artificial insemination;
   - *in vitro* fertilization;
   - use of a surrogate womb;
   - genetic manipulation.

3. Artificial insemination. The following points and alternatives should be taken into

consideration when regulating on artificial insemination:

- Insemination with the husband's semen. This case seems to present no special problems, except in the case of insemination after the death of the husband, using his semen conserved by freezing. In this case, the following matters may be the object of regulation:

  - Filiation: determining whether the child born after the end of legally presumed conception (normally up to 300 days after matrimony has terminated) has the civil status of a legitimate child, with the civil and patrimonial consequences (right to name; kinship with the paternal family; succession rights; and alimentary rights) provided by the patrilineal relatives.

  - Consent: determining whether it is required that the father authorized while alive the use of his preserved semen, and the formalities that such consent should entail. Determining whether it is required to have the consent of other of the husband's relatives or heirs. Determining whether a deadline date should be set after which this type of insemination can not be carried out. Determining the norms as to conserving or eventually destroying the conserved spermatozoids.

- Insemination with the semen of a third party: the following questions deserve special attention as regards consideration and possible regulation:

  - Consent: determining whether the husband's consent is required, the formalities that involve this consent and the juridical effects of the absence of such consent, both with regard to filiation and as regards its inclusion or exclusion concerning the definition of adultery.

  - Filiation: determining whether the child born of fecundation of this nature possesses the status of legitimate child for all purposes of civil and patrimonial condition, including:
    - use of the husband's name;
    - kinship with the husband's family;
    - succession rights and alimentary rights, as regards the husband and his family.

- Relationship with third parties: determining whether the child conserves some type of juridical relationship to the provider (biological progenitor). Determining whether the child has any right to prohibit the use of the semen provided or to demand that it be destroyed.

- Confidentiality: determining the nature and extension of the obligation of confidentiality concerning the origin of the semen, as well as the resources or penalties appropriate to the violation of those obligation on the part of the people or institutions directly involved in fecundation.

- Right to information: determining the nature and extension of the child's right to know the identity of the biological progenitor (for example, in order to determine the existence of hereditary diseases).

- Gratuity: determining whether it is prohibited for the man making the genetic contribution to receive remuneration for the use of his semen and the sanctions concerning violation of this prohibition.

4. *In vitro* fecundation. The following aspects and alternatives should be taken into account on considering *in vitro* fecundation:

- The case where both the ovule and the spermatozoid are provided by the couple. This does not differ in any substantial way from the case of artificial insemination with the husband's semen.
- The case where the ovule or spermatozoid come from a third party. The juridical problems that this gives rise to are substantially the same as those in the case of artificial insemination. In the case where neither the ovule nor the spermatozoid originate in the couple, a norm could be applied similar to adoption.

- Destruction of embryos: in the case of *in vitro* fecundation, the general rule is to fertilize many ovules and only one of the resulting embryos is implanted in the womb. The legislator will have to determine whether the destruction of the remaining embryos constitutes or not an act prohibited or punishable by law.

5. Use of a surrogate womb. Legislators will have to determine whether this alternative is permitted or not. If permitted, it will have to be determined whether this is restricted to certain persons (for example, immediate relatives of either party of the couple) and whether compulsory payment is to be established, as well as regulating the contractual relationship between the couple and the third party.

6. Genetic manipulation. Legislators will have to consider whether this operation is permitted. If so, it should be established whether this is limited to certain cases (for example, suppression of genes that cause hereditary diseases or deformities), as well as corresponding regulations.

7. Cloning. To date, no case of human cloning has been occurred, although the technical means are apparently available. Legislators will need to determine whether this operation is permitted. If so legislators must regulate the consequences, and if not, the applicable sanctions must be determined.

8. Matters related to the above

- Regulation of the activity of the people or entities that participate in medically assisted fertilization. The legislator must consider the regulation of the activity of the people or entities that contribute to fecundation, medical professionals, clinics, banks for semen and other genetic material, and so on. Among other matters, consideration should be given to:
  - operations permitted and prohibited and the legal sanctions for violation of norms;
  - obligatory registers;
  - confidentiality and the right to information on the part of interested parties;
  - norms on the destruction of genetic material;
  - required consent and authorization and the formalities to be fulfilled;
  - minimum guarantees and responsibility.

- Problems of International Law, especially in the area of Private International Law, that may arise with regard to doctor-assisted fertilization and its consequences.

- Limited access to all or some forms of assisted fertilization, for example:
  - single, widowed or divorced parties;
  - parties under or over certain age limits;

  - parties without certain requirements as to physical or mental health or who have been sentenced for crimes against children;
  - parties whose motives are exclusively eugenic.

- Determining criminal or civil actions (as material in family or succession law), and possible holders of such actions.

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## 3. Improving the administration of justice in the Americas

**Resolution:**

CJI/RES.5 (LVI-O/00): *Improving the administration of justice in the Americas*

**Document:**

CJI/doc.2/00: *Proposal for an Inter-American cnvention on the effects and treatment of the "forum non conveniens" theory: "forum non conveniens" and the Hague Convention. Latin American position* (presented by Dr. Gerardo Trejos Salas)

During the 56th regular session of the Inter-American Juridical Committee (Washington D.C., March, 2000), Dr. Jonathan Fried, co-rapporteur for the topic, presented an oral report reviewing the history of this topic within the Inter-American Juridical Committee. He noted that in several member States there are still problems in maintaining full independence for the judiciary and suggested the need to reaffirm the Juridical Committee's previous recommendations to the Committee on Juridical and Political Affairs. He also noted the importance of working in coordination with the recently established Justice Studies Center of the Americas, particularly with respect to access to justice.

During its session, the Juridical Committee also received a report from Dr. Gerardo Trejos Salas, co-rapporteur for the topic, on the Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas (Costa Rica, March 1-3, 2000), which he had attended as observer. He reported that one of the principal decisions taken was to name Chile as headquarters of the Justice Studies Center of the Americas, and that appointment of the Center's Executive Director was pending. He noted the issues on the agenda of that meeting, in particular penitentiary reform, alternative dispute settlement and the status of persons deprived of their liberty with respect to their health, and in particular with reference to AIDS.

With these considerations in mind, the Inter-American Juridical Committee adopted resolution CJI/RES.5 (LVI-O/00), *Improving the administration of justice in the Americas*, in which it welcomed the creation of the Justice Studies Center of the Americas and declared its willingness to support and cooperate with that Center, in all appropriate ways, to help it carry out its mandate. The Committee also decided to continue its consideration of the issue of access to justice in member States, in cooperation with the Center.

Dr. Gerardo Trejos Salas, co-rapporteur for the topic, presented document CJI/doc.2/00, *Proposal for an inter-American convention on the effects and treatment of the "forum non conveniens" theory: "forum non conveniens" and the Hague Convention. Latin American position*. Dr. Trejos noted that article 22 of the draft Convention on Foreign Jurisdiction and Sentences in Civil and Commercial Matters, proposed by the

Hague Conference, makes reference to *forum non conveniens* and provides that in exceptional circumstances, where the court's jurisdiction is not based on an exclusive election clause, the court may, upon request by one of the parties, suspend proceedings if it is clearly inappropriate for it to exercise its jurisdiction in that particular case, and if it is clearly appropriate for another State to exercise its jurisdiction.

Dr. Trejos recommended against attempting to prepare a convention on this issue within the Inter-American Juridical Committee, and suggested that the Committee should discuss the issue more broadly at its next regular session, with a view to submitting its viewpoints to the Hague Conference.

It should be noted that the 30th General Assembly of the OAS (Windsor, June, 2000) requested the Inter-American Juridical Committee, by means of resolution AG/RES.1704, to continue studying the different aspects of the enhancement of the administration of justice in the Americas, maintaining the necessary coordination and the highest possible degree of cooperation with other organs of the Organization that work in this area, especially with the Justice Studies Center of the Americas.

Following is the text of the resolution of the Inter-American Juridical Committee, and of the report presented by Dr. Gerardo Trejos Salas on the theory of *forum non conveniens*.

**CJI/RES.5 (LVI-O/00)**

**IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS**

THE INTER-AMERICAN COMMITTEE,

WHEREAS the Inter-American Juridical Committee, by its resolution CJI/RES.6/LV/99, recommended that the Third Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas include in 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;

AND WHEREAS the Juridical Committee in the above mentioned resolution also requested the Permanent Council to forward all previous work approved by the 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 the field; and

b) encouraging all member States to give priority to efforts to uphold these principles;

NOTING, however, that the conclusions of neither the Second nor the Third Meeting of Ministers of Justice or Ministers or Attorneys-General include references to the recommendations contained in the Committee's 1995 report that the appropriate organs of the Organization:

a) call the attention of member States to the basic principles on the independence of the judiciary and of 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, and 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 WHEREAS the Inter-American Juridical Committee resolved to continue the study of the subject taking into account the conclusions of the Third Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas, held in San José, Costa Rica, during the period March 1-3, 2000;

NOTING that the aforesaid Meeting welcomed the establishment of the Justice Studies Center of the Americas with its headquarters in Santiago, Chile as well as the adoption of the Statute of the Center and the election of its first Board of Directors by the General Assembly of the OAS thereby fulfilling a mandate of the Second Summit of the Americas,

RESOLVES:

1. To welcome the establishment of the Justice Studies Center of the Americas as another important entity of the Organization expected to play a significant role in the continuing process of reforming and modernizing the justice systems of member States of the Organization.

2. To pledge its cooperation and support in assisting the Center in such manner as may be considered appropriate to enable the Center to fulfill its mandate.

3. To continue its consideration of the increasingly important issue of access to justice in member States in collaboration with the Center.

**CJI/doc.2/00**

# PROPOSAL FOR AN INTER-AMERICAN CONVENTION ON THE EFFECTS AND TREATMENT OF THE *FORUM NON CONVENIENS* THEORY: *FORUM NON CONVENIENS* AND THE HAGUE CONVENTION. LATIN AMERICAN POSITION

(presented by Dr. Gerardo Trejos Salas)

## I. Introduction

### Illegality and problems caused by *forum non conveniens*

During the previous period of regular sessions a report on *forum non conveniens* (FNC) was introduced (OEA/Ser.Q CIJ/doc.29/99, July 14, 1999). Some of the illegalities and problems caused by said theory can be summarized as follows:

**No jurisdiction if no acts performed in the country**. Latin American jurisdictional notions, not surprisingly, are different from those in Common Law systems. By a US standard, Latin American jurisdiction seems more restricted. Absent, for instance, is the American theory of "long-arm jurisdiction", or the idea that service of process confers jurisdiction. Also, when a person has performed all the activity in question outside the Latin American country, there would be no national jurisdiction either[1]. If adverse effects follow from conduct deployed abroad, Latin American law assumes that jurisdiction lies in the foreign country where the acts occurred. Conversely, Latin American countries would have jurisdiction over acts performed there, even if the consequences in question take place abroad[2].

In spite of this, some foreign judges persist in applying FNC and ordering that lawsuits be filed in Latin America when the relevant acts took place abroad, although there is no jurisdiction in Latin America.

**Lack of jurisdiction if no power to constrain.** As it can be seen in footnotes 60 and 61, together with their accompanying text, the FNC defendant is not bound to obey a final judgment from the second court. That is also a reason causing lack of jurisdiction, since

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1 For instance, the Code of Civil Procedure of **Costa Rica** states that there is local jurisdiction "*When the action is based on a fact occurred or in an act that took place in Costa Rica*." (art. 46, para 3). Such interpretation was held in Carlos Luis *Abarca et al. v. Shell Oil Company et al*., affirmed by the Costa Rican Supreme Court on 2/21/96. In **Brazil**, art. 88, of the Code of Civil Procedure, states exactly the same principle: "*Brazilian courts have jurisdiction when … III The case is based on a fact that occurred, or in an act that was performed in Brazil."* In **Honduras**, art. 146, first paragraph, of the *Ley de Organización y Atribuciones de los Tribunales*, does not grant jurisdiction against a corporation who did not perform any acts in Honduras (Attorney General of Honduras, opinion of 6/2/95). According to the Attorney General of **Nicaragua**, in his opinion of 5/24/95, "*The procedural rules of our system do not grant jurisdiction to Nicaraguan courts against manufacturers … who have only made and sold their product abroad, without having performed acts in Nicaraguan territory. Code of Civil Procedure, article 265, para. 1*" In **Panama**, there is a judgment from the Primer Tribunal Superior de Justicia, of 4/18/95, stating that jurisdiction over foreign corporations lies: "… *with the court situated where the corporations have their principal office*." This precedent was followed twice in FNC cases, in 1995 and in 1999.

2 Such a territorial notion has a political angle. It is a way of protecting the borders and the sovereignty of the country concerned: by refraining from judging acts performed abroad, under foreign laws, it is more probable that foreign courts will refrain from judging acts that took place in our country. It is a variation of the expression *par in parem imperium non habet*. In this way Latin America departs from French law, where the plaintiff's nationality generates local jurisdiction, even for acts performed abroad (**France**, Civ. Code, art. 14).

jurisdiction cannot exist *"without the power to compel the enforcement of what has been ordered.*" (MORALES LEBRÓN, M. *Diccionario jurídico según la jurisprudencia del Tribunal Supremo de Puerto Rico.* San Juan, 1977. p. 563)

**Jurisdiction is terminated**. Even when there is concurrent jurisdiction, the claim filed before one court extinguishes the jurisdiction of the other court[3].

**And is not reborn**. For jurisdiction to be reborn in Latin America, there has to be a (voluntary) nonsuit of the first case and an new (voluntary[4]) filing of the claim before the second court. A FNC filing does not generate jurisdiction.

Despite such a clear rule, some foreign courts persist in applying FNC. When the Latin American court dismisses the case for lack of jurisdiction, they refuse to accept the case, or they allow it to remain dormant for years. (For instance, see footnotes 15 – 18 and their corresponding text.)

**Procedural freedom**. FNC *forces and/or constrains* plaintiff to file the second lawsuit. It is intolerable for a national judge to force or to constrain a citizen to file a claim[5]. It is worse still if who forces and constrains is a foreign judge.

***Actor sequitur forum rei***. The proper court for personal actions is the one of the defendant's domicile[6]. A foreign court with jurisdiction cannot export its FNC theories when they clash with this principle.

**Bilateral treaties with the USA**. FNC is a domestic law. Consequently, it is trumped by international treaties[7]. It then follows that FNC cannot block access to the courts which is, precisely, what these treaties guarantee[8].

**Sovereignty**. A foreign judge should not try to impose, unilaterally, the performance of procedural acts in Latin America, particularly when such conduct breaches Latin American law[9]. FNC cannot be exported if it violates the second country's laws[10].

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3 Once jurisdiction attaches, it cannot be altered, see for instance, Codes of Civil Procedure of **Guatemala**, art. 5; **Ecuador**, art. 15 (see also Ecuadorian Constitution, art. 24, para. 11); **Honduras**, arts. 138 and 141; **Panama**, art. 253, **Brazil**, art. 87, **Nicaragua**, art. 255. The term of art for this is "*prevención*", or "*competencia preventiva*". From "*prevenire*", a Latin term meaning to arrive (*venire*) earlier (*pre*) and consequently preventing or blocking the way for others.

4 It is so basic that a lawsuit cannot be ordered by the courts that Latin American procedural codes do not bother to mention this principle. As an exception, the Code of Civil Procedure of **Costa Rica** elaborates that "*Nobody can be forced to file a lawsuit* …" (arts. 122 and 477).

5 Latin American law knows the theory of *acto personalísimo*. These are acts where the free will of the person is so important that they cannot be forced upon anybody. Examples are marriage and the making of a will. No judge can order someone to get married, or to make a will. The filing of a claim falls in this same category. A Latin American judge cannot order anyone to file a claim. And with greater reason, a Latin American judge cannot preside over a lawsuit that has been filed following a foreign court's order. The functional equivalent of this would be to expect Latin American notions of forced heirship, in a US probate proceeding, just because the decedent was Latin. See also, for instance, the Constitution of **Honduras**, art. 70: "*… nobody can be forced to do what the law does not command, nor prevented from doing what the law does not prohibit."* Obviously, FNC cannot breach this rule.

6 It just suffices to mention article 323 of the Bustamante Code, adopted by **Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama and Peru**. Latin American countries that have not adopted the Bustamante Code still follow the same principle. Example: **Argentina**, Code of Civil Procedure, art. 5 (4) states that: "*In personal actions stemming from civil liability [jurisdiction lies with the court] of the place where the facts occurred, or of the defendant's domicile, as chosen by plaintiff.*" (emphasis added).

7 Vienna Convention on the Law of Treaties, art. 27. See, for instance, the Constitution of **Honduras**, arts. 16 and 18 (Supremacy of Treaties).

8 In some treaties, the right of access to courts is unfettered. In others, access is granted on equal footing with nationals.

9 For instance, the Constitution of **Honduras**, art. 82, establishes that "*The citizens of the Republic have free access to the courts, to exercise their action in the way determined by the laws".* Obviously, said laws are Honduran, not the foreign ones.

**Equality before the law**. This principle is a constitutional rule11. FNC discriminates openly against the foreign plaintiff[12]. Logically, a Latin American judge cannot, and should not, become the successor, or the accomplice, of the procedural discrimination initiated by the original court. It should be added that the discrimination against the foreign plaintiff that FNC perpetrates, also breaches important multilateral treaties as, for instance, the OAS Organizational Charter[13].

**The first court remains as an appeals court for the second and it behaves as a Constitutional Court for the second country.** Strange as it may seem, the final judgment of the second court, is not really final. According to American law such judgment can still be challenged before the first court, and on grounds of American law[14]. Final control over the case –ordering effectively that the defendant pay an adverse decision- remains under the first court's control. The supposed "jurisdiction" and "sovereignty" of the second court is just an illusion. This explains why Latin American judges are not enthusiastic about accepting these cases.

***Lis pendens***. While the case is being prosecuted in the second country, the FNC dismissal could still be under appeal in the first country. Usually the second court is not informed about this appeal since the plaintiff is "gagged" by the first court and the defendant does not want to jeopardize his possibility to remain in the second court. This happened, for instance in the *Delgado* and in the *Patrickson* cases. The Latin American judges in these

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10 Latin American codes, special statutes, judgments and opinions of Attorneys General say very explicitly that FNC violates important constitutional and procedural rules.

11 For instance, see the Constitutions of: **Brazil**, art. 5; **Costa Rica**, art. 33; **Ecuador**, art. 23(3); **Guatemala**, art. 4 and **Honduras**, art. 60, para 1 and 2, and art. 61.

12 For instance, in *Gerardo Denis Patrickson et al. v. Dole Food Company, Inc. et al.*, cuse Nr. 97-0156, before the United States District Court for the District of Hawaii, determines that *"When the plaintiff is **non-foreign**, there is a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors weigh in favor of trial in the alternative forum. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981). This is because "[w]hen the home forum has been chosen, it is reasonable to assume that this choice is convenient." Id. **When the plaintiff is foreign, however**, this assumption is less reasonable and the **plaintiff's choice is afforded less deference**. Id. In such cases, the showing required to obtain dismissal is reduced. See Empresa Lineas Maritimas Argentinas S.A. v. Schichau-Unterwesser A.G., 955 F2d 368 (5th Cir. 1992).* (Bold added).

The forum non conveniens judgment in *Delgado v. Shell Oil Company*, published in 890 F. Supp. 1324 (S.D. Tex. 1995), says virtually the same.

Another example is *Ruth Linares Polanco v. H. B. Fuller*, cause Nr. 3-96-8, before the US District Court, District of Minnesota, Third Division. A judgment of September 23, 1996, while applying the theory of forum non conveniens states, at page 25, in reference to the *Piper* case, as follows:

*"The Court began its own analysis by noting that while a plaintiff's choice of forum was normally entitled a strong favorable presumption, district courts are "fully justified" in according less weight to this choice **when the plaintiff is foreign**. Id at 255-256. This is because it is much less reasonable to assume that **a foreign plaintiff** has chosen an American forum for reasons of convenience.* (Bold added).

At page 35, in the same ruling, an identical thought is expressed:

"Plaintiff's continuing reliance on Reid-Walen is again misplaced, because **the plaintiff in that case was an American citizen**, a fact which entitled the plaintiff to a strong presumption of deference in her forum choice." (Bold added).

13 Article 5 (j) of the Charter of the Organization of American States , re-numbered as 3(j) in its 1967 version, says as follows:

"The American States proclaim the fundamental rights of the individual without distinction as to race, **nationality**, creed or sex." [Emphasis added]. The United States ratified this convention first on June 19, 1951 (See U.S.T. 2394, T.I.A.S. Nr. 2361 and, after the Buenos Aires Protocol, the same text was ratified by the United States on April 26, 1968 (see T.I.A.S. Nr. 6847. O.A.S.T.S. Nr. 1-A, O.A.S.O.R., O.E.A./Ser.A/2.add2). The second draft of the convention entered into force in the United States on February 27, 1970. All Latin American countries, with the exception of **Cuba**, are members of this treaty.

It should be added that in 1959 the OAS created an **Inter-American Human Rights Commission**, whose goal was to further respect for human rights, expressly "those established in the American Declaration of the Rights and Duties of Man." In 1967, when the OAS Charter was restructured, the Inter-American Human Rights Commission was given the rank or "principal organ" (art. 51). Protecting compliance with human rights falls within the purview of this Commission. (See Thomas Burgenthal, *The Revised OAS Charter and the Protection of Human Rights* 69 A.J. Int'l L. 828, 1975)

14 See section VIII, below, for more detail.

cases could one day be informed, to their surprise, that a foreign court of appeals has decided that the cases shall return to the first country.

The judge who applies FNC resorts to an exceptional mechanism. Having jurisdiction and not being disqualified by personal reasons he expects another judge to take charge of the case. If the second court rules it has no jurisdiction, then first court should reassume adjudicating the case. In re *Ecuadorean Shrimp Litigation*[15] this did not happen. Here the case was dismissed on FNC and plaintiffs were ordered to refile in Ecuador. The US court had established that it would reassume adjudicating the case if the Supreme Court of Ecuador ruled for lack of jurisdiction. Eventually the Ecuadorian Supreme Court upheld lower rulings for lack of jurisdiction and the case was brought again before the US court. The American judge still refused to take the case based on two reasons. One reason was that Ecuadorian law (Law 55 and art 15 of the Code of Civil Procedure) "*has the effect of vitiating Florida law on forum non conveniens and forcing Florida courts to accept jurisdiction* …" The second reason was that plaintiffs had acted in bad faith by lobbying for the enactment of Ecuadorian Law 55, which destroyed the FNC option.

These two arguments are flawed and they illustrate why FNC cannot be exported. The fact that said Ecuadorian laws "vitiated" Florida FNC law is not a reason to ignore them. FNC is the *subservient system* to foreign law. It is not that foreign law should accommodate FNC, but exactly the opposite should happen[16].

The second argument also fails. Latin American constitutions allow, and even encourage, people to present petitions to the authorities (*derecho de peticionar a las autoridades*)[17]. This is in fact one of the pillars of any democratic system. When plaintiffs -Ecuadorian nationals- were sent to Ecuador they had a perfect right, while in Ecuador, to lobby for whatever laws they wanted[18]. It is politically incorrect for a foreign judge to send plaintiffs to refile a lawsuit in Ecuador and to punish them later because they availed themselves, while litigants in Ecuador, of rights granted by the Ecuadorian Constitution. It is also juridically incorrect to penalize a party for having done what was legal in a given country, when that party was sent to litigate in such country.

In holding that certain Ecuadorian statutes –extremely pertinent- are inapplicable, since they "vitiate" Florida law, the foreign judge behaves as a constitutional court, using Florida law as if it were the Ecuadorian Constitution.

There is something Orwellian about exporting FNC. The rule seems to be: "*Go and litigate in country X. But if you exercise any right that country X grants, that I do not like, I will punish you for it."*

The illegalities and problems caused in Latin America by FNC are not limited to those stated above. There are additional obstacles, equally important, as public order, multilateral treaties, *lis pendens*, etc… Since the point seems to have been sufficiently explained, it is better now to continue with other topics.

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15 Case Nr. 94-10139 (27), *Circuit Court of the 17th Judicial Circuit, in and for Broward County, Florida, ruling of 9/24/99*. Other times the foreign court does not openly reject the Latin American decision for lack of jurisdiction, but it does not accept jurisdiction either, allowing the case to remain dormant for years. As an example, see Delgado v. Shell Oil Co., 890 F. Supp. 1324 (S.D. Tex. 1995).

16 FNC is based on the "availability" of a foreign forum. FNC theory does not say that foreign laws that do not accommodate FNC lawsuits shall be disregarded. FNC is ***subordinated to*** the existence of an alternative available forum. It is not the other way around.

17 See, for instance, the Constitution of **Honduras**, art. 80 "*Any person … has the right to present petitions to the authorities …"*

18 As the origin of the word indicates, lobbying was invented, and is widely practiced in the USA. In 1992, a group of FNC defendants (Alfaro case) lobbied –successfully- to have Texas anti-FNC law abolished. Tobacco companies are famous for lobbying the US Congress. They even lobby Congresses in Latin America. No US court penalizes US corporations for lobbying. Why cannot Latin American plaintiffs do the same in their own country?

**Instance where FNC is legal**. There is, however, a possibility for FNC to be viable in Latin America. It is the case of the plaintiff who files the action before a court that does not correspond to the defendant's domicile. If the defendant raises FNC and obtains the transfer of the case to his domiciliary tribunals, then such case would be viable in Latin America. This is because now FNC coincides with the principle that personal actions lie before the defendant's domiciliary courts. Expressed in another way, in this hypothesis FNC overlaps with the principle *actio sequitur forum rei*.

**Hague Convention**. The issue of FNC has been recently enriched with the *Preliminary draft convention on jurisdiction and foreign judgments in civil and commercial matters*, proposed by the International Law Academy of The Hague (hereinafter, the "Convention"). FNC is contemplated by the Convention. It should then be determined whether it would be more convenient for Latin American States to ratify the Convention in due time, or whether an independent treaty would be more appropriate. Such is, precisely, the central theme of this report.

Several articles of the Convention relate to FNC and that is why they should be analyzed. By order of importance, articles 3, 10 and 22[19] must be studied first. A second group of articles that play a role in FNC are 17, 25(2), 26, 38(2) and 37, the latter forming part of the Convention's annex.

## I. Hague Convention

### Analysis of articles 3, 10 and 22

***Article 3 – Defendants'forum***

***1. Subject to the provisions of the Convention, a defendant may be sued in the courts of the State where that defendant is habitually resident.***

***2. For the purposes of the Convention, an entity or person other than a natural person shall be considered to be habitually resident in the State –***

***a) where it has its statutory seat,***
***b) under whose law it was incorporated or formed,***
***c) where it has its central administration, or***
***d) where it has its principal place of business.***

This article uses the expression "habitual residence" as a synonym of "domicile". It follows the system of *actor sequitur forum rei*. It is a very clear principle, in harmony with Latin American law. To mention just a few countries of the region that adopt such principles, the following could be named: **Argentina**[20], **Brazil**[21], **Costa Rica**[22], **Ecuador**[23], **Guatemala**[24] and **Panama**[25]. From the rest of the article it stems that the present rule only applies to personal actions[26].

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19 The Convention's complete text can be consulted at ftp://www.hcch.net/doc/241e.rtf (English version) and /241.rtf (French version).
20 Código Procesal Civil y Comercial de la Nación, art. 5.
21 Código de Processo Civil, arts. 88, 94 and 100, para. IV (a). Código Civil, art. 35.
22 Código Procesal Civil, arts. 24 and 46.
23 Código de Procedimiento Civil, art. 27.
24 Código Procesal Civil y Mercantil, art. 12.
25 Código Judicial of the Republic of **Panama**, arts. 254 and 255.
26 Concerning actions on realty, for instance, article 13(1) grants exclusive jurisdiction to the country in whose territory the property in question is situated.

The importance of the principle actor sequitur forum rei has already been explained in the previous report[27]. Since the concept is so clear, no further commentary is necessary.

***Article 10 – Torts or delicts***

***1. A plaintiff may bring an action in tort or delict in the courts of the State –***

***a) in which the act or omission that caused injury occurred, or***
***b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury or the same nature in that State.***

***2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolization, or conspiracy to inflict economic loss.***

***3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.***

***4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.***

Paragraph one establishes that the lawsuit may be filed at the place where "*the act or omission that caused the action occurred*" (paragraph a), or where "*the injury arose*" (paragraph b). Let us imagine a tort that is organized in a country X, but that only triggers its consequences in a country Y. Plaintiff could sue in the courts of X, according to mentioned paragraph (a), or in the courts of Y, according to paragraph (b).

The possibility of suing in tort in the place where the harm was produced, in addition to the defendant's domiciliary court would add a new jurisdictional basis to Latin American law.

***Article 22 – Exceptional circumstances for declining jurisdiction***

***1. In exceptional circumstances, when the jurisdiction of the court seized is not founded on an exclusive choice of court agreement valid under Article 4[28], or on Article 7[29], 8[30] or 12[31], the court may, on application by a party, suspend its proceedings if in that case it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has jurisdiction and is clearly more appropriate to resolve the dispute. Such application must be made no later than at the time of the first defense on the merits.***

***2. The court shall take into account, in particular –***

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27 See section I.2.(b) and (c). Article 323 of the Bustamante Code, which is law in **Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Haiti, Nicaragua, Panama, Peru and the Dominican Republic**, follow the same position.

28 It refers to choice of forum.

29 It refers to consumer contracts.

30 It refers to individual labor contracts.

31 It refers to cases of exclusive jurisdiction as, for instance, that of the country where the land is situated in realty cases.

> ***a) any inconvenience to the parties in view of their habitual residence;***
> ***b) the nature and location of the evidence, including documents and witnesses, and the procedures for obtaining such evidence;***
> ***c) applicable limitation or prescription periods;***
> ***d) the possibility of obtaining recognition and enforcement of any decision on the merits.***

***3. In deciding whether to suspend the proceedings, a court shall not discriminate on the basis of the nationality or habitual residence of the parties.***

***4. If the court decides to suspend its proceedings under paragraph 1, it may order the defendant to provide security sufficient to satisfy any decision of the other court on the merits. However, it shall make such an order if the other court has jurisdiction only under Article 17, unless the defendant establishes that sufficient assets exist in the State of that other court or in another State where the court's decision could be enforced.***

***5. When the court has suspended its proceedings under paragraph 1,***

> ***a) it shall decline to exercise jurisdiction if the court of the other State exercises jurisdiction, or if the plaintiff does not bring the proceedings in that State within the time specified by the court, or***
> ***b) it shall proceed with the case if the court of the other State decides not to exercise jurisdiction.***

As opposed to articles 3 and 10, article 22 raises serious problems, which will be analyzed in the following section.

It is seen that this rule deals with FNC without mentioning it when talking about "suspending proceedings" if it were "clearly inappropriate for such court to exercise jurisdiction" and another court were "clearly more appropriate to resolve the dispute". In a certain way, article 22 is welcome since it sheds some light and it imposes a certain order in a legal field that has caused serious problems[32]. For those cases where FNC is capable of generating jurisdiction in Latin America, explained in paragraph 2 of this report, it is important to analyze this rule closely.

## II. Critique of article 22

This article tries to impose certain limitations on FNC. An explanation follows on how, in practice, such limitations are largely inoperative or easy to avoid.

### *Article 22 (1) – Exceptional circumstances*

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32 Outside the Latin American area the issue appears rather confusing. The confusion is seen, especially, in foreign judgments that do not quite understand that FNC is normally illegal in Latin America and, consequently, incapable of generating jurisdiction. Part of the problem is the dearth of legal writing existing in the Spanish language. As an exception to this, see the lucid essay of Professor Javier Zamora Cabot Accidentes en Masa y "Forum Non Conveniens": El Caso Bhopal, in XII Jornadas de la Asociación Española de Profesores de Derecho Internacional y Relaciones Internacionales (1989), reimpresa en Rivista di Diritto Internazionale Privato e Processuale, pp. 821-852, October – December 1990.

**Application "*in extremis*".** Paragraph 1 implies that FNC would only be applied under the following conditions:

a) "*in exceptional circumstances*",
b) when it is "*clearly inappropriate*" that the case remain before the first court, and
c) when a foreign court with concurrent jurisdiction results "*clearly more appropriate"* to resolve the dispute.

This paragraph does not change anything since it recites approximately what American law already says. The problem arises out of the subjectivity of the conditions. The phrase "exceptional circumstances" does not explain much. In practice FNC cases are all exceptional since they normally affect thousands of people. It will suffice to mention the Bhopal case as an example.

What is "clearly appropriate" or "clearly more appropriate" to one party is not so to the other. The objectivity projected by this paragraph is hard to find in real life.

It should be added that FNC is completely unknown in Latin American law, where the judge always exercises his jurisdiction and never refers the case to another court with jurisdiction because the latter is considered "more appropriate". The proceeding can only be "suspended" for reasons personal to the judge, like manifest friendship or enmity with one of the parties, close kinship, etc… Some codes talk about "impediment", "recusation", "inhibition", "excusation". Some countries also contemplate the "suspention" of jurisdiction when the case is under appellate review[33]. The existence or not of another court with concurrent jurisdiction is a completely irrelevant fact for a Latin American judge.

For that reason in Latin America it is contradictory to say that a court with jurisdiction over a case considers itself "clearly inappropriate" to adjudicate such case. If the court has jurisdiction, for exactly such reason, it is appropriate to adjudicate the case. In Latin America what is "inappropriate" is just the opposite: that a court with jurisdiction over a given case decides to relinquish it[34].

***Article 22 (2) - Considerations***

This rule offers four elements to be taken into account: a) the convenience of the parties in view of their habitual residence, b) the nature and location of the evidence, c) the limitations or prescription periods and d) the possibility of enforcing the judgment.

**a) Convenience**. The only truth about this criterium is that for the plaintiff it is convenient to obtain a high award, as soon as possible. The defendant's convenience runs in exactly the opposite way. It is a simple truth, known by all. The psychological or parapsychological gymnastics that the court displays, to ascertain "the inconvenience" that the parties would encounter in one and in another court, are completely divorced from the reality that is lived and perceived by the parties.

For that reason one cannot talk about "convenience" as if it were a neutral element or a quality linked to the habitual residence of the parties. It is enlightening to consider that the parties normally fight for the case to be adjudicated before the court corresponding to the habitual residence *of the opposing party*.

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33 See the codes of civil procedure of **Argentina**, arts. 8, 12, 16 and 30; **Brazil**, arts. 134, 135, 265 para. III, 304, 305, 306; **Costa Rica**, arts. 49, 51, 79 and 80; **Ecuador**, art. 21; **Guatemala**, art. 4 (prorogation of jurisdiction due to impediment); **Panama**, art. 239, para. 2 and 3.

34 See note 3 and accompanying text.

When saying that the case "is more convenient" in one country than in other, what one really says is that the case is more convenient *for the plaintiff*, or *for the defendant*, in such other country. The proceeding is an intellectual abstraction; accordingly it cannot be deemed to have a "convenience" or "inconvenience" of its own. One and the other are manifested through the procedural position of the parties. The court that finds that the proceeding is "more convenient" in another country usually expresses itself in neutral terms, seeking support in the opinion of experts, precedent, etc… But the apparent objectivity and scientific reasoning cannot change the fact that moving the case to another country is convenient for one of the parties, not to the case.

If the speed in reaching final judgment were an important element to decide on the more convenient court, FNC would never be applied. It can easily be demonstrated empirically that FNC adds years to the case.

**b) Evidence**. This is an ambiguous parameter. Normally evidence is available in both countries, without it being able to say that one kind is more important than the other. However, there are countries like the USA where the procedural means available to obtain evidence are most powerful (discovery). If the ease with which evidence can be obtained were a test really applied, all cases would remain in the USA, since evidence there is more effective. Besides, the *Inter-American convention on letters rogatory* –of which the USA is a party- creates the possibility for a court of one country to request evidentiary measures from the court of another country. Finally, it must be remembered that the burden of proof is borne by the plaintiff. It is then disconcerting to use the argument to ease in obtaining the evidence, to send the plaintiff to litigate in a court that he has not chosen.

**c) Statute of limitations**. In practice this issue is resolved with the defendant's promise, before the first court, that he will not raise such an exception before the second court. This is the only condition that works properly because the statute of limitations is a disposable right, which the party holding it can use or not, as he pleases.

**d) Enforcement**. This fourth consideration follows the fate of the first and the second one. It is unsatisfactory since what matters is not the possibility of enforcing the second court's judgment before the first jurisdiction, but the certainty[35] of doing so. Besides, such "possibility" is limited to the decisions obtained in the second court "on the merits". It is not difficult for a defendant who supposes he will most likely lose, to manipulate the case, to cause a judgment based on procedural grounds, by default, etc…, avoiding judgment on the merits.

More importantly, it must be remembered that in some systems, for instance the American one, a foreign judgment is always subject to a constitutional attack. It would suffice for the defendant to allege that the adverse judgment of the second court violated his due process rights to force litigation of such issue[36].

It can be seen that FNC dislodges the case from a jurisdiction where the judgment is directly enforceable, to where it is not. FNC could be compared to a sports event where the match begins on a normal field, where the point can be scored against one or the other party (the first court). At a given time the match is suspended and it is transferred to another field (the second court), where the points against a certain player (defendant) are not immediately counted against him, but must be validated (enforced) before different authorities. Facing such a colossal disproportion it is not surprising that defendants and plaintiffs respectively embrace and reject FNC with equal energy.

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35 If the case remained before the defendant's domiciliary court, where his principal assets are, a final judgment against him would certainly be enforceable.

36 See text and footnotes of Seccion VIII.

After all, the second court's judgment will be enforced or not according to the first court's law. Continuing with the sportive analogy, that would force one of the contenders (plaintiff) to play under two sets of rules, the ones of the second lawsuit and the ones of the place where he wishes to have the judgment finally enforced.

FNC trebles the number of lawsuits: the first one before the original court; the second one before the court indicated by the first judge; and the third one, again, before the first court, to enforce the judgment by the second court. Notice that even if plaintiff succeeds in enforcing the second court's judgment before the first court, that is obtained at a great expense of time and money. The defendant who has lost before the second court still has a great argument to extract concessions from the winning party. The defendant could offer to pay only 50% of the judgment, voluntarily, threatening to challenge the enforcement if plaintiff tries to collect 100%. It is an argument made in bad faith, but it is effective. For the plaintiff it may well be impossible to reject such offer. The important thing is that FNC allows, and even invites, such type of conduct.

### *Article 22 (3) – Non discrimination*

The objective here is to prevent discrimination based on nationality or on the parties' place of residence[37]. The principle is noteworthy. The doubt remains as to how effective this rule can be. It is not difficult to continue discriminating in a covert form. For instance, without mentioning the plaintiff's foreign citizenship but basing the FNC judgment on the reason that a lawsuit in another country is "more convenient".

### *Article 22 (4) - Bond*

This paragraph tries to redress one of the most unfair effects of FNC. In the greatest majority of cases the defendant's assets are in his domicile. It is there where the judgment can be directly enforced. But through FNC the defendant normally dislodges the case outside his domicile, to a jurisdiction where he does not have his principal assets.

The Convention includes the idea that the defendant post sufficient bond before the first court, to cover an eventual adverse judgment from the second court. However, it would be more convenient for the bond to be posted before the second court[38]. That would avoid the costly and lengthy proceeding of enforcing a foreign judgment. Besides, if the defendant is serious about having the second court adjudicate the case, there is no reason why the second court cannot guard the bond.

It seems unfair to force plaintiff to litigate outside defendant's domicile without a bond before the second court. Extrapolating to terms of labor law, it is like paying an employee, not in legal tender but with a commercial paper that "may" be cashed. Or paying him with an object that "may" be sold for a price equivalent to the salary. In terms of property law, it would be like talking about ownership without the right of possession. It is not a full ownership right, but a diminished one.

The argument –disingenuous and impractical- that the judgment "may" be enforced in the first court (or before a third one) causes lack of certainty, great expense and loss of time. All these are burdens that plaintiff should not have to bear.

### *Article 22 (5) – Return of the case*

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37 This would abolish the doctrine of *Piper Aircraft Co v Reyno*, 454 U.S. 235, 255-56 (1981). This case determines that the choice of forum by a foreign plaintiff deserves "less deference" than if the plaintiff is a national. <u>See</u> note 11 and accompanying text.

38 <u>See</u> footnote 62 and accompanying text.

Paragraph 5 ends stating that the original court "shall proceed with the case" if the second court decides not to exercise jurisdiction.

What is currently ordered now in FNC cases is that the judge of the first court will only accept the case back "if the highest court" of the second country declares lack of jurisdiction[39]. This forces plaintiff to appeal, in the second country, intermediate decisions for lack of jurisdiction, even if he is convinced that they are legally correct. In those instances the first court is forcing plaintiff to appeal, in bad faith, before the second court. Such obligation is evident; if plaintiff allows an intermediate decision for lack of jurisdiction to become final in the second country, he cannot continue litigating there, nor can he return with the case to the first court.

It would be desirable for the Convention to establish standards[40] withdrawing from the first court the power to impose the duty of appealing –or of refraining to appeal- before the second court.

Concerning possible improvements on the text of article 22, see section VI.

## IV. Other relevant articles

Somewhat more tangential, but still relevant, the following articles, transcribed below, should be considered: 17, 25(2), 28, 38(2) and 37 of the Annex:

***Article 17 – Jurisdiction based on national law***

***Subject to Articles 4, 5, 7, 8, 12 and 13, the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18.***

The articles specifically cited establish the following. Article 4 refers to the jurisdiction chosen by the parties. Article 5 determines that the defendant who makes an appearance without challenging jurisdiction accepts it and that the time to challenge jurisdiction lapses with the first defense on the merits. Articles 7 and 8 have already been mentioned above. Article 13 is about provisional and protective measures, basically establishing that jurisdiction lies with the country where the assets are. The most interesting rule here is article 18 which prevents exorbitant grounds of jurisdiction, for instance, exclusively based on the nationality of one of the parties, the specific country where summons are served, etc…

All these rules are known to and in harmony with Latin American law. For such reason they do not present a problem. It would be important to clarify that the rules that determine *lack of jurisdiction* in the case, are also controlled by national law. In cases of FNC, it would be the law of the second country. However, two jurisdictional laws of Ecuador were recently considered "a ruse" by the American court, and they were ignored[41].

***Article 25 (2), (3) – Judgements to be recognized or enforced***

***[…]***

***(2) In order to be recognized, a judgment referred to in paragraph 1 must have the effect of res judicata in the State of origin.***

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39 See, for instance, *Delgado v. Shell Oil Co*, 890 F. Supp, 1324 (S.D. Tex. 1995) and *Gerardo Dennis Patrickson et al. v Dole Food Company, Inc., cause 97-0156, United States District Court for the District of Hawaii.*

40 At least in one case, when the Supreme Court of the second country dismissed the lawsuit for lack of jurisdiction, the first court continued refusing to take the case back. See footnote 11 and accompanying text.

41 See footnote 15 and accompanying text.

***(3) In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.***

Again, this is a concept that offers no difficulty from a Latin American point of view. However, it should be stressed that, according to this same rule, in cases of FNC, a foreign judgment for lack of jurisdiction that is firm, issued by the second court –even at district court level-, should be recognized by the first court. This strengthens the idea that the first court cannot force plaintiff to resort to "the highest court" in the second country and that intermediate judgments for lack of jurisdiction should be sufficient.

***Article 28 – Grounds for refusal of recognition or enforcement***

***1. Recognition or enforcement of a judgment may be refused if –***
***[…]***
***(c) the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court.***

This rule does not pose any difficulty. It is useful to bear it in mind to explain how a case that is filed in pursuance of a foreign FNC judgment, does not generate jurisdiction in Latin America. That happens, precisely, because of the same principle guiding paragraph (c) above. When a claim is filed by plaintiff, not spontaneously and freely, but constrained by a foreign judge, assuming jurisdiction would contradict basic principles of Latin American procedural law.

It is clear that a final foreign judgment can be rejected for reasons of basic procedural incompatibility. And with greater reason still, the Latin American judge can refuse to implement a foreign FNC judgment. The way to refuse such implementation is, simply, by declaring lack of jurisdiction.

***Article 38 (2) – Uniform interpretation***

***[…]***
***2. The courts of each Contracting State shall, when applying and interpreting the Convention, take due account of the case law of other Contracting States.***

It is convenient to remember that in Latin American law there are clear precedents establishing that local jurisdiction dissolves when the plaintiff files his action before a foreign court. These cases also determine that local jurisdiction is not reborn with a complaint that has not bee filed by the plaintiff in a *free and spontaneous way*. For such reason Latin American countries lack jurisdiction to adjudicate FNC cases. There are also specific statutes that uphold the same result[42].

The legal documents on FNC produced by Latin American authorities are noteworthy. The present appendix updates the previous appendix including the most recent judgments and synthesizes the most important legal arguments.

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42 There is precedent in this sense in Costa Rica, Panama, Nicaragua, Ecuador and Guatemala. For the first four countries, the cases go all the way to the Supreme Court. Specific laws have been enacted by Ecuador, Dominica and Guatemala. PARLATINO has recommended a model law of the same type. There are also official opinions sustaining such thesis by the Attorneys General of Ecuador, Honduras, Nicaragua and Guatemala. The previous report has an appendix where said judgments, statutes and legal opinions are transcribed. These can also be read in Dahl's Law Dictionary / Diccionario Jurídico Dahl, third edition, NY, 1999, pp. 219 – 240 (English version) and pp. 664 – 691 (Spanish version).

***(Annex) Article 37 – Relationship with other conventions***

This part of the Convention is less developed, still lacking a stable text. There are three different proposals. Until an initial text is adopted it would seem premature to make any suggestions.

Still, it should be remembered that some multilateral conventions block or prevent FNC. For instance, against the xenophobic FNC, which discriminates against the foreign party, the following treaties can be mentioned: a) *Convention regarding the status of aliens in the respective territories of the contracting parties*; b) *American declaration of the rights and duties of man*; c) *Universal declaration of human rights*, and d) *Charter of the Organization of American States*[43].

Interestingly enough, the *Universal declaration of human rights* prevents, not only the xenophobic FNC, but also the FNC applied against the national litigant. Article 8 of this convention determines that: "*Everyone has the right to an effective remedy before competent national tribunals for acts violating the fundamental rights granted by the constitution or by law.*" The obvious conclusion then is that FNC cannot deprive the national litigant from his court when there is jurisdiction. Logically, this treaty holds a superior rank than the FNC doctrine, which is only a judicial creation. The supremacy of international treaties over domestic law happens not only in every country, individually considered, but it also stems from the *Vienna convention on the law of treaties* (Art. 27: A party may not invoke the provisions of its international law as justification for its failure to perform a treaty obligation.)

Now, if according to said article 8 FNC cannot be applied against the national litigant, it cannot be opposed either against the foreign litigant, as a simple corollary of the principle of equal procedural treatment.

More interesting still are the bilateral treaties on friendship, commerce and navigation that the USA has signed with many nations. These treaties normally include a clause allowing nationals of one country to litigate before the courts of the other country[44]. Again, this clause being part of an international treaty, it cannot be curtailed by a rule of domestic law, such as FNC.

The important thing of all this is to make sure that the Convention does not weaken procedural rights that stem from other treaties already ratified by Latin American nations. It would be prudent for the Latin American nation wishing to ratify the Hague Convention to include a reservation when ratifying. Such reservation would insure that the jurisdictional rights created by other treaties, for the benefit of nationals, are not affected by the Hague Convention[45].

## V. Evaluation

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43 In the previous report (OEA/Ser.Q,CJI/doc.29/99 the articles violated by FNC are transcribed.

44 See a more detailed discussion of this topic in the document OEA/Ser.Q, CIJ/doc.29/99, p. 13.

45 Such reservation could say something like: "The Government of the Republic of ……… holds the view that nothing in this Convention can hinder any bilateral or multilateral treaty guaranteeing access for its nationals to foreign courts. None of such treaties are hereby denounced or in any way weakened. The Government of the Republic of …………. clarifies that, under its legal system, all procedural acts, including the filing of a claim, must be result of the party's free and spontaneous will. Claims filed in this Republic under the direct or indirect pressure from foreign authorities do not generate jurisdiction. The Government of the Republic of ……. further clarifies that in personal actions the plaintiff has the right to institute proceedings before the defendant's domiciliary courts (*actor sequitur forum rei*), provided such courts have jurisdiction according to their own legal system."

Of all the material reviewed, it is article 22 that concentrates the most important issues. Its present text does not solve the three most important problems of FNC: a) the control that the first judge has over the second; b) the lack of freedom that the plaintiffs have, before the second court, for expressing themselves frankly and c) the inherent disadvantages for collection that litigating outside the defendant's domicile creates.

Even when FNC "suspends" the proceeding and sends plaintiff to file a new lawsuit abroad, the first judge continues to inspire reverential fear and to control, like a ghost, what happens before the second court. Extrapolating to terms of probate law, the situation would be called a *mainmorte*. The solid control that the first judge retains over what happens before the second court stems, simply, from the fact that the defendant's assets are normally within the first jurisdiction, not in the second one. Plaintiff knows that to collect on the judgment it must necessarily do so before the first judge. That is how the first court can expressly impose the obligation to appeal before the second court or how it may, implicitly, prevent the plaintiff from being sincere with the second court. Plaintiff appears before the second court constrained, gagged and cowed.

This is an unhealthy procedural situation and it must be fought. It is bad for the plaintiff. It is also injurious for the second court, with whom the plaintiff cannot be sincere, afraid of the sanctions that the first judge might levy.

The Convention does not adequately compensate plaintiff for the loss of certainty as to collection that the transfer of the lawsuit outside the defendant's domicile causes.

## VI. Proposed solutions

The adverse effects of FNC could be corrected, in a certain way, introducing the following article to the Convention:

***Article 22 bis – Power of the second court***

***1. The court that suspends proceedings according to article 22:***

- ***a) lacks any power before the second jurisdiction, and***
- ***b) shall refrain from influencing or from judging the conduct of the parties before the second court. For instance, it shall not cause the parties, when they are under the authority of the second court, to appeal or not to appeal intermediate decisions, to oppose or not to oppose specific arguments, etc…, and***
- ***c) shall accept any final decision of the second court, concerning the law of that second country, as conclusive – for instance, a judgment for lack of jurisdiction – without being able to impose the condition that such decision should originate from a specific tribunal, like the court of appeals or the Supreme Court.***

***2. When plaintiff, following a judgment based on article 22, paragraph 1, files a claim before the second court:***

- ***a) such second court may order defendant to provide security sufficient to satisfy any decision it may render. If a solvent defendant refuses to provide the security, the court shall deem the facts alleged by plaintiff proven and shall issue judgment accordingly. This judgment shall be enforceable in the first jurisdiction.***

*b)* ***the parties remain completely bound to the second court. They shall remain under any existing duty of loyalty and good faith towards such court, which cannot be curtailed or threatened by any ruling made by the first court. If plaintiff believes that the second court lacks jurisdiction, or that said jurisdiction is doubtful, he may raise such arguments freely, without the first court being able to penalize him because of this,***

*c)* ***the first court shall not consider any procedural mistakes or irregularities that allegedly took place before the second court, without a final judgment where the second court ascertains the existence of such mistake or irregularity.***

***Article 22 bis (1) – Power of the second court***

The objective here is to prevent the first court from overpowering the second one. One also tries to block the first judge from forcing the parties to appeal –or not to appeal- decisions from the second court. Parties should be free to appeal or not the second court decision as they please and according to the law of the second country. It is legally incorrect and politically intolerable for the judge of one country to control procedural acts performed in another country.

***Article 22 bis (2) (a) – Bond before the second court***

This rule is already foreseen in the present article 22(4), but allowing only the first court to order the bond. There is no reason for preventing the second judge from doing the same.

In contemporary practice the defendant promises the first court that he will submit to the jurisdiction of the second, but he clarifies that he reserved the right to challenge a final judgment from the second court, before the first court, and for legal grounds of the first country. Under these conditions the second court lacks, in practice, any power over the defendant. The way to correct this is ordering a bond.

Another advantage of the bond is that it allows a direct enforcement of the second court's decision, dispensing with the tedious and costly procedure of enforcing abroad.

In last instance, the bond corrects one of the distortions caused by FNC. Through FNC the defendants dislodges the lawsuit from the place where his assets are (his domicile) towards a jurisdiction where he has nothing to lose (plaintiff's domicile). The defendant who posts a bond before the second court remains, now yes, under the effective power of such judge. An adverse decision in that country can no longer be challenged before foreign judges, by reasons of foreign law. In other words, we are now contemplating a serious lawsuit. The bond eliminates the possibilities of procedural gambits by the defendant.

***Article 22 bis (2) (b) – Sovereignty of the second court***

The point of this rule is to insure the independence of the second court and to prevent the first court from imposing procedural standards to be followed in the second country. Otherwise the second court becomes subordinate to the first one.

It is difficult to maintain that the duty of loyalty and good faith towards the second court are contingent to what the first court determines. It also seems ethical, logical and juridical

that, if plaintiff believes the second court to lack jurisdiction, he could so express freely, without fear of reprisals from the first court.

This article strives to give some assurances to the plaintiff and prevent the first court from overpowering the second one. In other words, if FNC dislodges the lawsuit from one jurisdiction to another, let the second lawsuit be serious and not a watered-down version of the first one.

### *Article 22 bis (2) (c) Independence of the second court*

One tries here to end with the dilatory and intimidatory technique of using the first court as an appeals court for interlocutory acts performed before the second court. In previous cases it has been seen how Latin American judgments for lack of jurisdiction, even issued by the respective Supreme Courts[46], were challenged before the first court. Some of the grounds raised were that the lawsuit had been filed in the country's capital when it should have been filed in a province, that such an article of the procedural code had been invoked when such other one should have been raised, etc…

These strategies cause an enormous loss of time and money, being perfectly able to atrophy the proceeding. Besides, if defendants believe that plaintiff has committed procedural mistakes before the second court, it is fair that the defendants complain before such second court –where the mistake supposedly was made- and not before the first court.

## VII. Content of the rest of the convention

The remainder of the Convention is beyond the content of this report. That is why it will be mentioned only briefly. A quick analysis reveals that the text is compatible with Latin American law. For instance, the Convention only applies to civil and commercial law. Sensitive areas such as capacity of natural persons, maintenance obligations, matrimonial property regimes and others, are expressly excluded[47]. Certain issues, traditionally subject to a State's sovereignty are also kept outside the Convention's reach, e.g. ownership of real property or the validity of recordings in public registers[48].

In contractual matters the Convention accepts the court chosen by the parties[49], which is the standard in Latin America. Also, when the defendant pleads on the merits, without challenging the court's jurisdiction, he tacitly submits himself to it[50]. The consumer is protected since he can only be sued in his domiciliary court, but he has more than one forum available when he is the plaintiff[51]. Provisional and protective measures must be requested from the court handling the principal action[52]. Jurisdictional bases without a substantial connection to the case cannot be used to obtain jurisdiction[53]. Then, for instance, jurisdiction cannot be based exclusively on the plaintiff's nationality[54] or on defendant's, or on the fact that summons were served in a particular State[55]. *Lis pendens* plays a moderate role[56].

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46 See section VIII, below.
47 Arts. 1 and 2.
48 Art. 12.
49 Art. 4.
50 Art. 5.
51 Art. 7.
52 Art. 13.
53 Art. 18.
54 As **French law** currently allows (Civ. Code, art. 14).
55 As American law currently establishes.
56 Art. 21.

The last part of the Convention deals with the recognition and the enforcement of foreign judgments[57]. Some of these articles are still being elaborated and their final text is not yet known. However, it can be seen that this part of the Convention has also followed the road of moderation and of respect for foreign laws. For instance, among the reasons to reject the enforcement of a foreign judgment one finds the ground that "the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court."[58]

## VIII. Regardless of the convention a bond would be justified

**Sham submission**. For countries that believe to have jurisdiction in FNC cases, a solution to redress the unfairness caused by such doctrine would be ordering the defendants to post a bond for the amount claimed[59]. The bond is amply justified by the following facts:

a. Defendants dislodge the case from a jurisdiction where they are solvent, to another one where they do not have any assets.

b. They promise the judge in the original lawsuit that they will submit to the courts of the second country. But when they file their stipulations they promise a submission under reservations, not an unconditional one. Typically, they reserve the right to contest (in the USA) the final judgment of the foreign court, for reasons of American law[60].

c. This "submission" to the foreign court, with reservations, is considered valid under American law[61].

**Mockery of plaintiff's rights**. The described strategy allows to mock the rights of plaintiffs who win the case in the second country. When enforcement of the judgment is sought in the jurisdiction where the assets are, the defendants can simply allege (before the judge of the first country) some of the grounds (of the law of the first country) that they had reserved. This is unfair to plaintiffs. They lose certainty of collection and they are forced to litigate in the second country with the worry of not contravening rules of the first country, largely unknown to them, and which can be easily manipulated by a foreign attorney. For instance, if an interlocutory hearing in Argentina is presided by the deputy Judge (*Secretario*), instead of the Judge, does that breach due process in the USA? And if the

57 Arts. 23 – 41.

58 Art. 28, par. (c).

59 For instance, this is what **Guatemala** has done. See the previous report for the text of the law.

60 As an example we transcribe the reservation made by one of the defendants in the case *Gerardo Dennis Patrickson et al. v. Dole Food Company, Inc. et al.* , case Nr. 97-0156, before the United States District Court for the District of Hawaii: "*The Dole defendants agree to satisfy any final judgment (i.e., a judgment as to which all appeals have been exhausted) rendered against it and in favor of plaintiffs in a Foreign Lawsuit. The Dole defendants, however, **reserve the right to contest** such a judgment if it was obtained by fraud, without due process of law, or without Dole Defendants having sufficient notice of the proceeding. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 809 F.2d. 195, 205 (2d Cir. 1987). The Dole Defendants further **reserve the right to contest** any judgment that results from a "Bill of Attainder or ex post facto," or their equivalent. U.S. Const. Art. I, sec. 9, cl.3*." (Emphasis added).

61 See, for instance, the ruling of the judge from Hawaii, in the same Patrickson case, mentioned above, and dated March 8, 1999: *"Defendants agree to satisfy any final judgment rendered against them and in favor of Plaintiffs in a foreign lawsuit. They purport to retain the right to contest such a judgment if it was obtained by fraud, without due process of law, or without sufficient notice of the proceedings. The defendants further reserve the right to contest any judgment that results from a bill of attainder or ex post facto. (See, e.g., Dole Defendants' Agreements at 5.) These issues seem to have been raised by Defendants as an attempt to reserve the usual defenses to a foreign judgment under general principles of comity. See generally In Re Union Carbide, 809 F.2d 195, 205-6 (2d Cir. 1987).*

***General principles of comity allow defendants in an action to enforce a foreign judgment to raise the defenses of fraud, lack of due process, and lack of sufficient notice. See id. This Court does not seek to bind Defendants to a final judgment obtained by fraud, without due process of law, or lack of sufficient notice.*** (Emphasis added).

*Although unlikely, if the Defendants were able to demonstrate that the judgment obtained by Plaintiffs was the result of a legislative act and not a judicial one, they could similarly raise the defenses of bill of attainder or ex post facto laws under principles of comity."*

hearing is presided by the *Oficial Primero*? And if during the five years that a case may take in Brazil, the procedural rules are amended, would that be considered a bill of attainder? These are questions we should not have to ask ourselves; much less worry about them. Still, FNC allows –even invites- defendants to challenge final judgments of the second country, creating all these doubts.

**Remedy**. All procedural codes of Latin America state that when there is a founded fear that one party will mock the rights of the other, the court may order precautionary measures, for instance, the posting of a bond[62]. Such a measure would bring a certain balance to the lawsuit and, more importantly still would prevent that in practice the defendant submits to the second court "under reservations". The bond trumps such reservation and returns to the second case an element that was present in the original lawsuit: a court under whose jurisdiction the defendant has assets.

## IX. Conclusion

FNC lawsuits cannot be exported to Latin America when it violates the law of such countries. Ideally, a multilateral treaty would solve the serious problems that FNC causes in an international setting.

The proposed Hague Convention does not redress the unfairness and the quandary of FNC between two different countries. The solutions offered by article 22 are naïve and inoperative. Still the Convention has the merit, important after all, of opening a way susceptible of improving the present situation.

As it has been suggested, the shortcomings of said article 22 are quite correctable. One way of so doing would be by incorporating the principles mentioned in the proposed article 22 bis. If such rules were introduced it would be convenient for Latin American States to ratify the Convention.

The Convention is now in a period of discussion and debates. Before proposing an independent treaty it is prudent to wait and see if the final text improves the present version.

Since the issues in question hold great practical importance, it would be convenient that the Latin American nations accredited before the Convention, or those who can influence on it in any way, strive to obtain a final text that is more fair.

62 For instance, the codes of **Brazil** (art. 798), of **Costa Rica** (art. 242), of **Guatemala** (art. 530), of **Panama** (art. 558), etc…

## 4. Juridical dimension of integration and international trade

**Resolutions:**

CJI/RES.1(LVI-O/00): *Juridical dimension of integration and international trade*

CJI/RES.14(LVII-O/00): *Competition law and policy in the Americas*

**Document:**

CJI/doc.23/00: *Considerations relevant to a proposal to include the "competition law" as a topic to be studied by the Inter-American Juridical Committee* (presented by Dr. João Grandino Rodas)

During the 56th regular session of the Inter-American Juridical Committee (Washington, D.C., March, 2000), Dr. Jonathan T. Fried, rapporteur for the topic, presented an oral report summarizing the background to the issue within the Juridical Committee. He felt that it would be premature to present additional written reports without first evaluating the results of the Meeting of Trade Ministers of the Americas and the Third Ministerial Conference of the World Trade Organization. It would be best to request the Secretariat for Legal Affairs to undertake direct consultations with the OAS Trade Unit to identify issues requiring further analysis by the Inter-American Juridical Committee, so as to provide support for negotiators of the Free Trade Area of the Americas.

The Inter-American Juridical Committee approved resolution CJI/RES.1 (LVI-O/00), *Juridical dimension of integration and international trade*, in which it decided to continue its analysis of the topic at its next regular session, taking into account relevant developments at the world and regional level, and to strengthen its cooperation with the Special Trade Unit of the General Secretariat of the Organization, to provide its support in this area, and to request the Secretariat for Legal Affairs to hold consultations on the best ways and means of doing so.

The text of this resolution is reproduced below.

**CJI/RES.1 (LVI-O/00)**

**JURIDICAL DIMENSION OF INTEGRATION AND INTERNATIONAL TRADE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WELCOMING the constructive results of the Meeting of Trade Ministers of the Americas held in Toronto, Canada on November 1-4, 1999;

NOTING the failure of the Third Ministerial Conference of the World Trade Organization to reach agreement on a launch of a new round of multilateral trade negotiations;

REAFFIRMING the positive contribution of liberalization of trade and investment to development and economic growth throughout the Americas, including through bilateral and sub-regional agreements;

RECALLING the importance of strengthening the rule of law in international trade relations to this end;

HAVING BENEFITTED at its current session from an extensive exchange of views in this regard,

RESOLVES:

1. To continue its analysis of the juridical dimension of integration and international trade at its next regular session in the light of the relevant international and regional developments.

2. To strengthen its cooperation with and support to the Special Trade Unit of the General Secretariat of the Organization regarding these matters, and to request the Secretariat of Legal Affairs to undertake consultations on ways and means of so doing.

During its 57th regular session, the Inter-American Juridical Committee also considered the document CJI/doc.23/00, *Considerations relevant to a proposal to include the "competition law" as a topic to be studied by the Inter-American Juridical Committee*, prepared by Dr. João Grandino Rodas.

According to Dr. Grandino Rodas, the Inter-American Juridical Committee could use this study to suggest alternatives to member States of the OAS for protecting free market structures in a globalized world. He noted that this is an issue of commercial and economic law, and that the Juridical Committee has in the past conducted an intense study of the issue; it was therefore important to return the topic to its agenda. He suggested preparing a compilation of rules governing competition law in the Americas in order to visualize the current status of the issue and to prepare a final report. Dr. Grandino Rodas subsequently suggested that the Juridical Committee might participate in discussions as to how competition law could be improved within the region.

Members of the Juridical Committee noted that this was part of the general topic of integration and that it affected all fields of international trade, and that it should therefore be examined within this framework. It would be essential to consult member States at the outset, since the issue was a critical one for the various integration processes.

During discussion of this issue it became clear that there are four dimensions to the area of competition law that must be taken into account. The first two relate to the substance of the issue and have to do both with vertical issues (relationship between the supplier and the entities that will ultimately distribute or sell a given product) and horizontal issues (relationship between parties engaged in the same activity). It was important to bear this distinction in mind when considering and analyzing legislation in

this area. The third dimension relates to the question of jurisdiction and, more particularly, the question of the scope of any given piece of legislation, and in particular whether it is intended to be applied beyond a country's borders. The fourth dimension has to do with international cooperation. In conclusion, it was recommended that, before undertaking further work, the Committee should decide whether to address all four of these dimensions, or only one of them.

The Inter-American Juridical Committee adopted resolution CJI/RES.14 (LVII-O/00), *Competition law and policy in the Americas*, in which it decided to include the issue of competition law in the Americas on its agenda, as part of the topic of the Juridical Dimension of Integration and International Trade, and to appoint doctors João Grandino Rodas and Jonathan Fried as co-rapporteurs. It also requested the rapporteurs, in light of the major studies and contributions to date, to conduct a preliminary analysis of existing competition laws and regulations in member States, with particular attention to horizontal and vertical restrictions, State enterprises and regulated industries, and international aspects such as export cartels, the definition of major markets, capacity to cooperate in the exchange of information and research, and limits to jurisdiction. It also decided to examine at its next regular session, on the basis of these preliminary studies, the available options for conducting other studies on this topic.

The text of the resolution and the documents submitted by Dr. João Grandino Rodas are reproduced below.

**CJI/RES. 14 (LVII-O/00)**

**COMPETITION LAW AND POLICY IN THE AMERICAS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

ACKNOWLEDGING that economic growth in countries of the Americas continues to depend, in large measure, on business activity, and that the benefits of such activity are maximized in an environment that protects and promotes market-based competition;

NOTING that during the negotiations on a Free Trade Agreement of the Americas, participants undertook the commitment “to guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices”, and “to develop mechanisms that facilitate and promote the development of competition policy and guarantee the enforcement of regulation on free competition among and within countries of the Hemisphere”;

RECOGNIZING the valuable work already completed by the Tripartite Committee comprising the Trade Unit of the OAS, the Inter-American Development Bank, and the Economic Commission for Latin America and the Caribbean of the United Nations (ECLAC) in this regard;

RECALLING that the General Assembly has urged the Inter-American Juridical Committee to continue to study various dimensions of legal aspects of integration and free trade in the Americas;

HAVING CONSIDERED a preliminary proposal presented by Dr. João Grandino

Rodas: *Considerations relevant to a proposal to include the 'Competition Law in the Americas' as a topic to be studied by the Inter-American Juridical Committee* (OEA/Ser.Q CJI/doc.23/00),

RESOLVES:

1. To incorporate in the Inter-American Juridical Committee agenda the topic of Competition Law and policy in the Americas as part of the topic on the legal dimension of the integration of international trade.

2. To appoint Drs. João Grandino Rodas and Jonathan T. Fried as rapporteurs of the above-mentioned topic.

3. To request the rapporteurs, in the light of relevant studies and analysis, to undertake a preliminary analysis of existing laws and regulations on competition in member States, with particular emphasis on approaches to:

a) horizontal and vertical restraints, state enterprises, and regulated industries; and

b) such international aspects as export cartels, definitions of relevant markets, capacity for cooperation in exchange of information and investigation, and limits to jurisdiction.

4. To review at its next regular session, based on this preliminary analysis, options for further work on this subject.

**CJI/doc.23/00**

**CONSIDERATIONS RELEVANT TO A PROPOSAL TO INCLUDE THE "COMPETITION LAW" AS A TOPIC TO BE STUDIED BY THE INTER-AMERICAN JURIDICAL COMMITTEE**

(presented by Dr. João Grandino Rodas)

The role of the Competition Law has very much gained in importance with the globalization of the economy, privatization processes and less tariff barriers. This is now because the increase and the very maintenance of international trade, as well as the healthy financing of national markets, depend heavily on the prevention and repression of acts that restrain competition. Practices such as division of markets or price fixing through international cartels, and vertical restraints blocking the admission of national or international suppliers into new markets have the destructive effect not of canceling but at least restricting the benefits notoriously arising from free trade and diminishing the economic well-being in the national sphere.

This is why, and for other reasons too, that the important document co-authored by the World Bank and OECD *A framework for the design and implementation of competition law and policy* emphasizes that "Indeed, the case can be made that competition policy should be viewed as the fourth cornerstone of government economic framework policies along with monetary, fiscal and trade policies"[1].

In recognition of this fact, the 1997 UNCTAD *Investment Report* points out that, in fact, today more than 70 countries have laws protecting competition compared to less than

1 Quotation from the chapter written by R. Shyam Khemani (Project Director), p. 8.

40 before the eighties"[2].

This situation, then, requires an in-depth analysis of the content of the competition laws in force and their consequences for the legal regulation of the economy. It is also necessary to compare these competition laws and their purposes and instruments, since they may have major differences arising either from their legal systems (civil or common law) or from the relationships they have with other branches of the Judiciary. In fact, while the Brazilian Competition Law –Act no. 8,884, dated 11 June 1994– focuses on economic law, provides for an entity that is also ruled by administrative law and imposes, in cases of omission, the subsidiary application of the Code of Civil Procedure, American legislation –in which the 1890 *Sherman Act* is a good example– clearly has a close relationship with penal law. This distinction is, obviously, not irrelevant and may assume major practical consequences, such as the kind of evidence to be used and accepted in judging a possible cartel, where the only thing that would link firms participating in it would be parallel behavioral patterns that cannot be explained by economic logic alone.

It is also very necessary to clearly analyze these laws in order to define exactly what the legal principle wants to protect. Such an apparently easy task must take into account the differences in legal interests. When the Judiciary, therefore, which plays a leading role in protecting competition, looks for a fair and equitable solution either as an instance of recourse against the decisions of adjudicatory administrative agencies or as an instance without appeal, it shall settle the conflict hereunder pointed out by Luis Tineo, Legal Advisor to the OAS Trade Unit:

> *Para los individuos el valor a proteger es el derecho a la libertad económica, mientras que para la sociedad el valor a proteger es que las decisiones de los individuos en torno al qué, cuánto, cómo y a qué precio se producen los bienes en la economía se determine en forma eficiente, independiente y en condiciones de competencia efectiva*.

Another important distinction that may exist in these laws to protect competition and is worth analyzing is to adopt, when punishing potential antitrust offences, a *per se* criterion or the use of the "rule of reason". The *per se* criterion is based on the understanding that any action concerted between competitors would lead to less production and a consequent increase in prices to the consumer. Hence, in the *per se* model –originally applied in the United States– it is sufficient to have evidence of the occurrence of the concerted practice for it to be declared illegal and punished, while the rule of reason model endeavors to take into consideration any future efficiencies that some practices could potentially bring to the economy. In this sense, practices such as economic concentration, vertical agreements and even abuse of a dominant position could be authorized by the competition protection agency if they were, for example, to increase the productivity of firms, improve the quality of their goods or services, foster efficiency and technological or economic development, without involving the elimination of competition in a large part of the relevant market.

In addition to these already traditional but as yet unresolved important issues, new problems[3] in the Competition Law have also to be solved. Consequently, the relative incapacity

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2 As underscored by Gesner Oliveira in *Defesa da concorrência em países em desenvolvimento: aspectos da experiência do Brasil e do Mercosul,* a text published in *Série Idéias e Debates* (n. 7) of the *Instituto Teotônio Vilela* (Brasília, 1998), p. 6.

3 On the relevance of the Law in general in achieving the objectives of regional integration, it is interesting to highlight the teaching of Pierre Pescatore, eminent judge of the Court of the European Communities, when he states that "*... el desarollo de la construcción se ha beneficiado ampliamente de dos características complementarias del derecho comunitario, a saber: la estabilidad de sus bases constitutivas, que han creado un punto de partida y un fundamento sólido, y el dinamismo de su sistema legislativo, puesto en valor, a su vez, por los procedimientos de interpretación de la Corte de Justicia. No dudo en afirmar que el papel del derecho es capital, y aún más, indispensable para las necesidades de um processo de integración*" (our

of national jurisdictions to effectively control and punish international cartels and mergers in a worldwide framework, and the new mechanisms for protecting competition stated in processes of economic integration, such as the European Union, Andean Community of Nations ("Andean Pact") and Mercosur, should be thoroughly examined. The first point is directly linked to the intricate theme of extraterritorial application of the antitrust laws and the signing by competition protection agencies of technical cooperation protocols with similar agencies. The second issue, however, opens the way for analyzing the specific details and objectives of the rules for protecting competition provided in the treaties that constitute those international organizations.

With regard to the latter, it is important to stress that the creation of free trade zones, customs unions and common markets –the last for furthering free circulation of services, persons and capitals– offers major challenges to the Competition Law. In fact, it is worth mentioning the following points of discussion raised by Professor Phedon Nicolaides, of the European Institute of Public Administration, at the seminar on "Competition Policy and Integration: options and needs":

> *Por ejemplo, el levantamiento de las barreras comerciales puede permitir a un producto extranjero ganar una posición dominante en el mercado, mientras que el levantamiento de las barreras de las inversiones puede permitir que empresas extranjeras adquieran empresas nacionales lo cual hace más concentrado el mercado interno. También es posible que las empresas extranjeras bajo un sistema de carteles extiendan sus prácticas colusivas al mercado interno. De modo que, aún si el mercado interno es competitivo, el comercio interno y las inversiones pueden generar distorsiones de la competencia.*
>
> *Si los países tienen como punto de partida mercados protegidos que son oligopólicos o donde las redes de distribución están controladas por unas pocas empresas, la reducción de las barreras comerciales o las inversiones pueden en realidad inducir a las empresas a coludir de modo de dejar de afuera a los productos y empresas extranjeras. Además, la liberalización recíproca sobre una base preferencial también puede inducir a la colusión transfronteriza. En casos donde la colusión no se intentó porque los mercados estaban protegidos, podría convertirse en una opción tentadora para las empresas que quieren mantener la segmentación del mercado. Su colusión preservaría, de hecho, las barreras comerciales pero en una forma diferente y menos visible. De modo que para los países con estructuras de mercado que se apartan desde el comienzo del ideal competitivo, existe por cierto la necesidad de normas de competencia y esa necesidad puede ser más fuerte a medida que se levantan las barreras comerciales y de inversiones*"[4].

Similarly, Mauro Grinberg, when specifically addressing matters of Competition Law in the Mercosur framework, asks:

> *a*) como enfrentar o problema de uma empresa paraguaia que vende um produto a uma empresa uruguaia e depois recusa-se a vender peças de reposição para o produto vendido? *b*) o que fazer quando uma empresa brasileira vende um produto a uma empresa argentina e posteriormente só autoriza uma determinada oficina a prestar assistência técnica a esse produto, eliminando assim a

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underscoring). See article *La importancia del derecho en un proceso de integración económica*. In *Derecho de la Integración*, INTAL, no. 15, 1974, p. 21.

4 See the article by the author *Políticas de competencia en el proceso de integración económica: análisis de las formas y límites de la cooperación*", published in the book on the Seminar "Competition Policy and Integration: options and needs", 8-10 September, 1997 in Montevideo, Uruguay, at the headquarters of *Centro de Formación para la Integración Regional – CEFIR*. It should be mentioned that "raising trade barriers" must be understood as "removing trade barriers"..

> concorrência entre os prestadores de serviços argentinos? *c*) e quanto ao *dumping*, que é, basicamente, a venda de produtos por preços bem abaixo dos praticados no país da empresa vendedora, como proceder?"[5]

It is exactly in order to settle these issues that the experience of the European community integration brought significant contributions to the study of the Competition Law. The first is the express recognition in the Treaty of Rome[6], which founded the European Economic Community, of the possibility that state aid to economic agents has the virtue of distorting competitive conditions in the markets. The second is the important debate on the objectives of Competition Law in regional integration experiences, whose markets will only in fact be integrated if their economic agents had free access to them. Laws protecting competition then not only have the traditional objectives of antitrust laws but also have the duty to ensure "free access" to the markets of the Member States. This is why, as Richard Whish underscores, both administrative jurisprudence of the European Commission and the legal jurisprudence of the EEC Court of Justice have been emphatic in prohibiting "absolute territorial protection":

> In EEC law generally, one of the prime aims of the Commission and Court is to ensure that goods and services can be sold throughout the Community, unimpeded by obstacles to trade imposed by Member States or erected by private undertakings. In particular, the Community authority will endeavour to ensure national markets to not become impregnable to 'parallel imports' from other Member States: a producer of widgets can agree to sell his products only to distributor X in France, but he cannot go further and agree to ensure that no-one else will ever import his widgets into France. This would be to confer absolute territorial protection on X, meaning that he would face no intra-brand competition from parallel goods at all. Only in the rarest of circumstances would this be permitted[7]

Lastly, an important issue raised by the European experience of regional integration is concerned with the relationship between the community authorities and national agencies to protect competition. Lengthy discussions have been held in the European Union – and will probably also be held in Mercosur[8] and the Andean Pact – on the division of competence between these organizations, principally taking into consideration the *ratione loci* and *ratione materiae* criteria*9*. The European Union's conclusion on this matter, excluding the cases of absolute territorial protection and other exceptions, is that the competence of the community authority will only be defined when the antitrust practice has "considerably affected" trade relations between two or more Member States. Hence, the tendency of European community

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5 See *A Concorrência entre empresas perante o MERCOSUL: enfoque específico sobre Brasil e Argentina face à legislação anti-truste".* In*: Revista de Direito Mercantil*, n. 89, p. 82.

6 In this Treaty, pursuant to the amendments received in 1992 in Maastricht, one of the instruments for achieving the common market ideal will be precisely "a system ensuring that competition in the internal market is not distorted*"* (article 3, g). Such a system, contained in the Treaty itself (arts. 85 to 94) and in later regulations (e.g. Reg. 17/62, referring to administrative processes), will be intended, then, to guarantee, in terms of article 7-A of the EEC Treaty, the existence of space "without internal borders in which free circulation of merchandise, persons, services and capital is guaranteed".

7 See *Competition Law*, Butterworths, London, Third Edition, 1993, p. 46.

8 It should be mentioned that both organizations have common legislation on protecting competition. It should also be said that the Protocol of Competition Protection of Mercosur, the "Fortaleza Protocol", already has been instated in Paraguay and, in order for it to be enforced, the President of the Federative Republic of Brazil must publish a decree ratifying the terms of the Legislative Decree no. 06/2000, dated 02.15.2000. João Grandino Rodas, Chairman of Inter-American Juridical Committee and Brazilian arbitrator to the Court for the Brasília Protocol, speaks on the need to publish the aforementioned Decree that "*O Brasil, após a Independência, continuou a seguir a tradição lusitana de promulgar os tratados já ratificados por meio de um decreto do Executivo*". Segundo o autor, "*Consoante a praxe atual, a Divisão de Atos Internacionais do Ministério das Relações Exteriores redige o instrumento do decreto, que será acompanhado do texto do tratado e, eventualmente, de tradução oficial. Tal decreto é publicado no Diário Oficial da União, após assinatura do Presidente da República, referendada pelo Ministro das Relações Exteriores*" (In*:* "Tratados Internacionais", São Paulo, Editora Revista dos Tribunais, 1991, p. 54-55).

9 For a resume of this discussion, see the paper "*Defesa da concorrência no Mercosul: acordos entre empresas, abusos de posição dominante e concentrações*", by Paulo Caliendo Velloso da Silveira, São Paulo, LTr, 1998.

jurisprudence – principally after including in that system the "Principle of Subsidiarity" in the Treaty of Maastricht – has been to acknowledge the competence of the European Commission in cases of anti-competitive practice on relevant trans-border markets.

It is then inferred that major challenges to the Competition Law come from the processes of regional integration. It is emphasized, however, that another of the consequences of globalization is the increase in practices of international cartels and worldwide mergers, so that relevant legal concepts such as that on "positive comity" becomes part of the agreements of technical aid and cooperation undertaken by national agencies –and, in the case of the European Union, which has a respectable cooperation agreement with the United States– community agencies to protect competition. This agreement stipulates in the item relating to "positive comity" precisely that "The competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anticompetitive activities in accordance with the Requested Party's competition laws. Such a request may be made regardless of whether the activities also violate the Requesting Party's competition laws, and regardless of whether the competition authorities of the Requesting Party have commenced or contemplate taking enforcement activities under their own competition laws"[10]

As pointed out by the European Commission General Director for Competition, the value of this agreement lies in the fact that "it represents a commitment on the part of the US and the EU to cooperate with respect to antitrust enforcement rather than seeking to apply their antitrust laws extraterritorially"11. Moreover, as stated by the aforementioned Prof. Phedon Nicolaides, "*La aplicación de una cortesía positiva mejora la efectividad de la intervención del gobierno para corregir distorsiones del mercado en por lo menos un aspecto importante. Para los países grandes como los de la UE o Estados Unidos, el cumplimiento extraterritorial de sus propias normas es posible porque tienen influencia económica y política. Para los otros países no es fácil usar los instrumentos de la competencia para contrarrestar las prácticas anticompetitivas que se originan en otros países*"[12].

It may then be deduced that a broader more complex cooperation among competition protection agencies is an important mechanism to seek the protection of the consumer and structures of a free market in this globalized world. The definition as to what the extent and content of those agreements must be, is, however, left open and is a topic that would greatly benefit from a careful analysis of comparative jurisprudence.

In conclusion, it may be said that the Competition Law plays a vital role in the legal regulation of economic activities. The classification by the World Bank and OECD of the topic as the "fourth cornerstone of government economic framework policies" is sufficient to demonstrate this fact. Nevertheless, it was demonstrated here that several intricate and relevant issues relating to the Competition Law remain without solution.

The issues relating to the inclusion of the Competition Law in different legal systems, the rising number and increasing harmfulness of international cartels and worldwide mergers, the relationship between common and national authorities to protect competition in the sphere of regional integration processes, among others, are currently indispensable, in fact, as a subsidy for the debates on the creation of the Free Trade Area of the Americas, FTAA.

It is concluded, therefore, that the Inter-American Juridical Committee would provide invaluable contributions if it were to accept the challenge of undertaking an in-depth study on

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10 Consult the home page on the Internet http://europa.eu.int/comm/dg04/interna/en/dftusa.htm.

11 See the article by Alexander Schaub, published in *Competition Policy Newsletter*, February 1998, no.1, Luxembourg, p. 5.

12 *Op. cit.*, p. 14.

Competition Law, so that, in the conclusion herein, it would be possible to suggest to the OAS member States ways of ensuring the protecting of the free market structures in a globalized world. Lastly, it is worth mentioning that undertaking studies of such a scope is not only an interesting challenge but, as stated in article 99 of the Organization of the American States, is precisely one of the main roles of the Inter-American Juridical Committee.

## 5. International abduction of minors by one of their parent

**Resolution:**

CJI/RES.6 (LVI-O/00): *International abduction of minors by one of their parents*

During its 56th regular session (Washington D.C., March, 2000), the Inter-American Juridical Committee approved resolution CJI/RES.6 (LVI-O/00), *International abduction of minors by one of their parents*, in which it shared the profound concern expressed by the General Assembly of the Organization of American States, in its resolution AG/RES.1691 (XXX-O/99) at the existence of cases of international abduction of minors by one of their parents, and requested the Inter-American Children's Institute, through the General Secretariat, to provide more detailed information with respect to the specific case involved and on the aspects that, in its judgment, should be examined by the Inter-American Juridical Committee. That resolution also requests the General Secretariat to provide an information document including a list of inter-American and universal conventions and other instruments relating to the issue, and indicating the status of their ratification.

At the request of Dr. Eduardo Vío Grossi, who until that time had been rapporteur for the topic, Dr. João Grandino Rodas was nominated as the new rapporteur in his place.

During its 57th regular session (Rio de Janeiro, August, 2000), the Inter-American Juridical Committee noted that it was still awaiting a response from the Inter-American Children's Institute, before taking a final decision on the matter.

Following is the text of the resolution approved by the Inter-American Juridical Committee during its 56th regular session.

**CJI/RES.6 (LVI-O/00)**

**INTERNATIONAL ABDUCTION OF MINORS
BY ONE OF THEIR PARENTS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that, by resolution AG/RES.1691 (XXIX-O/99), dated June 8, 1999, the General Assembly of the Organization of American States requested the Committee "to issue an opinion, as it was asked to do in resolution CD/RES.10 (73-R/98), adopted by the 73rd Regular Meeting of the Directing Council of the Inter-American Children's Institute (IIN)";

BEARING IN MIND that, in that IIN resolution, dated October 24, 1998, the CJI is requested "to issue an opinion on the situation described" in that resolution, as follows: "…the Directing Council of the IIN, at the request of the Representative of the Argentine Republic, heard the report by Gabriela Arias Uriburu on the situation of her three minor

children, who have been abducted by their father from their residence in Guatemala City, Republic of Guatemala. Subsequently, according to the report submitted, their father illegally took the children to the Kingdom of Jordan, where they now reside";

HAVING SEEN that, in order to determine the implications or dimension of the problem of international abduction of minors, it is necessary to study, among other factors, the treaties on the matter, the actual operations of the bodies charged with applying them in the States, and recent cases;

TAKING INTO ACCOUNT the report of the Inter-American Juridical Committee's observer to the 74$^{th}$ Meeting of the Directing Council of the Inter-American Children's Institute and the 18$^{th}$ Pan American Child Congress (OEA/Ser.Q CJI/doc. 5/00, 30 September 1999, Original: Spanish); and

RECALLING that Article 100 of the Charter of the Organization of American States provides that "the Inter-American Juridical Committee shall 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," and that this provision is reiterated in Article 12 of the Statutes of the Inter-American Juridical Committee,

RESOLVES:

1. To add its voice to the grave concern expressed by the General Assembly of the Organization of American States, in its resolution AG/RES.1691 (XXIX-O/99), over the existence of cases of international abduction of minors by one of their parents.

2. To request from the Inter-American Children's Institute, through the General Secretariat, a more detailed report on the specific case that gave rise to this initiative and on those specific factors which, in the opinion of the Institute, should be studied by the Inter-American Juridical Committee.

3. To request that the General Secretariat provide a background document that includes a list of conventions and other inter-American and world instruments on the subject and indicates the status of ratification of each such instrument.

## 6. Consideration of topics suggested to the Inter-American Juridical Committee by Legal Advisors and representatives of OAS member States

**Document:**

CJI/doc.20/00: *Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States*

During its 56th regular session (Washington, D.C., March, 2000), on the occasion of the Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, the Inter-American Juridical Committee included this topic on its agenda and appointed as co-rapporteurs Drs. Luis Herrera Marcano and Luis Marchand Stens.

During its 57th regular session (Rio de Janeiro, August, 2000), members of the Inter-American Juridical Committee considered the document CJI/doc.20/00, *Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS member States*, prepared by the Department of International Law.

Dr. Luis Herrera Marcano, co-rapporteur for the topic, noted that the two issues most frequently mentioned by the legal advisors related to the International Criminal Court and to human rights. He recalled that one of these issues, the International Criminal Court, already figured on the agenda of the Inter-American Juridical Committee. With respect to the human rights issue, he wondered if it would be appropriate for the Committee to discuss areas that fall within the jurisdiction of other organs of the Organization. The co-rapporteur then reviewed the various topics that appear in the above-mentioned document. He noted that only two of those topics were not, and never had been, on the agenda of the Juridical Committee, namely those relating to the mutual evaluation process and to arms trafficking. The Committee decided to request Dr. Sergio González Gálvez to submit a report on the arms traffic to the next regular session, based on decisions taken within the OECD, and to prepare a second report, together with Dr. Luis Herrera Marcano, on follow-up to the Inter-American Convention against Corruption, adopted in Caracas, Venezuela, in 1996, on the basis of which the Inter-American Juridical Committee would decide whether or not to include this topic on its agenda.

Some members referred to the possibility of including other topics on the agenda of the Juridical Committee, including a study on non-ratification of inter-American conventions and the reasons therefor. Some members suggested that these joint meetings could be the occasion for exchanging opinions on this matter with the legal advisors. In this respect, the Juridical Committee requested the General Secretariat to prepare a list of such conventions, showing the current status of signature and ratification, so that the Committee might, at a subsequent regular session, examine the status of the issue.

Following is the text of document CJI/doc.20/00, prepared by the Department of International Law.

**CJI/doc.20/00**

**FOURTH JOINT MEETING WITH LEGAL ADVISORS OF THE MINISTRIES OF FOREIGN AFFAIRS OF THE OAS MEMBER STATES**

**1. Topics presented by the Legal Advisors**

Brazil — International Criminal Court, issues concerning the agenda of the next Inter-American Specialized Conference on Private International Law (CIDIP-VI), internal administratrive issues of the Ministry of Foreign Affairs;

Canada — Scope of the concept of human security, International Criminal Court, development of trade law;

Colombia — Inter-American system for the protection of human rights, international criminal law (judicial cooperation), International Criminal Court, private international law, jurisdictional immunity of States, justice (decongestion of courts), mutual evaluation proceeding;

Ecuador — Corruption, administration of justice, human rights, non-ratification of American conventions;

Guyana — Traffic in weapons, human rights, illicit traffic in drugs, corruption;

Jamaica — Human rights, trade law, law of the sea, International Criminal Court, national security and national legal cooperation issues;

Mexico — Human rights, International Criminal Court, enhancement the administration of justice (legal and judicial cooperation), corruption, hemispheric security, CIDIP-VI (guarantees), mutual evaluation proceedings (monitoring), settlement of disputes;

Venezuela — Human rights, integration, hemispheric security and democracy, CIDIP-VI.

**2. Topics presented by the members of the Juridical Committee**

1. Juridical aspects of hemispheric security;
2. Enhancement of the administration of justice in the Americas;
3. Juridical dimension of integration and trade law;
4. International abduction of children by one of their parents;
5. Preparation of a report on human rights and biomedicine, or on the protection of the human body;
6. Application of the United Nations Law of the Sea Convention by States of the Hemisphere;
7. Democracy in the inter-American system.

## 7. Right to information: access to and protection of personal information and data

**Resolution:**

CJI/RES.13 (LVII-O/00): *Right to information: access to and protection of personal information and data*

**Document:**

CJI/doc.25/00 rev.1: *Right to information: access to and protection of information and personal data in electronic form*
(presented by Dr. Jonathan Fried)

During the 57th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2000), Dr. Jonathan T. Fried, rapporteur for the topic, presented document CJI/doc.25/00 rev.1, *Right to information: access to and protection of information and personal data in electronic form*. Dr. Fried indicated that this matter had been on the Juridical Committee's agenda for many years, and that it had evolved considerably over time. He noted that the issue of information in electronic format had taken on great importance within the political bodies of the Organization and that this fact could give it a new focus within the Inter-American Juridical Committee. Much of the work on legislative guides had already been done within the OECD, and a complete process of international codification in this area was underway. He suggested that the Juridical Committee would have to wait for clearer guidelines from the political bodies of the Organization in order to determine priorities for its further consideration of the issue.

In light of the above, the Inter-American Juridical Committee approved resolution CJI/RES.13 (LVII-O/00), *Right to information: access to and protection of personal information and data*, requesting the General Secretariat, through the Secretariat for Legal Affairs, to send to member States the reports prepared by the rapporteur on the topic (CJI/doc.25/00 rev.1 and CJI/doc.45/99), and reiterated its request to member States to provide information, prior to the next regular session of the Juridical Committee, on existing or proposed national legislation, as well as on the rules and policies governing access to personal information and its protection. The resolution also requests the rapporteur, with the assistance of the General Secretariat, through the Secretariat for Legal Affairs, to prepare a summary of applicable principles and the most important considerations relating to national laws and regulations in this area. Finally, the Inter-American Juridical Committee decided that at its next regular session it would consider any additional answers received from member States, as summarized in the report to be prepared, and would examine options for its further work on this issue, including the possibility of developing basic principles and guidelines or recommendations for possible international instruments in this area.

Following is the text of the resolution approved by the Inter-American Juridical Committee and document CJI/doc.25/00 rev.1, *Right to information: access to and protection of information and personal data in electronic form*, prepared by the rapporteur for the topic:

**CJI/RES.13 (LVII-O/00)**

**RIGHT TO INFORMATION:**
**ACCESS TO AND PROTECTION OF PERSONAL INFORMATION AND DATA**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

REITERATING its view that, 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;

RECOGNIZING THAT 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;

NOTING that developments in technology suggest the need to ensure that domestic laws and procedures are adequate to provide access to and protection of data in electronic form, whether in the possession or control of governments or private entities;

RECALLING its request that member States submit information on existing domestic laws and procedures regarding access to and protection of personal information and data;

HAVING CONSIDERED the most recent report of the rapporteur on the subject (CJI/doc.25/00 rev.1),

RESOLVES:

1. To request the General Secretariat, through the Secretariat for Legal Affairs, to forward to member States the two reports of the rapporteur on the subject (OEA/Ser.Q CJI/doc.25/00 rev.1 and CJI/doc.45/99) and 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.

2. To request the rapporteur, with the assistance of the General Secretariat, through the Secretariat for Legal Affairs, to prepare a summary of applicable principles and considerations relevant to domestic laws and regulations in this field.

3. To review at its next regular session, in the light of additional responses from member States and the summary to be prepared, options for further work on this subject, including the possibility of developing basic principles and guidelines or recommendations regarding possible international instruments in this field.

**CJI/doc.25/00 rev.1**

## RIGHT TO INFORMATION: ACCESS TO AND PROTECTION OF INFORMATION AND PERSONAL DATA IN ELECTRONIC FORM

(presented by Dr. Jonathan T. Fried)

### INTRODUCTION

At its twenty-sixth regular session in Panama City in June 1996, the General Assembly requested that the Inter-American Juridical Committee pay 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 Council of Europe *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 fifty-third meeting in August 1998, the Juridical Committee asked the Secretariat for Legal Affairs to solicit information from OAS member States on existing domestic legislation, regulations and policies concerning:

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
f) 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.[1]

The General Secretariat requested this information in Note N OEA/2.2/39/98 on 8 December 1998. Six member States provided information in response to the request: Costa Rica, Ecuador, Guatemala, Paraguay, Peru and Mexico.

Based on the information submitted, as well as independent research, a report entitled *Right to information: access to and protection of information and personal data* (OEA/Ser.Q CJI/doc.45/99) was tabled by this rapporteur to the Inter-American Juridical Committee of the OAS in August 1999. The focus of that report was governmental regulation of personal information and data held in government hands. In its resolution (CJI/RES.9/LV/99), the Juridical Committee requested the General Secretariat to reiterate its request for information from member States; this was done through process-verbal OEA/2.2/32/99. Subsequently, interest was expressed by both members of the Juridical Committee and government representatives in assessing the legal implications of the protection of data held not only in government but also in private hands. The purpose of this report, therefore, is to examine the regulation of the protection of and access to personal data held in electronic form by private organizations. While data protection in the private sector can be enhanced through

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1 OEA/Ser.Q CJI/RES.15/LIII/98.

various means, including market-forces, technology, and self-regulation,[2] the focus of this report will be on governmental regulation. The report was prepared with the invaluable assistance of, and on the basis of thorough research by Thomas Fetz, Counsel of the Bureau of Legal Affairs of Canada's Department of Foreign Affairs and International Trade.

With advances in computer technology, medicine and biotechnology, there has been a marked increase in the processing of personal data in the various spheres of economic and social activity. The progress made in information technology also makes the processing and exchange of such data across international borders relatively easy. The challenge, therefore, is to protect fundamental rights and freedoms, notably the right to privacy and the right to access personal information (also known as *habeas data*), while encouraging the flow of information and electronic commerce.

The report is divided into three parts. The first one discusses the regulation of data processing in the private sector by means of international instruments as well as legislation by a number of OAS countries. The second part looks at how these international agreements and national laws address the issue of privacy protection in the context of transborder flows of personal data. The third part of the report identifies various approaches available for the regulation of the cross-border flow of personal data, ranging from the international harmonization of data protection laws to the development of mutual assistance treaties.

## I REGULATION OF DATA PROTECTION IN THE PRIVATE SECTOR

### 1. Background

Laws and regulations concerning access to and protection of personal data have initially focussed on the public sector. This was the case because governments generally hold a great deal of information about individuals. Yet, private organizations are making increasing use of sensitive information and personal data as governments have been offloading services to the private sector and as new opportunities in electronic commerce emerge. Improvements in technology, particularly in the area of computers and telecommunications, have vastly expanded the possibilities of collecting, storing, accessing, and comparing personal information. With the expansion computer networks and particularly the Internet, information can be made available to thousands, if not millions of users, simultaneously and worldwide.[3] Currently more than 150 million people use the Internet and that number is expected to grow to about 510 million by 2003. In 1998, the Internet created revenues of US$301 billion and this figure is expected to multiply over the next few years.[4]

Because personal information can be useful for marketing and sales, private organizations increasingly seek such information from individuals by traditional means or on the Internet.[5] Individuals often disclose personal data voluntarily on the Internet when visiting commercial sites, registering with discussion groups, entering contests, or voicing their opinions. The type of information disclosed may concern a person's name, civic and e-mail addresses, telephone numbers, occupation, income, marital status, age, sex, or credit card

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2 The protection of personal data can be achieved through instruments such as consumer contracts, privacy policies and codes of conduct. For example, the International Chamber of Commerce has published a proposed model contract for transborder flows of personal data (online: <http://www.iccwbo.org>). Information on model policies, agreements and codes of conduct can be obtained from Privacy Exchange (online: <http://www.PrivacyExchange.org>).

3 The Internet dates back to 1968 when the contract for its development was awarded. The physical internet was built a year later. The World Wide Web was introduced in 1992. Michael Power, "Bill C-6: Federal Legislation in the Age of the Internet" Manitoba Law Journal (1999) 26(2): 235.

4 OAS. Department of International Law. *Privacy, access to information and the internet in the European Union, the United States and Latin America: a comparative study*. SG/SLA DDI/doc.01/00. Washington, D.C. : General Secretariat, Feb.2, 2000. p. 3.

5 Collecting personal information about individuals and their preferences to target consumers is referred to as "data mining" and considered an invasion of privacy by many.

details. In addition, users of digital technologies often produce “electronic footprints”, that is, digital information about where they have been, what they were looking at, the messages they sent, and the goods and services they bought. For example, “surfing” on the Internet leaves behind certain “header information” which may reveal:

a) the Internet Protocol (IP) address containing the domain name and the name and location of the organization who registered the domain name;
b) information about the user’s operating system and hardware platform;
c) the time and date of the visit;
d) the Uniform Resource Locator (URL) of the Web page which was previously viewed;
e) the query put into a search engine if applicable, or
f) the user’s e-mail address if it is in the browser’s preference configuration screen.

Furthermore, when browsing through a web site, a user can leave behind “click-stream data” which provide information on the pages visited, the time spent looking at a page and the information sent and received. This information gathering about users may be facilitated by the use of “cookies” which are small data packets sent from the web site server to the user’s hard drive. These cookies assign a unique code to each visitor and may be accessed by the server when the user subsequently visits the web site. Some cookies permit the user to gain quicker access to a web site, but can also be used to track a user’s movements on the web. This type of technology, while it has its advantages, increases the risk of automatic data collection, use and disclosure without a person’s knowledge or consent.[6]

As in the public sector, personal data held in the private sector may be subject to unauthorized collection, use, or disclosure, either deliberately or accidentally, and measures to minimize such activities have to be taken. Yet, the regulation of the protection of and access to personal data needs to be sensitive to the needs of data subjects, including users and consumers as well as businesses and other organizations. These needs are not necessarily contradictory. For example, confidence in on-line privacy protection is an essential feature for the growth of electronic commerce.[7] Consumers are concerned about their right to privacy in an increasingly interconnected electronic environment, and businesses want to reassure consumers and avoid interruptions in transborder data flows. Essentially, data protection is a question of striking the right balance between the rights of individuals to have their personal data protected and the free flow of information. Yet, as on many other issues, States may not agree on where the proper balance should be or whether data protection is more a human rights issue or an economic issue.

2. International Instruments

Some efforts have been made at the international level to establish common principles for the protection of personal data in the private sector. While the direct effect of international instruments varies, several of them have clearly influenced national laws and self-regulatory mechanisms on privacy protection.

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6 Organization for Economic Cooperation and Development; Directorate for Science, Technology, and Industry; Committee for Information, Computer and Communications Policy; Working Party on Information Security and Privacy; “Inventory of Instruments and Mechanisms Contributing to the Implementation and Enforcement of the OECD Privacy Guidelines on Global Networks” DSTI/ICCP/REG (98)12/FINAL, (19 May 1999) p. 7-8.

7 The growth of electronic commerce also raises a host of other questions with respect to consumer protection. The Organization for Economic Cooperation and Development has recently issued its “Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce” (19 Dec. 1999). Online: OECD: <http://www.oecd.org/dsti/sti/it/>.

a) International human rights instruments

The right to privacy is enshrined in several international human rights instruments.[8] Article 12 of the *Universal declaration of human rights*[9] states the following:

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the *International covenant on civil and political rights*[10] uses almost identical terms:

> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.

The *American convention on human rights*[11] provides for the express protection of “private life” in Article 11:

> 1. Everyone has the right to have his honor respected and his dignity recognized.
> 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
> 3. Everyone has the right to the protection of the law against such interference or attacks.

Article 8 of the *European convention for the protection of human rights and fundamental freedoms*[12] guarantees the right to privacy and secrecy of correspondence:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The principles expressed in these human rights instruments are often referred to in treaties or conventions dealing specifically with the protection of personal data.

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8 See: Lee A. Bygrave, “Data Protection Pursuant to the Right to Privacy in Human Rights Treaties” International Journal of Law and Information Technology (1998) 6(3): 247.

9 Online: United Nations High Commissioner for Human Rights, Treaties: <http://www.unhchr.ch/udhr/lang/eng.htm>.

10 Online: United Nations High Commissioner for Human Rights, Treaties: <http://www.unhchr.ch/html/menu3/b/a_ccpr.htm>.

11 Online: Organisation of American States, Treaties and Conventions: <http://www.oas.org/>.

12 E.T.S. 5, signed 11 Apr. 1950, entered into force 3 Sept. 1953; online: Council of Europe, Treaty Office, <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

b) OECD Guidelines

On 23 September 1980, the Council of the Organisation for Economic Cooperation and Development (OECD) adopted the *Recommendation concerning guidelines governing the protection of privacy and transborder flows of personal data*[13] (OECD Guidelines) which provides minimum standards for the protection of personal data. While the OECD Guidelines are not binding under international law, they represent a political commitment by the member States. The OECD Guidelines cover "any information relating to an identified or identifiable individual" and apply data processing in the public and private sector.[14]

The OECD Guidelines recommend that "Member countries take into account in their domestic legislation the principles concerning the protection of privacy and individual liberties set forth in the Guidelines" and that they "endeavour to remove or avoid creating, in the name of privacy protection, unjustified obstacles to transborder flows of personal data". The principles outlined in the OECD Guidelines are as follows:

<u>Collection limitation</u>

Data should be obtained by lawful and fair means and with the knowledge and consent of the data subject where appropriate.

<u>Data quality</u>

Personal data should be relevant to the purposes for which they are used and accurate, complete, and up-to-date.

<u>Purpose specification</u>

Personal data should be collected and used only for specified purposes.

<u>Use limitation</u>

The use or disclosure of personal data should be limited to the purposes specified, unless provided otherwise by law or consent of the data subject.

<u>Security safeguards</u>

Reasonable security safeguards should be put in place against risks such as loss, unauthorized access, destruction, use, modification or disclosure of personal data.

<u>Openness</u>

Policies and practices with respect to personal data should be open and transparent.

<u>Individual participation</u>

Data subjects should have the right to access their personal data and to have them corrected or destroyed in a manner that is reasonably understandable and cost and time efficient.

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13 OECD Document C(80)58/FINAL (1 October 1980); online: OECD: <http://www.oecd.org/dsti/sti/it/secur/prod/priv-en.htm> [hereinafter: OECD Guidelines].

14 OECD Guidelines, Part One.

Accountability principle

Data controllers should be held accountable for complying with the measures set out in the Guidelines.[15]

The OECD Guidelines recommend that countries implement these principles by: a) adopting appropriate legislation; b) encouraging self-regulation; c) providing reasonable means to individuals to exercise their rights; d) providing adequate sanctions and remedies where there is a lack of compliance; e) and ensuring that there is no unfair discrimination against data subjects.[16] The fundamental weakness of the OECD Guidelines, however, is their voluntary nature.

c) Council of Europe Convention

Unlike the OECD Guidelines, the Council of Europe *Convention for the protection of individuals with regard to automatic processing of personal data*[17] is a binding international legal instrument. The Convention was adopted on 18 September 1980, opened for signature on 28 January 1981, and entered into force on 1 October 1985 after five ratifications. Any State, even those which are not members of the Council of Europe, may accede to the Convention. The Convention is applicable to the automated processing of personal data in the public and private sectors.[18]

The Convention obligates States to incorporate certain principles regarding the collection and processing of personal data into their domestic law. These principles are similar to those of the OECD Guidelines. Article 6 of the Convention, however, adds a further principle providing for appropriate safeguards for data revealing information about racial origin, political opinions or religious and other beliefs, health or sexual life, or criminal convictions. Member States are also required to establish "appropriate sanctions and remedies for violations of domestic law giving effect to the basic principles".

The Council of Europe Convention has provided an important impetus for member States to enact laws regulating the flow of personal data. On its own it is not a very strong instrument for the protection of personal data given that its interpretation and implementation rests with the national authorities of the member States.

The Consultative Committee established under Article 18 of the Convention has recently drafted an "Additional Protocol"[19] dealing with the establishment of supervisory authorities and transborder data flows. This draft Protocol would require Parties to establish independent supervisory authorities which ensure compliance with domestic laws giving effect to the principles set out in the Convention. These supervisory authorities (privacy commissioners or data protection officers) would hear complaints about violations of privacy

15 OECD Guidelines, Part Two.
16 OECD Guidelines, Part Four.
17 European Treaty Series No. 108; Council of Europe, Treaty Office: <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> [hereinafter Council of Europe Convention].
18 States are, however, permitted to limit the scope and application of the Convention by a declaration addressed to the Secretary General of the Council of Europe. Council of Europe Convention, Article 3.
19 Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, "Draft Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108) regarding supervisory authorities and transborder data flows," Strasbourg, 8 June 2000; web site of the Council of Europe, Personal Data Protection: <http://www.coe.fr/dataprotection/Treaties/projet%20de%20protocole%20E.htm> [hereinafter Draft Protocol].

laws and would have the power to investigate and intervene, as well as to engage in legal proceedings where privacy provisions of domestic laws are violated.[20]

The Council of Europe also encourages self-regulation through codes of conduct with respect to the processing of personal data. For example, the Committee of Ministers recommended to member States the dissemination of the *Guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways* which are addressed directly to internet service providers and users.[21]

d) United Nations Guidelines

The United Nations General Assembly adopted the United Nations High Commissioner for Human Rights' *Guidelines for the regulation of computerized personal data files* (UN Guidelines),[22] pursuant to Article 10 of the United Nations Charter, in 1990.[23] The UN Guidelines, which are non-binding, provide minimum standards for States to adopt when regulating privacy protection for public and private computerized and manual files.[24]

The principles included in the UN Guidelines are lawfulness and fairness, accuracy, purpose-specification, access, non-discrimination, power to make exceptions (national security, public order, public health and morality, and rights and freedoms of others), security, as well as supervision and sanctions. These principles are similar to those of the OECD Guidelines. Additional protection is provided through the prohibition of the compilation of "data likely to give rise to unlawful or arbitrary discrimination, including information on racial or ethnic origin, colour, sex life, political opinions, religious, philosophical and other beliefs as well as membership of an association or trade union."[25]

The UN Guidelines call upon countries to designate independent, impartial and technically competent authorities responsible for overseeing the principles set out in the Guidelines. Sanctions for violations of the principles should include appropriate criminal or other penalties as well as individual remedies.[26]

e) European Union Privacy Directive

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the *Protection of individuals with regard to the processing of personal data and on the free movement of such data*[27] (EU Directive) was signed in 1995 and was to be implemented by the member States by 24 October 1998. It requires Member States to have laws in place establishing a minimum level of protection regarding the processing of personal data by whatever means. States are free to pass laws with stricter standards than those set by the EU Directive. The EU Directive recognizes that "personal data should be able to flow freely from one member State to another, but also that the fundamental rights of individuals should be safeguarded." The EU Directive applies to the processing of personal data by any person

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20 Draft Protocol, Article 1.

21 Recommendation No.R (99) 5 of the Committee of Ministers to Member States for the Protection of Privacy on the Internet: Guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways (adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers' Deputies) at the web site of the Council of Europe, Personal Data Protection: <http://www.coe.fr/dataprotection/rec/elignes.htm>.

22 United Nations High Commissioner for Human Rights: <http://www.unhchr.ch/html/menu3/b/71.htm>.

23 Resolution 45/95, 14 December 1990, at the web site of the United Nations, Documentation Centre: <http://www.un.org/gopher-data/ga/recs/45/95>.

24 The UN Guidelines also apply to personal data files kept by governmental international Organizations.

25 UN Guidelines, Article 5.

26 UN Guidelines, Article 8.

27 Directive 95/46/EC, 24 October 1995, Official Journal of the European Communities, L 281 (23 November 1995), at 31. The text of the European Union Privacy Directive can also be found at: Eur-Lex: <http://europa.eu.int/eur-lex/en/lif/dat/1995/en_395L0046.html> [hereinafter EU Directive].

whose activities are governed by Community law, in the public and private sectors, but not to processing operations concerning public security, defence, State security, and State activities in the areas of criminal law. Neither does it apply to the data processing activities of natural persons in the course of a purely personal or household activity.[28]

The privacy protection principles set out in the EU Directive are broader and more detailed than those of the OECD Guidelines. Data can only be processed if the "data subject" has given "unambiguous consent".[29] Such consent must be explicit with respect to "data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[30] Even where consent has been obtained to process information, the data subject must "be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses."[31]

Generally, processing without consent can proceed only if one of five exceptions applies. The processing is 1) "necessary for the performance of a contract to which the data subject is party"; 2) "necessary for compliance with a legal obligation"; 3) "necessary in order to protect the vital interests of the data subject"; 4) "in the public interest"; or 5) "processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection."[32]

The data subject must be informed about the identity of the controller (the person determining the purpose and means of processing data); the purpose of the data processing, and about any other relevant information to "guarantee fair processing". Data subjects also have a right to access and to correct or erase personal data. Data subjects are enabled to monitor and challenge the use of personal information during and after processing. They can trace which third parties hold their personal information, verify how they are using it, and block unauthorized uses.[33] Furthermore, they have a right to challenge ("not to be subject to") any decision which significantly affects them, such as one that is based on an automated processing of data intended to evaluate personal aspects such as performance at work, creditworthiness, reliability, conduct, etc."[34]

The member States of the EU are responsible for the implementation as well as enforcement of the EU Directive. States must guarantee data subjects the right to a judicial remedy, and wronged data subjects must be able to obtain damages.[35] The implementation of the EU Directive's principles on privacy protection is to be reinforced by a supervisory authority. These authorities must "act with complete independence" and have "investigative powers" which allow them access to data and to collect information. In addition, they must have "effective powers of intervention" such as the ability to deliver opinions, to publicize matters, or to order the blocking or destruction of data. The supervisory authorities must also have the power to engage in legal proceedings or to bring matters to the attention of judicial authorities.[36]

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28 EU Directive, Article 13.

29 EU Directive, Article 7.

30 EU Directive, Article 8.

31 EU Directive, Article 14. Direct marketing sales in Europe totalled 125 billion dollars in Europe in 1997, compared to 1.2 trillion dollars in the United States. Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards," (2000) 25(1) Yale Journal of International Law 1 at 18.

32 EU Directive, Article 7.

33 EU Directive, Articles 10, 11 & 12.

34 EU Directive, Article 15.

35 EU Directive Articles 22-24.

36 EU Directive, Article 28.

f) General agreement on trade in services

Given the impact trade rules have on so many aspects of economic and social activity, reference should be made to the *General agreement on trade in services (GATS)*[37], which is part of the World Trade Organization (WTO) treaty framework. Article XIV of the GATS states:

> 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) (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.[38]

Thus, while the GATS prohibits discrimination and disguised trade barriers, there is room for national authorities to regulate the transborder flow of data for purposes of privacy protection.

3. National legislation

At the national level, data protection in private sector organizations has taken the form of constitutional protections, comprehensive laws, sectoral laws, self-regulation, or a combination thereof. Comprehensive laws tend to apply general privacy protection principles to a wide range of sectors, both public and private. Sectoral laws are concerned only with specific sectors, such as communications, or with specific data such as medical information. Most countries' laws include general data protection principles, provisions for oversight authorities, generally known as privacy commissioners or data protection officers, and some reference to industry self-regulation. The roles and powers of oversight authorities usually concern public education, the investigation of complaints, and enforcement. Self-regulation relies on market forces and industry-led initiatives to provide innovative solutions. The rules are developed and enforced by those to whom they apply. In some cases, however, independent bodies or public entities are involved in the development, implementation and enforcement of industry codes and guidelines.

Data protection in Latin America is strongly tied to the concept of *habeas data* which guarantees individuals a right to access their personal information. It is based on the recognition that an individual should have control over the data gathered about him or herself. The principle emerged recently in response to the detrimental impact of the use of computers on privacy rights. The Brazilian Constitution of 1988 was the first to use the term *habeas data*. Thereafter, the right of individuals to access their personal information was included in the national constitutions of several other Latin American States, including Argentina, Colombia, Paraguay, Peru and Venezuela.[39]

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37 Web site of the World Trade Organization, Legal Texts: <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter GATS].

38 GATS, Article XIV c(ii).

39 OAS. *Op.cit.*, p.26.

a) Argentina

Argentina has no specific laws which protect individuals from the unauthorized collection, use and disclosure of their personal data held in electronic form by private organizations.[40] Nor are there specific laws or regulations requiring the holders of data banks to permit the review of privately held files, or to amend or correct errors when identified.

1) *Argentine Constitution and proposed habeas data implementing legislation*

The 1994 Constitution of Argentina provides some protection for privacy. Article 18 states:

> The domicile may not be violated, as well as written correspondence and private papers; and a law shall determine in which cases and for what reasons their search and occupation shall be allowed.

Article 43 of the Constitution provides for the right of *habeas data* as follows:

> 1. Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.
>
> ....
>
> 3. Any person shall file this action (1) to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data.

In 1996, legislation giving effect to the provisions of Article 43 of the 1994 Constitution was approved by the Senate and the Chamber of Deputies.[41] This statute was vetoed by President Menen following interventions by the Banking Association, who considered that the disclosure and privacy provisions were too strong, and would undermine the operations of VERAZ - a credit screening organization.

Replacement legislation on *habeas data* (Bill 606) was approved by the Senate in 1998.[42] The *habeas data* bill grants "integral protection to data of a personal nature held in files, registries, data banks or other technical means of electronic or manual data treatment." It "guarantees" the protection of the reputation and privacy of individuals, as well as the individual's right to access, review and correct any personal information, thereby implementing the terms of the third paragraph of Article 43 of the 1994 Constitution. The bill is still locked in the Committee system of the Chamber of Deputies.

2) Penal Code

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40 Information on the legislation governing the electronic processing of personal data in Argentina has been provided by Hartmuth Kroll from the Canadian Embassy in Buenos Aires on 26 July 2000.

41 Law No. 24.745 (23 Dec. 1996).

42 S.577/98, Ley de Protección de los Datos Personales (26 Nov. 1998).

Articles 153-157 of the Penal Code prohibit the publishing of private communications. In April 1999, a court found that those provisions also applied to electronic mail. Also the Civil Code prohibits “that which arbitrarily interferes in another person’s life: publishing photos, divulging correspondence, mortifying another’s customs or sentiments or disturbing his privacy by whatever means.”[43]

b) Brazil

1) Brazilian Constitution

Brazil does not have a specific law for the purpose of protecting of individuals from the unauthorized collection, use, and disclosure of their personal data held in electronic forms by private organizations.[44] Of relevance, however, is the 1988 Constitution, whose Article 5 guarantees the inviolability of the rights to life, freedom, equality, security, and property, and defines that lawsuits for *habeas data* are free of charge. There are other laws which touch indirectly on the issue of privacy protection in the private sector.

2) Law No. 9507

Law No. 9507, of November 1997, regulates the right of access to information and codifies the procedures of *habeas data.* It considers within the public domain "all registry or databanks containing information which is or could be transmitted to third parties or that is not for the private use of an organ or entity producer or depository of information."

3) Law No. 8078

The focus of Law No. 8078, of September 1990 (*Code of consumer's protection and defence*), is on consumer protection, linked to consumer rights, consumer relations, quality of products and services, and suppliers' responsibilities. In Article 44, the law states that the consumer will have access to personal and consumer related data about his person and respective sources of information. It allows the consumer to review and demand immediate correction of mistaken data.

4) Proposed legislation

In 1996 the Senate of Brazil introduced Bill No. 61 which would have governed the creation and use of personal registers and databanks, whether public or private.[45] The Bill has not become law and was filed on January 1999 with the end of the 1994-1998 Legislature. There is, however, another privacy Bill in the Senate (No. 268 of 1999), already approved by the Senate's Constitution and Justice Committee, that will supersede Law. no. 9507. The new law, if enacted, will govern the structuring and the use of data banks and codify the procedures of *habeas data.* For the purposes of the law, personal data on race, political and religious opinions, beliefs and ideologies, mental and physical health, sexual life, police records, family matters, and profession are considered personal data which can not be released or utilised for any other purpose than that which led to the creation of the databank, except by court order or the person's authorisation. The bill specifies that personal data refers to both physical and juridical persons.

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43 Art. 1071bis, Cod. Civ.; See: David Banisar and Simon Davies, “*Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*” (1999) 18 (1) *John Marshall Journal of Computer & Information Law* 1, at 15-17.

44 Information on the legislation governing the electronic processing of personal data in Brazil has been provided by Luiz Miguel da Rocha from the Canadian Embassy in Brasília on 27 July 2000.

45 Privacy Exchange, Legal Library, Proposed/Pending National Legislation, Brazil, “Senate Bill No. 61, 1996": <http://www.privacyexchange.org/>.

c) Canada

While Canada's Constitution, including the Charter of Rights and Freedoms, does not explicitly recognize the right to privacy, the Supreme Court has interpreted Section 8 of the Charter (which deals with search and seizure) to guarantee a right to a reasonable expectation of privacy.[46] Canada has a number of comprehensive laws governing access to and processing of personal data. The *Privacy Act*[47] as well as the *Access to information act*[48] apply to federal public sector institutions. In addition, the *Personal information and electronic documents act* has recently been enacted to regulate data protection in the private sector. Most provinces have comprehensive laws that cover data processing in the public sector, but Quebec's *Act respecting the protection of personal information in the private sector* is the only comprehensive law applying to the private sector.

1) *Personal information and electronic documents act*

The *Personal information and electronic documents act*[49] received royal assent on 13 April 2000 and comes into force in Canada on 1 January 2000.[50] The Act's purpose is to establish "rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal information and the need to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances."[51] While protecting the privacy of personal information, the Act is to support and promote electronic commerce. This new law should help Canada meet the data protection standards established in the European Union Privacy Directive.

The Act will be phased in over a period of three years and will eventually apply to every private organization that collects, uses or discloses personal information in the course of commercial activity, except to activities within provincial jurisdiction where a province has its own law that is substantially similar to the federal Act. To date the province of Quebec is the only jurisdiction in North America which has such a law. The Act does not apply to individuals in respect of personal information collected, used, or disclosed solely for personal or domestic purposes. An exception is also made for organizations collecting, using, or disclosing information whose purpose is journalistic, artistic or literary.[52]

Personal information is defined as "information about an identifiable individual", including race, ethnic origin, colour, age, marital status, religion, education, medical, criminal, employment or financial history, address and telephone number, numerical identifiers such as the Social Insurance Number, fingerprints, blood type, tissue or biological sample, and views or personal opinions.

The Act lists ten principles to govern the collection, use and disclosure of personal information:[53] accountability, identifying the purposes for the collection of personal information, obtaining consent, limiting collection, limiting use, disclosure and retention, ensuring accuracy, providing adequate security, making information management policies readily available, providing individuals with access to information about themselves, and

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46 *Hunter* v. *Southham* [1984] S.C.R. 159, 160.

47 Department of Justice, "Consolidated Statutes" <http://canada.justice.gc.ca/FTP/EN/Laws/Title/P/index.html>.

48 Department of Justice, "Consolidates Statutes", <http://canada.justice.gc.ca/FTP/EN/Laws/Title/A/index.html>.

49 S.C. 2000, c-5; Canada Gazette, 23(1), <http://canada.gc.ca/gazette/hompar3-2_e.html> [hereinafter PIEDA].

50 The federal Act provides for several phase-in periods to allow the provinces to adapt to the new legislation. If a province enacts a law that is substantially similar to the federal Act, the organizations or activities covered by the provincial law will be exempted from the federal law.

51 PIEDA, Article 3.

52 PIEDA, Article 4.

53 The Act incorporates as Schedule 1 the principles set out in the Canadian Standards Association's *Model Code for the Protection of Personal Information*.

giving individuals a right to challenge an organization's compliance with these principles. These principles are further discussed below.

Accountability

Organizations are responsible for personal information under their control and they must designate individuals to oversee compliance with the Act. Policies and procedures must be implemented, employees trained, and information provided to the public to ensure that personal information is protected. Where information is processed by a third party, an organization is required to use contractual or other means to provide for a comparable level of protection.[54]

Identifying purposes

The purposes for which personal information is processed must be identified and documented, including in cases where previously collected information is used for a new purpose. Preferably, individuals should be informed about the purposes before or at the time of collection but no later than before use of the information.[55]

Consent

Except in limited circumstances, an individual must have knowledge and give his or her consent if personal information is to be collected, used, or disclosed. Consent may be obtained after collection of the data but no later than before use of the information. To make consent meaningful, the purposes of data processing must be explained to an individual and organizations must make a reasonable effort to ensure that they are understood. The nature and form of consent may vary depending on the sensitivity of the information, the circumstances, and the individual's reasonable expectations. Consent can only be obtained for the processing of data for specified and legitimate purposes. If an organization wishes to use information for a purpose different from that for which it was collected, consent must be obtained again. Individuals are free to withdraw their consent, subject to legal or contractual obligations and reasonable notice.

An organization may collect personal information without the knowledge or consent of an individual only under very limited circumstances. This may be the case as where the collection clearly benefits the individual or where obtaining consent would compromise the information's accuracy. In addition, knowledge and consent are not required for a legal investigation or aid in an emergency that threatens the life, health, or security of an individual, or if disclosure is required by law, for statistical or scholarly purposes or the conservation of records of historical or archival importance.[56]

Limiting collection

The amount and type of information collected must be restricted to what is necessary for identified purposes. All information must be collected by fair and lawful means without misleading or deceiving individuals about the purpose for which information is collected.[57]

Limiting use, disclosure, and retention

54 PIEDA, Schedule 1, Principle 1.
55 PIEDA, Schedule 1, Principle 2.
56 PIEDA, Article 7; Schedule 1, Principle 3.
57 PIEDA, Schedule 1, Principle 4.

Except with the consent of the individual or as required by law, personal information can only be used or disclosed for purposes for which it was collected. Personal information must be retained only as long as necessary to fulfil the identified or required purposes and to allow an individual access to information after a decision has been made. Organizations should develop guidelines and implement procedures for information retention and destruction.[58]

Accuracy

Personal information used by organizations, including information disclosed to third parties, must be as accurate, complete, and up-to-date as necessary for the identified purposes, particularly where this is in the interest of the individual. Limits to the accuracy of the information must be clearly set out. Personal information must not be routinely updated unless required by the purposes for which the information was collected.[59]

Safeguards

Security safeguards must be in place to protect personal information against loss or theft, unauthorized access, disclosure, copying, use or modification. The nature of the safeguards must be appropriate to the sensitivity, amount, distribution, format, and storage of the information. The methods of protection should include physical measures such as locked filing cabinets, organizational measures such as security clearances, or technological measures such as computer passwords. Employees must be aware of the need to protect the confidentiality of personal information, and care must be taken in the disposing of data to prevent unauthorized access.[60]

Openness

Information about an organization's policies and practices related to the management of personal information must be provided to the public. Such information must include the name, title and address of the person in charge of compliance with the Act and to whom complaints can be brought; a description of the nature of personal information held by the organization; the means of gaining access to that information; and what information is provided to related organizations such as subsidiaries. This information must be both easy to obtain and understand.[61]

Individual access

Individuals have a right to access their personal information, challenge its accuracy and completeness and have it corrected. Access must be granted unless it would compromise personal data of other individuals, be extremely costly, or is prohibited for legal, security, commercial proprietary reasons, or because of solicitor-client privilege. Organizations must inform an individual about what personal information they possess, how it is used, and to which third parties it has been disclosed. Access to information requests must be answered within a reasonable time period, which would normally be 30 days. If a request for access to information is refused, the individual must be informed in writing about the reasons and any other recourse available under the Act.[62]

Challenging compliance

58 PIEDA, Schedule 1, Principle 5.
59 PIEDA, Schedule 1, Principle 6.
60 PIEDA, Schedule 1, Principle 7.
61 PIEDA, Schedule 1, Principle 8.
62 PIEDA, Articles 8-9; Schedule 1, Principle 9.

Individuals have a right to bring a complaint about an organization's lack of compliance with the Act to the designated official.[63] If an individual cannot settle a dispute with the designated official, he or she can complain to the federal Privacy Commissioner who performs the functions of an ombudsman. The Privacy Commissioner receives complaints concerning contraventions of the Act, conducts investigations, and attempts to resolve complaints through persuasion, mediation and conciliation. He or she has powers to seek and examine relevant information when conducting an investigation and may enter the premises occupied by an organization, examine relevant records, and interview individuals. After an investigation, the Privacy Commissioner may write a report with appropriate findings and recommendations. Persons who hinder the Commissioner's investigation, destroy documents, or move against whistle blowers are guilty of an offence and may be fined up to $100,000. The Privacy Commissioner can also audit the information management practices of an organization and make the results public. The Commissioner's tasks include public education programs and research.[64]

The Commissioner has no power to compel an organization to act on the findings or recommendations of a report. If a matter remains unresolved, an individual may, however, bring a complaint to the Federal Court of Canada within 45 days of receiving a report from the Commissioner. The Commissioner may appear on behalf of a complainant or as a party to the hearing. The Court may prescribe corrective measures to the organization involved and award damages to the complainant if appropriate.[65]

2) Other federal legislation

Other legislation by the Canadian Government which provides for privacy protection includes the Criminal Code which prohibits the unlawful interception of private communications.[66] In addition, there are sectoral laws like the Bank Act[67], the Insurance Companies Act[68], and the Trust and Loan Companies Act[69], among others, which provide for the protection of privacy.[70]

3) Quebec: *Act respecting the protection of personal information in the private sector*

With the enactment of the *Act respecting the protection of personal information in the private sector* in 1993, the Province of Quebec became the first jurisdiction in North America to provide for comprehensive legislation governing the protection of personal information in the private sector. The Act regulates the collection, use, and dissemination of personal information and grants individuals the right to have access to their personal data and to have them corrected if applicable. Complaints can be brought to the *Commission d'accès à l'information*.

c) Chile

*1) Chilean Constitution and other laws*

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63 Schedule 1, Principle 10.
64 PIEDA, Articles 11-13. The web site of Canada's Privacy Commissioner can be found at: <http://www.privcom.gc.ca>.
65 PIEDA, Articles 14-17.
66 Criminal Code, c-46, " 184, 193.
67 R.S.C. ch. B-101, " 242, 244, 459.
68 R.S.C. ch I-11.8, " 489, 607.
69 R.S.C. ch T-19.8, " 444.
70 See David Banisar and Simon Davies. *Op.cit.*, p.26-30.

Privacy and secrecy of communications are protected under Article 19 of Chile's Constitution of 1980. Law No. 19, 423 prohibits undisclosed taping, telephone intercepts, and other surreptitious means. Information obtained in such a way can only be disclosed by judicial order.[71]

*2) Act on the protection of personal data*

The *Act on the protection of personal data*[72] of August 1999 is the first comprehensive personal data protection law applying to the public and the private sector in Latin America. The Act regulates electronic as well as manual processing of personal data. The following principles are ensured by the Act:

Fair Information practices

Data processing can only occur in accordance with internationally recognized fair information practices.

Consent

The processing of personal data requires express written consent from the data subject, unless authorized otherwise by law. Consent can be revoked (but not retroactively) in writing. There is no requirement to obtain consent if data are publicly available; used only for internal purposes; shared with associates or affiliates; or used for statistical or rating purposes.

Personal data can only be used for the purpose(s) for which they were collected. Individuals may object to the use of personal data for advertising or market research.

Sensitive data

Sensitive data, including those revealing formation about, race, ethnic origin, political opinion, philosophical or religious belief, physical or mental health, sexual life, and personal habits, may only be processed if authorized by law, express consent is given by the individual or if processing is required to determine a person's medical treatment and health benefits. Personal medical information may only be disclosed with the patient's express, written consent.

Accuracy and security

Data processors must ensure that data are accurate, complete, up-to-date, and secure.

Access and transparency

Individuals must be informed about who collects personal information, what information is collected for what purpose, and which third parties are to receive the information. Every six months, they are also entitled to a free copy of the information held by an organization. Individuals may not only request the correction of personal data but also its blocking or deletion if the data 1) have been voluntarily supplied; 2) are outdated or obsolete; 3) are being used for commercial purposes.

Enforcement

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71 See . David Banisar and Simon Davies. *Op.cit;,* p. 30-31.

72 Online: Privacy Exchange, National Omnibus Laws: <http://www.privacyexchange.org/>.

While there is no provision for an independent data protection authority, complaints can be made to the courts.

e) Mexico

1) Mexican Constitution

While the Mexican Constitution does not have specific provisions relating to the disclosure of electronic data, it does have general articles which refer to the right to information and to the freedom of the press.[73] Article 6 states that the right to information will be guaranteed by the State. Article 7 limits freedom of the press with respect to privacy, morality, and the public peace.

Article 16 of the Mexican Constitution states:

> No one shall be molested in his person, family, domicile, papers or possession except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken.
>
> .......
>
> Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with, and may demand to be shown the books and documents required to prove compliance with fiscal rulings, in which latter cases they must abide by the provisions of the respective laws and be subject to the formalities prescribed for cases of search.

The provisions of the Constitution are complemented by some sectoral laws, including the Federal Copyright Law.

2) *The federal copyright law (Ley federal del derecho de autor)*

Article 109 of the *Federal copyright law* (Ley federal del derecho de autor) makes it illegal to sell or offer personal information contained in an electronic database without permission of the individual. The text of Article 109 is as follows:

> The access to private information on persons contained in databases to which the preceding Article refers as well as the publication, reproduction, release, public communication and transmission of said information, shall call for the prior authorization of the persons involved.
>
> Any investigations carried out by the authorities entrusted with procuring and imparting justice, in accordance with the respective legislation, as well as the access to public archives by persons authorized by law, shall be exempt from the foregoing, provided that the consultation is made pursuant to the respective procedures.

Thus, like several other Latin American countries, Mexico provides privacy protection in some sectors but lacks comprehensive data protection legislation applicable to the private sector.

f) Peru

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73 Information on the state of Mexican law was provided by Heather Jeffrey and Gilian Moran from the Canadian Embassy in Mexico on 24 July 2000.

1) Political Constitution of Peru

Privacy, data protection, and freedom of information rights are guaranteed by the Peruvian Constitution of 1993. Article 200 of the Constitution also includes a "constitutional guarantee of *habeas data*".

2) Penal code

Under Article 154 of the Penal Code of Peru "a person who violates personal or family privacy, whether by watching, listening or recording an act, a word, a piece of writing or an image using technical instruments or processes and other means, shall be punished with imprisonment for not more than two years. Article 151 of the Penal Code provides that "a person who unlawfully opens a letter, document, telegram, radiotelegram, telephone message or other document of a similar nature that is not addressed to him, or unlawfully takes possession of any such document even if it is open, shall be liable to imprisonment of not more than 2 years and to 60 to 90 days' fine.

g) United States

The right to privacy is not explicitly protected in the US Constitution. The Supreme Court held that a limited constitutional right to privacy arises out of the Bill of Rights in relation to government surveillance. The right to privacy in the private sector is only guaranteed where there is legislation. There is no privacy oversight authority in the United States. The Office of Management and Budget plays a policy role in the federal public sector and the Federal Trade Commission oversees consumer credit information and fair trading practices.[74] The United States does not have a comprehensive law controlling access to and the protection of information and personal data held by private organizations.[75] Instead the United States has legislated on a sectoral basis and relies heavily on self-regulation of the private sector. Legislation regulating privacy protection in the private sector includes, among others, the following acts:

1) *Cable communications policy act*

The *Cable communications policy act*[76] (1984) regulates the use of cable television subscriber records. Consumers must be informed about the nature of the information collected and its use. Identifiable information such as viewer choices may not be disclosed without written consent. Information must be accurate and procedures for corrections must be in place. Consumers must be informed at least once a year about the "nature, frequency, and purpose" of information stored and disclosed. Actual and punitive damages may be obtained through court action.

2) *Children's online privacy protection act*

The *Children's online privacy protection act* (1998)[77] applies to information concerning children collected on-line. The Act requires that parents must consent before data on children under the age of 13 can be collected or disclosed.[78] Parents must also be given access to data collected and can prevent the further use of the information. Operators

74 See David Banisar and Simon Davies. *Op.cit*. p.108-111.

75 The federal government's handling of personal data is regulated by the *Privacy Act* (1974), 5 U.S.C. ' 552a (1994).

76 47 U.S.C. ' 551.

77 Online: United States, Federal Trade Commission: "Legal Framework, Statutes Enforced or Administered by the Commission, Statutes Relating to Consumer Protection Mission" <http://www.ftc.gov/ogc/stat3.htm>.

78 Information for the protection of children using the internet and filtering programs are available at a web site called "getNetWise": <http://www.getnetwise.org/>.

of commercial websites must inform parents about their information practices and must maintain confidentiality, security and integrity of the information.

3) *Electronic communications privacy act*

The use of electronic communications, including voice, video, and data communications, is regulated by the *Electronic communications privacy act*[79] (1986). The Act prohibits the unauthorized interception, acquisition, or disclosure of electronic communications, including those stored on a computer, unless the communication is readily accessible to the general public. It applies to the public as well as the private sector. Yet, the Act allows for several exceptions. Computer system operators for example may access stored data and divulge information accidentally obtained to government authorities. Since a system can be configured to store all messages that pass through it, the system operator may have access to all messages that pass through. Violations of private communications carry with them potential criminal and civil damages.[80]

4) *Fair credit reporting act*

Under the *Fair credit reporting act*[81] of 1970, the collection and use of information of credit reporting agencies is regulated. The Act applies to the activities of those who supply the information to credit agencies, to the credit agencies themselves, and users of credit information. Credit agencies must ensure that their information is accurate and provide for correction procedures. Their records must be available to consumers. Information can only be released to authorized customers who must notify the consumer if adverse action is taken based on a credit report. Users must also inform the consumer about the source of the credit information. If information is incomplete or inaccurate, the consumer can request that the matter be investigated free of charge by the credit agency. The Act is administered by the Federal Trade Commission which has procedural, investigative and limited enforcement powers. Aggrieved persons can also bring cases to court and sue for actual and punitive damages.

5) *Right to financial privacy act*

The *Right to financial privacy act*[82] regulates the transfer of financial records. Generally banks are prohibited from disclosing clients' financial records without a court order. Individuals are generally given the opportunity to challenge access of federal investigators to financial records. Relief for actual and punitive damages may be sought in the courts.

6) *Video privacy protection act*

Video rental or sales information is protected under the *Video privacy protection act*[83]. The Act prohibits the release of consumers' names, addresses, and titles of videos rented or bought. Customers must be given an opportunity to opt out of marketing schemes. Aggrieved parties can sue in the courts.

While the US Government has regulated data protection in parts of the private sector, major legislative gaps continue to exist, for example, with respect to medical records, bank

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79 18 U.S.C. ' 2510-2520, 2701-2709 (1997).

80 See: Domingo R. Tan, "Personal Privacy in the Information Age: Comparison of Internet Data Protection Regulations in the United States and the European Union" (1999) 21(4) Loyola of Los Angeles International and Comparative Law Journal, 661.

81 15 U.S.C. ' 1681-1681(u); Federal Trade Commission: <http://www.ftc.gov/os/statutes/fcra.htm>.

82 12 U.S.C. sec. 3401 et seq.

83 18 U.S.C. ' 2710. This Act was passed in response to media reports about video rental records of Judge Robert Bork's family during Supreme Court nomination hearings.

records and the internet. Some privacy protection is available through state legislation and through the courts, the tort of privacy was first adopted in 1905 and is now available in almost all states as a civil right of action.[84] The general approach, however, remains that the private sector should regulate itself through codes of conduct and market forces. There are a number of industry-based organizations which have developed codes of conduct. These include, among others, the “Information Technology Industry Council”, the “Interactive Services Association”, the “Online Privacy Alliance” and the “American Electronics Association”.[85]

## II. REGULATION OF TRANSBORDER DATA FLOWS

### 1. Background

As it is the case with many other international transactions, the flow of personal data across borders by electronic means, particularly the internet, raises numerous jurisdictional questions. The identification, assignment and enforcement of jurisdiction may pose considerable difficulties. The following example may be illustrative of the problem: personal financial information about an individual of Country A is collected by a credit bureau. The information is stored on a computer in Country B and also at the bureau’s headquarters in Country C. The individual has reason to believe that some of the information may not be correct and wants to access it. The laws of Country A provide a right of access to such information if it is held in Country A. In this case, however, the information is not held in Country A. Country B has a similar law but it applies only to the public sector and thereby excludes recourse against a private credit bureau. Also Country C has data protection laws, but they apply only to its own citizens. Recourse is not possible because the individual is not a citizen of Country C. Thus, even though the three countries have data protection laws, a lack of jurisdiction prevents recourse for the individual concerned.[86]

Establishing a jurisdictional rule to cover Internet sites is rather difficult without creating conflict, given that so many individuals belonging to many distinct communities use the Internet. Additional problems are posed by technology, for example when trying to determine who should regulate a particular internet server. One approach could be to allocate jurisdiction according to the country of the domain name registration. Yet, websites could be registered under several domaines such as the “.com” domain as well as the “.uk” domain. Jurisdiction on the basis of the IP number is also difficult because two different websites could use the same IP-number. Even the establishment of jurisdiction based on the physical location of the server is problematic. Such a policy could encourage the placement of servers in locations where laws are favourable to the owner, a “cyberhaven”. In any event, any assertion of jurisdiction based on the current technological configuration of the internet will likely be doomed as technology evolves further.[87]

The globalization of data processing renders privacy protection increasingly difficult without the application of extra-territorial jurisdiction. Under traditional international law, however, most States oppose extraterritorial measures that contradict or undermine the laws or clearly enunciated policies of another State exercising concurrent territorial jurisdiction

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84 See David Banisar and Simon Davies. *Op.cit*. p 108-111.

85 For data protection laws in the United States, see also: Organization for Economic Cooperation and Development; Directorate for Science, Technology, and Industry; Committee for Information, Computer and Communications Policy; Working Party on Information Security and Privacy; AInventory of Instruments and Mechanisms Contributing to the Implementation and Enforcement of the OECD Privacy Guidelines on Global Networks,@ DSTI/ICCP/REG (98)12/FINAL, (19 May 1999) at 47-50.

86 “Conflicting Assertions of National Jurisdiction over Information Matters.” Noes for a Speech by J.T. Fried before the Media and Communications Law Section of the Canadian Bar Association, Ottawa, 11 October 1984.

87 For a discussion of jurisdiction over the internet in the context of European conventions see: Agne Lindberg, Delphi Lawyers, “Jurisdiction on the Internet: European Conventions,” 7 January 1998, at the web site Privacy Exchange, Conference Presentations and Papers, <http://www.privacyexchange.org/>.

over the same conduct.[88] There may be a need to devise new ways of dealing with the issue of state jurisdiction to deal with the challenges posed by the Internet and other global networks. Some attempts to address transborder data flows, including jurisdictional aspects, have been made at the international as well as domestic level.

2. International instruments

The issues of jurisdiction, transborder data flows and international cooperation have been addressed in a limited and general way by the OECD Guidelines, the Council of Europe Convention, and the UN Guidelines. A more detailed approach to the transboundary flow of data was adopted in the EU Directive.

a) OECD Guidelines

The OECD Guidelines provide some basic principles for dealing with the flow of personal data across borders and legitimate restrictions for the purpose of privacy protection. The Guidelines recommend a country should take all reasonable steps to ensure that transborder flows of personal data are "uninterrupted and secure". A country "should refrain from restricting transborder flows of personal data" unless the re-export of data would circumvent its domestic privacy legislation or the other country provides "no equivalent protection." The OECD Guidelines reinforce that "countries should avoid developing laws, policies and practices in the name of the protection of privacy and individual liberties, which would create obstacles to transborder flows of personal data that would exceed requirements for such protection."[89]

The OECD Guidelines encourage international cooperation by ensuring "that procedures for transborder flows of personal data and for the protection of privacy and individual liberties are simple and compatible with those of other Member countries." Members are called upon to exchange information related to the Guidelines and to facilitate "mutual assistance in the procedural and investigative matters involved." Finally, countries should develop "principles, domestic and international, to govern the applicable law in the case of transborder flows of personal data."[90]

b) Council of Europe Convention

The Council of Europe Convention states that A[a] Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorization transborder flows of personal data going to the territory of another Party. Yet, a Party to the Convention may block the transborder flow of data "insofar as its legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection." Similarly, a Party may prohibit the cross-border transfer of personal data where "the transfer is made from its territory to the territory of a non-contracting State through the intermediary of the territory of another Party, in order to avoid such transfers resulting in circumvention of the legislation ..."[91] In short, data transfers can be blocked to countries which do not provide an equivalent standard of protection.

In order to facilitate the transborder flow of data, the Convention requires each Party to designate a national data protection authority which provides information on its laws and

88 For a discussion of the principles of jurisdiction see: Pierre Trudel, "Jurisdiction over the Internet: A Canadian Perspective" (1998) 32(4) International Lawyer 1027 at 1029-1047.

89 OECD Guidelines, Part Three.

90 OECD Guidelines, Part Five.

91 Council of Europe Convention, Article 12.

administrative procedures in the field of data protection to other Parties.[92] In addition, each Party is required to assist persons resident abroad to exercise their rights.[93] The Convention establishes a Consultative Committee which represents member States and makes proposals as to the application and improvement of the Convention.[94]

The Draft Protocol produced by the Consultative Committee requires the supervisory authorities established under the Protocol to cooperate with one another in the performance of their duties, particularly through the exchange of information.[95]

The Protocol also addresses the issue of transborder data flows to a recipient which is not subject to the jurisdiction of a Party to the Convention. It states that such transfers of personal data are permitted "only if that State or organization ensures an adequate level of protection for the intended data transfer."[96] Exceptions to this rule are only allowed:

a) if domestic law provides for it because of specific interests of the data subject, or legitimate prevailing interests, especially important public interests, or

b) if safeguards, which can in particular result from contractual clauses, are provided by the controller responsible for the transfer and are found adequate by the competent authorities according to domestic law.[97]

The provisions of the Draft Protocol with respect to the transfer of personal data to third countries are similar to those of the EU Directive.

c) United Nations Guidelines

The UN Guidelines address the issue of transborder data flows in Article 9 which states:

> When the legislation of two or more countries concerned by a transborder data flow offers comparable safeguards for the protection of privacy, information should be able to circulate as freely as inside each of the territories concerned. If there are no reciprocal safeguards, limitations on such circulation may not be imposed unduly and only in so far as the protection of privacy demands.

As in the OECD Guidelines, limitations on the crossborder flow of data are only permitted if the required standards of privacy protection are not met. Measures must be proportionate to the need of protection required.

d) European Union Privacy Directive

One of the major objectives of the EU Directive was to address the transborder flow of personal data and to create a common European market. Article 1(2) of the EU Directive requires that countries of the European Union "shall neither restrict nor prohibit the free flow of data between Member States." Given that all EU States are required to provide a roughly equivalent level of protection for personal data as a result of the EU Directive, limitations on the free movement of data merely for reasons of privacy protection are not permitted within the Union.

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92 Council of Europe Convention, Article 13.
93 Council of Europe Convention, Article 14.
94 Council of Europe Convention, Articles 18-20.
95 Draft Protocol, Article 1.
96 Draft Protocol, Article 2.
97 Draft Protocol, Article 2.

Chapter IV of the EU Directive deals with the *Transfer of personal data to third countries.* EU countries must block the transfer of personal information to non-member States that do not offer an "adequate" level of protection. Article 25 of the EU Directive states:

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.

Decisions about the adequacy of a third country's data protection regime under the EU Directive are first made at the level of national authorities. The EU member States and the European Commission are required to share information with each other about cases where a third country does not properly protect personal data.[98] If the Commission finds that a third country does not offer an adequate level of protection, EU member States are required to prevent the transfer of personal data.[99]

Article 26 of the EU Directive provides the following exceptions to the rule that personal data cannot be transferred to countries providing an adequate level of protection:

a) the data subject has given his consent unambiguously to the proposed transfer; or
b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or
c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
e) the transfer is necessary in order to protect the vital interests of the data subject; or
f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

The transfer of personal data to a third country that does not provide adequate privacy protection is also permissible "where the controller adduces adequate safeguards with

98 EU Directive, Article 25(3).
99 EU Directive, Article 25(4).

respect to the protection of the privacy", for example through "appropriate contractual clauses".[100]

Where a third country does not provide adequate privacy protection, the Commission may enter into negotiations "with a view to remedying the situation".[101] Given the importance of the EU in the global exchange of data, the EU Directive has potentially significant consequences outside the Union. Where third countries do not provide sufficient legislation to protect personal data in the private sector, public authorities or even individual businesses may be forced to undertake negotiations with the Commission with a view to demonstrating their compliance with the EU rules.

The EU Directive encourages cross-border cooperation within the European Union by stipulating that a national "authority may be requested to exercise its powers by an authority of another Member State" and that "supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information."[102]

3. National legislation

Most States do not have specific legislation dealing with the transborder flow of personal data. However, the data protection laws of some countries require that the release of personal data to foreign States can take place only if certain conditions are met. Usually the foreign State or the recipient organization must guarantee a minimum level of privacy protection. Some laws also make provisions for cooperation with other data protection or law enforcement authorities.

a) Argentina

Argentina has no specific laws governing the flow of data in electronic form across international borders.[103] However, the proposed *habeas data* bill No. 606 of 1998 approved by the Argentine Senate forbids the transfer of personal data of any kind to other countries or to international or supra-national bodies which do not provide adequate levels of protection. Exceptions to this are exchange of data with purposes of international judicial cooperation, medical data if the treatment of a patient requires it or in the course of epidemiological research, bank or stocks transfers, when the transfer is done according to international treaties to which Argentina is a signatory, or when it is part of international cooperation among intelligence agencies with the purpose of fighting organized crime, terrorism and drug trafficking. It is not clear how this will be applied to the internal operations of transnational corporations, or to the operations of business level transactions.

b) Canada

Canada's *Privacy Act*, which applies to the public sector, provides (in Article 8) for the transboundary disclosure of personal information:

> f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or

100 EU Directive, Article 26.
101 EU Directive, Article 25(5).
102 EU Directive, Article 28.
103 Information on the legislation governing the electronic processing of personal data in Argentina has been provided by Hartmuth Kroll from the Canadian Embassy in Buenos Aires on 26 July 2000.

any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;

Unlike the *Privacy Act*, the *Personal information and electronic documents act* does not address the issue of transborder flow of information or cooperation in specific terms, but organizations in Canada will still be held responsible for the proper protection of personal data even when data are transmitted across borders (accountability principle).[104] Quebec's *Act respecting the protection of personal information in the private sector* provides in Section 17 that when communicating data outside Quebec, an enterprise must take reasonable steps to ensure that the data will be used only for specified purposes and that the data subject is given an opportunity to object to use of the data for solicitation.

## III. APPROACHES TO DATA PROTECTION

### 1. Common data protection standards

One approach states have taken at the international level is to agree on a minimum level of convergence of national data protection regimes. The European Union has taken the most forceful approach by requiring its member States to harmonize their data protection legislation. While national laws need not be identical under the EU Directive, reasonably high-level standards must be met by all countries in order to create a common European market for the flow of data. In addition, a supranational organization, the European Commission, continues to play an important coordinating role and ensures that the Union's standards are not undermined by data transfers to third countries which do not meet the required standards. While presenting a significant challenge, this kind of harmonization of laws could be extended beyond the European Union through bilateral treaties or multilateral conventions.[105]

Indeed, all the international instruments discussed above have attempted to encourage the enactment of laws that provide a consistent and comparable level of privacy protection in the area of personal data processing. While the OECD Guidelines and the UN Guidelines represent non-binding recommendations on which to build data protection regimes, the Council of Europe Convention and particularly the EU Directive are legally binding instruments requiring states to pass laws establishing certain minimum standards in privacy protection. As a result of the Council of Europe Convention and the EU Privacy Directive, most European States introduced privacy protection regimes.[106]

The hope is that by agreeing on a minimum level of common data protection principles, states are no longer required to impose restrictions on transborder data flows. The international instruments discussed above allow for limitations to the free flow of data only in certain exceptional cases. The OECD Guidelines refer to countries that do not

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104 Discussion with Ken Huband, Privacy Policy, Industry Canada on 1 August 2000.

105 The EU Directive itself was negotiated under the threat of a data embargo from certain EU members with data protection laws, including France and Germany, against others with less stringent laws, such as Italy. Through the creation of similar data protection standards the possible interruption of the free flow of data was averted. Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards," (2000) 25(1) Yale Journal of International Law 1 at 10.

106 For a discussion of the privacy protection regimes of OECD countries see: OECD; Directorate for Science, Technology, and Industry; Committee for Information, Computer and Communications Policy; Working Party on Information Security and Privacy; "Inventory of Instruments and Mechanisms Contributing to the Implementation and Enforcement of the OECD Privacy Guidelines on Global Networks," DSTI/ICCP/REG (98)12/FINAL, (19 May 1999).

"substantially observe" the OECD Guidelines or fail to provide "equivalent protection"; the UN Guidelines make reference to a lack of "comparable safeguards"; the Council of Europe Convention requires the absence of "equivalent protection"; and the EU Directive provides for restrictions on data flows outside the Union where third countries do not offer an "adequate level of protection".

Where the required level of protection is not met, certain limited measures of control can be applied. The OECD Guidelines discourage measures which "in the name of the protection of privacy and individual liberties which would exceed requirements for such protection." The UN Guidelines recommend that restrictions be imposed "only in so far as the protection of privacy demands". The European Council Convention and the EU Directive clearly provide for a blocking of the movement of personal data to countries where sufficient protection is not assured.

The EU Directive imposes the strongest limitations on the transborder flow of data. Article 25 of the EU Directive obliges, rather than permits, EU member States to prohibit the transfer of personal data to States that do not provide adequate levels of protection. The standard required by the OECD Guidelines and the Council of Europe Convention may be stronger as it is one of "equivalence" rather than "adequacy", but only under the EU Directive must the transfer of data be blocked if the standard is not met. Because of the EU's economic importance, the potential of such a data embargo is a powerful incentive for states around the world to create some measure of harmonization in the protection of personal data.[107] Where the transborder flow of data is interrupted because a third country has inadequate privacy protection laws, the European Commission is required to enter into negotiations with that third country.

2. Safe harbour principles

In view of the entry into force of the EU Directive on 25 October 1998, the European Commission and the US Department of Commerce took up negotiations to avoid a disruption in the free flow of data between Europe and the United States. To diminish the uncertainty as to whether US organizations would meet the "adequate standard" test with respect to data protection required by the EU Directive, the United States proposed that US companies that wish to receive personal data from European Union adhere to the so-called *Safe harbour principles*.[108] Adherence to these Principles would establish a "presumption of adequate privacy protection" for the purposes of the EU Directive.

Decisions by organization to qualify for the safe harbour are voluntary. Organizations may qualify for the safe harbour in several ways. They can join a self-regulatory privacy programme that adheres to the Principles or they can develop their own self-regulatory privacy policies, provided that they conform with the Principles. If an organization fails to comply with self-regulation, it can be pursued under Section 5 of the *Federal trade commission act*, which prohibits "unfair and deceptive acts". Organizations which are subject to a statutory, regulatory, administrative or other law that effectively protects privacy may also qualify for the safe harbour. To qualify, organizations must self-certify to the Department

107 For example, the potential extra-territorial effects of the EU Directive have encouraged non-European countries such as Canada, Hongkong, New Zealand and Taiwan to pass data protection legislation to cover the private sector. See: Privacy Commissioner, New Zealand, "Report by the Privacy Commissioner to the Minister of Justice on the Trans-Tasman Mutual Recognition Bill and Transborder Data Flows," at Privacy Commissioner, New Zealand, "Reports and Submissions": <http://www.privacy.org.nz/people/transtas.html>.

108 US Department of Commerce, "Safe Harbour Principles" (21 July 2000), online: Privacy Exchange, News: http://www.privacyexchange.org/.See also: online: Europa, European Commission, Internal Masrket, Media Information Society and Data Protection, Data Protection, News, <http://www.europa.eu.interamericano/comm/internal_market/en/media/dataprot/news/safeharbor.htm>

of Commerce their adherence to the Principles in accordance with the guidance set forth in the *Frequently asked questions*.

The *Safe harbour principles*, issued in their final version on 21 July 2000, are the following:

> "Personal data" and "personal information" are data about an identified or identifiable individual that are within the scope of the Directive, received by a U.S. organization from the European Union, and recorded in any form.
>
> NOTICE: An organization must inform individuals about the purposes for which it collects and uses information about them, how to contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information, and the choices and means the organization offers individuals for limiting its use and disclosure. This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization or discloses it for the first time to a third party(1).
>
> CHOICE: An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party(1) or (b) to be used for a purpose that is incompatible with the purpose(s) for which it was originally collected or subsequently authorized by the individual. Individuals must be provided with clear and conspicuous, readily available, and affordable mechanisms to exercise choice.
>
> For sensitive information (i.e. personal information specifying medical or health conditions, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information specifying the sex life of the individual), they must be given affirmative or explicit (opt in) choice if the information is to be disclosed to a third party or used for a purpose other than those for which it was originally collected or subsequently authorized by the individual through the exercise of opt in choice. In any case, an organization should treat as sensitive any information received from a third party where the third party treats and identifies it as sensitive.
>
> ONWARD TRANSFER: To disclose information to a third party, organizations must apply the Notice and Choice Principles. Where an organization wishes to transfer information to a third party that is acting as an agent, as described in the endnote, it may do so if it first either ascertains that the third party subscribes to the Principles or is subject to the Directive or another adequacy finding or enters into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant Principles. If the organization complies with these requirements, it shall not be held responsible (unless the organization agrees otherwise) when a third party to which it transfers such information processes it in a way contrary to any restrictions or representations, unless the organization knew or should have known the third party would process it in such a contrary way and the organization has not taken reasonable steps to prevent or stop such processing.
>
> SECURITY: Organizations creating, maintaining, using or disseminating personal information must take reasonable precautions to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction.

DATA INTEGRITY: Consistent with the Principles, personal information must be relevant for the purposes for which it is to be used. An organization may not process personal information in a way that is incompatible with the purposes for which it has been collected or subsequently authorized by the individual. To the extent necessary for those purposes, an organization should take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.

ACCESS: Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

ENFORCEMENT: Effective privacy protection must include mechanisms for assuring compliance with the Principles, recourse for individuals to whom the data relate affected by non-compliance with the Principles, and consequences for the organization when the Principles are not followed. At a minimum, such mechanisms must include (a) readily available and affordable independent recourse mechanisms by which each individual's complaints and disputes are investigated and resolved by reference to the Principles and damages awarded where the applicable law or private sector initiatives so provide; (b) follow up procedures for verifying that the attestations and assertions businesses make about their privacy practices are true and that privacy practices have been implemented as presented; and (c) obligations to remedy problems arising out of failure to comply with the Principles by organizations announcing their adherence to them and consequences for such organizations. Sanctions must be sufficiently rigorous to ensure compliance by organizations.

1. It is not necessary to provide notice or choice when disclosure is made to a third party that is acting as an agent to perform task(s) on behalf of and under the instructions of the organization. The Onward Transfer Principle, on the other hand, does apply to such disclosures.

These Principles are complemented by a document dealing with *Frequently Asked Questions* providing guidance to the interpretation of the Principles.[109]

Adherence to the Principles may be limited by the following:

a) to the extent necessary to meet national security, public interest, or law enforcement requirements;
b) by statute, government regulation, or case law that create conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization; or
c) if the effect of the Directive or member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts.

The European Union recognizes the US Federal Trade Commission and the US Department of Transportation “as being empowered to investigate complaints and to obtain relief against unfair or deceptive practices as well as redress for individuals in case of

109 Online: Privacy Exchange, News: <http://www.privacyexchange.org/>.

non-compliance with the Principles implemented in accordance with the *Frequently asked questions*."[110]

Although the European Commission had already accepted the "adequacy" of the Safe Harbour Principles[111], the European Parliament called for the imposition of additional requirements on 14 July 2000:[112]

- recognition of an individual right of appeal to an independent public body instructed to consider any appeal relating to an alleged violation of the principles;

- an obligation on participating firms to compensate for the damage, whether moral or to property, suffered by those involved, in the event of violations of the principles, and an undertaking by the firms to cancel personal data obtained or processed in an unlawful manner;

- ease of identification of the steps to be taken to ensure data are cancelled and to obtain compensation for any damage suffered;

- provision of a preliminary check by the Commission on the proper functioning of the system within six months of its entry into force and presentation of a report on the outcome of the check and any problems encountered to the working party provided for in Article 29 and the Committee provided for in Article 31 of the Directive, as well as to the relevant committee of the European Parliament;

Despite these concerns by the European Parliament, the European Commission issued a Decision on 27 July 2000, accepting the Safe Harbour Principles released by the Government of the United States on 21 July 2000.[113] The Commission decided to proceed with the Decision, given that the European Parliament had not found that the Commission, in doing so, would be exceeding its powers. Nevertheless, the Commission notified the US Department of Commerce of the concerns of the European Parliament and stated that it would re-open discussions if Parliament's fears about the inadequacy of remedies for individuals proved to be well-founded.

3. Mutual assistance and cooperation

Where countries cannot agree on the establishment of a common data protection regime through the harmonization of laws or other mechanisms such as the *Safe harbour principles*, the effectiveness of national legislation can nevertheless be enhanced through mutual assistance and cooperation arrangements. In order to enforce data protection laws, adjudicative bodies must be able to exercise some control or influence over the offender and obtain the necessary evidence. Particularly in the area of personal data protection on the

110 "Annex to the Safe Harbour Principles", online: Privacy Exchange, News: <http://www.privacyexchange.org/>.

111 Commission Decision C5-0280/2000.

112 European Parliament Resolution on the Draft Commission Decision on the adequacy of the protection provided by the Safe Harbour Privacy Principles and related Frequently Asked Questions issued by the US Department of Commerce (C5-0280/2000 – 2000/2144 (COS)) in "Minutes of 05/07/2000 – Provisional Edition"on the web site of the European Union, European Parliament Search Guide, Resolutions; <http://www.europart.eu.interamericano/search/en/docsearch.htm#b-resolutions>

113 Data protection: Commission adopts decisions recognising adequacy of regimes in US, Switzerland and Hungary", online: Europa, European Commission, Internal Market, Media Information Society and Data Protection, Data Protection, News, <http://www.europa.eu.int/comm/internal_market/en/media/dataprot/news/safeharbor.htm>.

114 See for example: *Treaty Between the Government of the United States and the Government of Canada on Mutual Legal Assistance in Criminal Matters* (18 March 1985) 24 I.L.M. 1092 and the *Canadian Mutual Legal Assistance in Criminal Matters Act*, ch. M-13.6 (R.S., 1985, c. 30 (4th Supp.); online: Canada, Department of Justice, "Consolidated Statutes" http://canada.justice.gc.ca/FTP/EN/Laws/Chp/M/M-13.6.txt.

Internet and other global networks, international cooperation is required as individual countries alone cannot possibly deal with this issue. Some of the international instruments discussed above as well as national laws provide for cooperation among data protection authorities across international borders. Provisions for mutual assistance have also been included in other bilateral and multilateral treaties, particularly those dealing with criminal law.[114]

a) Mutual assistance in international instruments

The OECD Guidelines encourage members to exchange information related to the Guidelines and to facilitate "mutual assistance in the procedural and investigative matters involved."[115] The European Council Convention requires each Party's national data protection authority to provide information on its laws and administrative procedures in the field of data protection to other Parties and to assist persons resident abroad to exercise their rights.[116] The EU Directive stipulates that a national "authority may be requested to exercise its powers by an authority of another member State" and that "supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information."[117]

b) *Draft Convention on Cyber-Crime*

Of relevance to the discussion of international data protection and mutual legal assistance is the proposed *Convention on cyber-crime* which is currently being negotiated by the member States of the Council of Europe and a number of other States, including Canada, Japan, South Africa and the United States. The Council of Europe has published the current version of the Draft Convention (Draft No. 19) on the Internet.[118] Several of the provisions of the Draft Convention relate directly to the protection of personal data, such as those dealing with illegal access to computer systems (Article 2); the illegal interception of computer data (Article 3); the interference with computer data (Article 4) or a computer system (Article 5); or other computer related offences such as forgery (Article 7) or fraud (Article 8).

In addition, the Draft Convention contains language which may be useful in dealing with questions of jurisdiction and mutual legal assistance. The Convention addresses the issue of jurisdiction in Article 19:

> 1. Each Party shall take such legislative and other measures as may be necessary to establish jurisdiction over any offence ... when the offence is committed:
>
>    a. [in whole or in part] in its territory or on a ship, an aircraft, or a satellite flying its flag or registered in that Party;
>    b. by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State. ...

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115 OECD Guidelines, Part V.
116 European Council Convention, Articles 13 & 14.
117 EU Directive, Article 28.
118 Council of Europe, Directorate General I, Legal Affairs, Treaty Office, "Draft Treaties": <http://conventions.coe.int/treaty/EN/cadreprojets.htm> [hereinafter Draft Convention on Cyber-crime].

5. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

The Draft Convention clearly encourages States to assert jurisdiction over offenders on their territory as well as their nationals, by way of consultation if required.

Article 20 of the Draft Convention outlines general principles relating to international co-operation:

The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and national laws, to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences related to computer systems and data, or for the collection of electronic evidence of a criminal offence.

States are called upon to use any available legal means to pursue offenders.

Article 22 of the Draft Convention calls on Parties to provide for expedited mutual assistance for the purpose of enforcement:

1. The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations and proceedings concerning criminal offences related to computer systems and data, or for the collection of electronic evidence of a criminal offence.

2. For the purpose of providing cooperation under articles 24 - 29, each Party shall, in urgent circumstances, accept and respond to mutual assistance requests by expedited means of communications, including [voice], fax or e-mail, to the extent that such means provide appropriate levels of security and authentication, with formal confirmation to follow where required by the requested State.

The Draft Convention provides for mutual assistance procedures for cases where no mutual assistance treaty or arrangement is in place between the requesting and the requested Parties. Each Party is required to designate a central authority to deal with requests for mutual assistance. A register of central authorities is to be kept and the central authorities are to communicate directly with each other. Assistance may be refused, in full or in part, if required by law or if it would prejudice a Party's sovereignty, security, public order, or other essential interests. Parties may also forward to other Parties, without prior request, information which may lead to a request or to the initiation of an investigation. The information provided may only be used for specified purposes and may have to be kept confidential.[119] Requests for assistance may also concern the expedited preservation of data stored on computers.[120] If a third State was involved in the transmission of a communication, a Party may request the disclosure of a sufficient amount of data, in order to identify the service provider and the path which was used for the communication.[121] When a Party requests to access, seize, secure or disclose data stored on computers, the requested Party should respond as expeditiously as possible by:

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119 Draft Convention on Cyber-Crime, Article 23.
120 Draft Convention on Cyber-Crime, Article 24.
121 Draft Convention on Cyber-Crime, Article 25.

a) Where permitted by its domestic law, ratifying or endorsing any judicial or other legal authorisation that was granted in the requesting Party to search or seizure the data, thereupon executing the search or seizure and, pursuant to its mutual assistance treaties or laws, as applicable, disclosing any data seized to the requesting Party; or

b) Responding to the request and disclosing any data seized, pursuant to its mutual assistance treaties or laws, as applicable; or

c) Using any other method of assistance permitted by its domestic law.

In order to ensure immediate assistance in the form of technical advice, the preservation of data, or the collection of evidence, giving of legal information, and locating of suspects, a point of contact available on a 24 hour, 7 day per week basis needs to be established.[122]

While the Draft Convention on Cyber-Crime deals with criminal law matters, its mutual legal assistance provisions may nevertheless be of value to international efforts to protect personal data, particularly given the fact that the Convention deals with an area of law which is very closely related.

c) Cyber-Crime and G-8 Countries

A parallel process on the issue of cyber-crime is also under way under the auspices of the G-8 Countries. At the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime on 19-20 October 1999, a statement on the principles on transborder access to stored computer data was released which also contains provisions for "expedited mutual legal assistance":[123]

> 4. Upon receiving a formal request for access, search, copying, seizure or disclosure of data, including data that has been preserved, the requested State shall, in accordance with its national law, execute the request as expeditiously as possible, by:
>
>    a. Responding pursuant to traditional legal assistance procedures; or
>
>    b. Ratifying or endorsing any judicial or other legal authorization that was granted in the requesting State and, pursuant to traditional legal assistance procedures, disclosing any data seized to the requesting State; or
>
>    c. Using any other method of assistance permitted by the law of the requested State.
>
> 5. Each State shall, in appropriate circumstances, accept and respond to legal assistance requests made under these Principles by expedited but reliable means of communications, including voice, fax or e-mail, with written confirmation to follow where required.

Again, there is a recognition that effective mutual legal assistance is required in order to deal with data stored in a foreign State.

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122 Draft Convention on Cyber-Crime, Article 27.

123 "Communique: Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime (Moscow, October 19-20,1999)", online: Canada. Department of Foreign Affairs and International Trade, <http://www.dfait-maeci.gc.ca/foreignp/g7/1999/moscow1-e.htm>.

## IV. CONCLUSION

The protection of personal information and data held in electronic form in the private sector has been advanced through the establishment of international instruments. The OECD Guidelines, the European Council Convention, the UN Guidelines, and particularly the EU Data Protection Directive have had a profound impact on data protection in Europe and elsewhere. Also some OAS countries, notably Canada and Chile, have enacted laws which provide relatively high levels of privacy protection.

Nevertheless, it seems fair to say that many challenges remain particularly with respect to the transborder flow of personal data on the Internet and other global networks. The privacy of citizens remains vulnerable even in those countries which have effective national laws, because of the existence of data havens where no protection is available. The existing international and national instruments leave numerous problems unresolved, such as the interpretation of what “adequate” and “equivalent” levels of protection are or the nature of the enforcement required to implement agreed upon standards. Legislation and enforcement are especially challenging because of rapidly evolving technology. In addition, those States who wish to protect the privacy of their citizens are also faced with competing economic, trade, social and political interests.

These difficulties, however, are not unique to the area of data protection. Further progress in the area of privacy protection could probably be made by a combination of measures, including the development of international standards and enforcement mechanisms, mutual legal and technical assistance, the encouragement of industry self-regulation, and the operation of market forces influenced by information and education.

Based on the limited information which was available for this report, however, it is difficult to assess the adequacy of legislation throughout the OAS. It is therefore recommended that, in order to obtain a more complete assessment of the juridical issues concerning personal data protection in OAS countries, the Secretariat for Legal Affairs repeat its request to member States for more information on existing domestic legislation, regulations, and policies.

## 8. Application of the 1982 United Nations Convention on the Law of the Sea by the States of the hemisphere

**Resolution:**

CJI/RES.4(LVI-O/00): *Application of the United Nations Convention on the Law of the Sea by the States in the hemisphere*

**Document:**

CJI/doc.48/99 rev.3: *Review of the rights and duties of States under the 1982 United Nations Law of the Sea Convention: an informal guide* (presented by Dr. Keith Highet)

During the 56th regular session of the Inter-American Juridical Committee (Washington D.C., March 2000), Dr. Keith Highet, rapporteur for the topic, presented the document CJI/doc. 48/99 rev.3, *Review of the rights and duties of States under the 1982 United Nations Law of the Sea Convention: an informal guide*, which, according to the rapporteur, summarizes the contributions, observations and comments made by Dr. Orlando Rebagliati.

Dr. Highet pointed out in the document that States parties to the Convention must prepare themselves to take advantage of all their rights and to fulfill all their obligations flowing from the Convention, and that to do so each member State that is also a State party would be well advised to designate persons within its legal advisor's office to become familiar with three central aspects of the Convention, namely, the rights and opportunities that it establishes, the duties and responsibilities that it creates, and the proper methods for responding and reacting to maritime activities of other States and maritime emergency situations. The rapporteur noted that member States of the inter-American system that are also States parties to the Convention would do well to recall their rights and obligations concerning any pending maritime disputes with other member States parties to this Convention.

Dr. Orlando Rebagliati pointed out that the document was intended for officials with responsibilities in this area and that its purpose was to highlight clearly the rights and duties of States. In this respect, he requested other members of the Inter-American Juridical Committee to keep the scope of the report in mind in any comments they might make. He also noted that some areas received little elaboration in the document, such as the issue of the seabed beyond national jurisdiction and the issue of dispute settlement but that, nevertheless, it should be possible to conclude the work during the present regular session.

After a useful debate in which members of the Juridical Committee commented on the document in question, they adopted resolution CJI/RES.4 (LVI-O/00), *Application of the United Nations Convention on the Law of the Sea by States in the hemisphere*, in which the Committee approved the above-mentioned document under the title *Review of*

*the rights and duties of States under the 1982 Law of the Sea Convention: an informal guide*; referred this document to the appropriate authorities of OAS member States responsible for applying the Law of the Sea and to other professional and academic agencies specialized in this area, and agreed to keep the question of the application of the 1982 Convention on the Law of the Sea on the Inter-American Juridical Committee's agenda and to consider the preparation of further reports on this issue reflecting comments received from States and from the Committee on Juridical and Political Affairs of the OAS Permanent Council. As well, the Inter-American Juridical Committee decided to appoint Dr. Orlando Rebagliati as co-rapporteur for the topic, in addition to the rapporteur already appointed.

It should be noted that the 30th OAS General Assembly (Windsor, June, 2000), requested the Inter-American Juridical Committee, through resolution AG/RES.1704, to continue its studies and to submit document CJI/doc.48/99 rev.3 to the United Nations Law of the Sea Division for its comments

In October 2000, pursuant to the request of the Inter-American Juridical Committee contained in its resolution CJI/RES.12 (LVII-O/00), the Department of International Law published the document entitled *Review of the rights and duties of States under the 1982 United Nations Law of the Sea Convention: an informal guide*, in honor of the memory of Dr. Keith Highet.

Following is the text of the Inter-American Juridical Committee's resolution CJI/RES.4 (LVI-O/00), and of the unofficial guide approved by it.

**CJI/RES.4 (LVI-O/00)**

**APPLICATION OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY THE STATES IN THE HEMISPHERE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING CONSIDERED the importance of the 1982 Law of the Sea Convention to the States Members of the Organization of American States;

CONSIDERING the complexity of that instrument and possible uncertainties regarding its proper implementation;

HAVING CONSIDERED the document entitled *Review of the rights and duties of States under the 1982 Law of the Sea Convention: an informal guide* presented by Drs. Keith Highet and Orlando R. Rebagliati as co-rapporteurs (CJI/doc.48/99 rev.1),

RESOLVES:

1. To approve the *Review of the rights and duties of States under the 1982 Law of the Sea Convention: an informal guide.*

2. To forward said document to the governmental divisions of the OAS member States in charge of the implementation of the law of the sea, and to other professional bodies and scholars who specialize in this area.

3. To keep on the agenda of the Inter-American Juridical Committee the issue of implementation of the 1982 Law of the Sea Convention, and to consider undertaking further reports on that issue reflecting the comments received from Member States and the Committee on Juridical and Political Affairs of the OAS Permanent Council.

**CJI/doc.48/99 rev.3**

## REVIEW OF THE RIGHTS AND DUTIES OF STATES UNDER THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION: AN INFORMAL GUIDE

(presented by Dr. Keith Highet)

### Explanatory Note

During the January-February 1996 regular session of the Inter-American Juridical Committee, Dr. Keith Highet proposed the consideration of the topic “Application of the United Nations Convention on the Law of the Sea by the States of the Hemishphere”.

Between the 55th and the 56th regular session (August 1999 and March 2000), the rapporteur Dr. Keith Highet, submitted to the Inter-American Juridical Committee document CJI/doc.48/99, "Rights and Duties of States under the United Nations Convention on the Law of the Sea of 1982."

The Present document “Review of the Rights and Duties of States under the 1982 Law of the Sea Convention: an Informal Guide”, is the revised version number 3 of the original document and includes several contributions, observations and comments by Dr. Orlando Rebagliati, who was appointed rapporteur of the topic during the 56th regular session of the Inter-American Juridical Committee.

## RIGHTS AND DUTIES OF STATES UNDER THE 1982 UNITED NATIONS LAW OF THE SEA CONVENTION

*This study is the product of the work of the Inter-American Juridical Committee and is being transmitted to the Committee on Juridical and Political Affairs. This study does not constitute an official position or interpretation of the Convention by the Inter-American Juridical Committee, nor is it intended to reach any legal conclusions regarding the Conveniton, its status, or its applicability to non-party States. This study does not represent the official position or interpretation of the Organization of American States, its subcommittees, or its Member States, and all questions or interpretation of the provisions of the Convention are reserved to individual States.*

### I. INTRODUCTION

This study aims to provide member States of the Organization of American States with guidance as to their specific duties, obligations, responsibilities and rights under the 1982 United Nations Convention on the Law of the Sea (the “1982 Convention” or “Convention”). The task has acquired growing significance following the entry into force of the Convention on 16 November 1994. That event marked the culmination of a decades-long effort to formalize the rules that bind States in their international relations concerning ocean affairs—an effort that 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.[1] As such, it is imperative that the recognition and understanding of States' duties and rights under the Convention be both common and widespread. 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 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.[2] 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 established by the Convention. The study does also detail, however, 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 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 and rights 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., hamper innocent passage). Compliance with these duties usually involves simply 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.[3] Such "soft" duties can generally be

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1 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 1(2) 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."

2 "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.

3 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 sub-regional, 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

fulfilled by a good faith effort to achieve the specified objective of the provision. For example, a State Party could satisfy the repeated obligation of consultation and cooperation by setting up a consultative office in its legal advisor's office. The consultative office would then work directly with other States and indirectly through various international organizations (*e.g.*, the International Civil Aviation Organization, the International Seabed Authority, or the International Maritime Organization) in fulfillment of its consultative obligation.

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.[4]

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. Many aspects of the Convention have evolved directly out of longstanding historical State practice and widely accepted norms of international law, although others represent progressive developments of international law. In addition, the Convention has, as of this writing, been signed by 158 States and ratified by 132.[5] ~~;~~ This study is not intended to express any opinion regarding the legal status of the Convention, but it is important to note that the Convention could indirectly affect States in the inter-American system that are not parties to the Convention, even though they may not be affected directly by its provisions.[6]

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.

Notwithsatnding those necessary limitations on the scope of this review, this stydy will be continued and may be supplemented by further reports to include recent developments relevant to the implementation relevant to the implementation of the 1982 Convention. Likely topics for future discussion may comprise settlement of disputes including cases before the International Tribunal for the Law of the Sea, the 1995 Agreement for the Implementation of the Provisions of the Convention relating tot he Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and the

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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.").

4 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.)

5 A list of States that are parties to the Convention is contained in Annex I.

6 For more information on ~~the evolution of~~ the Law of the Sea Convention and its interaction with customary law, see, e.g., CHURCHILL, R.R., LOWE, A.V. *The law of the sea*. [s.l.:s.n.], 1988; BROWNLIE, Ian. *Principles of public international law.* [s.l.:s.n.], 1990. p.180-257.

subsequently adopted Agreement on the Implementation of Part XI of the Convention relating to the Area of the seabed and ocean floor beyond national jurisdiction.

## 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,"[7] are open to all States, regardless of whether they are coastal or land-locked.[8] The freedoms of the high seas are not entirely unlimited, however. They must be exercised with due regard for the interests of other States and for the rights of States under the Convention.[9] 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.[10]

### 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 advisors.

All States are obligated to "protect and preserve the marine environment" under the Convention.[11] 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"[12] to formulate rules, standards, and recommended practices for the protection and preservation of the marine environment.[13] The Convention contains a number of similar "soft" duties that relate to the marine environment. More specifically, States must individually or jointly take measures to prevent, reduce and control pollution of the marine environment,[14] and must monitor the risks or effects of pollution.[15] 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.[16] States must also cooperate with other States to promote information about pollution of the marine environment,[17] to establish appropriate scientific data for the creation of rules, standards and practices for reducing pollution,[18] 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.[19]

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7 Art. 86.
8 Art. 87(1).
9 Art. 87(2).
10 Art. 117.
11 Art. 192.
12 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 term in the various contexts in which it is used in the Convention. See BULLETIN. United Nations Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, Law of the Sea. n.31, 79-96, 1996.
13 Art. 197.
14 Art. 194.
15 Art. 204.
16 Art. 198.
17 Art. 200.
18 Art. 201.
19 Art. 202.

The Convention also includes specific directives or "hard" duties 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,[20] from or through the atmosphere,[21] and through dumping.[22] States that have vessels, installations, structures or other devices flying their flag engaging in activities in the Area are required to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from those activities.[23] 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.[24] 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.[25]

### 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.[26] 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.[27] 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.[28] 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 basis[29] and co-operate to encourage and facilitate the transfer of skills and technology in this area to developing States.[30] (No definition of "developing State" is contained in the Convention.)

### 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.[31] 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, 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.

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20 Art. 207.
21 Art. 212.
22 Art. 210. The term "Area" refers to "the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." Art. 1.
23 Art. 209.
24 Art. 211.
25 Art. 208.
26 Art. 239; Art. 242.
27 Art. 242.
28 Art. 266.
29 Art. 271.
30 Art. 273.
31 Art.1(1)(1).

Under the Convention, no State may claim or exercise sovereignty or sovereign rights over the Area or its resources.[32] Furthermore, States must 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.[33] All States Parties are responsible for ensuring compliance with the provisions of the Convention relating to the Area.[34]

In addition, States, both in their individual capacity and in their capacity as members of the Authority,[35] must cooperate in promoting the transfer of technology and scientific knowledge relating to activities in the Area.[36] Finally, all States Parties must provide contributions to the administrative budget of the Authority as assessed by the Assembly, and must act in accordance with the Assembly's decisions regarding the equitable sharing of financial and other economic benefits derived from activities in the Area.[37]

### 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 concerns 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.[38] Furthermore, parties to a dispute are obliged under the convention to engage in an exchange of views regarding settlement by negotiation or other peaceful means in three specific circumstances: (1) when a dispute arises between States Parties concerning the interpretation or application of the Convention; (2) when a procedure for the settlement of such a dispute has been terminated without a settlement, or (3) when a settlement has been reached and the circumstances require consultation regarding the manner of implementation.[39]

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.[40] If the parties agree to conciliation, the proceedings may only be terminated in accordance with the agreed conciliation procedure.[41] 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 compulsory procedures outlined in Section 2 of Part XV of the Convention.[42]

Under the procedures outlined in Section 2, States are encouraged to pre-commit 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 such

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32 Art. 137.
33 Art. 138.
34 Art. 139.
35 Art. 1(1)(1) ("'Authority' means the "International Sea-Bed Authority"). All parties to the Convention are members of the Authority. Art. 156(2).
36 Art. 144.
37 Art. 160.
38 Art. 279.
39 Art. 283.
40 Art. 284.
41 *Ibid*.
42 Art. 286.

disputes.[43] That decision is then binding unless and until the State files a new declaration or a notice of revocation.[44] (However, a new declaration, notice, or the expiry of a declaration will not affect pending proceedings unless the parties otherwise agree.[45])

If all the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure. If not, it may be submitted only to arbitration in accordance with Annex VII of the Convention, unless the parties agree to do otherwise.[46] 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 by all parties.

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.[47] 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.[48]

### 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 fulfil in good faith the obligations assumed under the Convention[49] and to refrain from any threat or use of force against another State in exercising their rights and performing their duties under the Convention.[50] 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.[51]

## III. RIGHTS OF COASTAL STATES

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

### 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.[52] A coastal State may exercise control over the zone contiguous to its territorial sea for specific enumerated purposes.[53] The contiguous zone may extend up to 24 nautical miles from the baselines from which the territorial sea is measured.[54]

In addition, every coastal State may establish an exclusive economic zone beyond and adjacent to the territorial sea,[55] but delimitation of the exclusive economic zone with

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43 Art. 287(1)
44 Art. 287(6),(7).
45 Art. 287(7).
46 Art. 287(5). Note that Section 3 of Part XV provides for limitations and exceptions to the applicability of the compulsory procedures contained in Section 2.
47 Art. 290.
48 Art. 296.
49 Art. 300.
50 Art. 301.
51 Art. 303.
52 Art. 3.
53 Art. 33.
54 *Ibid*.
55 Art. 55.

States with opposite or adjacent coasts must be effected by agreement on the basis of international law.[56] The coastal State is also permitted to establish the outer limits of the continental shelf wherever the margin extends beyond 200 nautical miles from the baselines from which the territorial sea is measured.[57] If a State fails to act on these rights, it may prejudice them.

### B. Baselines

The Convention establishes several criteria that coastal States may use in the process of drawing the baselines from which the territorial sea and other maritime areas are 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.[58] In drawing such straight baselines, States may take into account economic interests peculiar to the region concerned, as evidenced by long usage.[59]

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.[60] 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.[61]

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.[62] 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.[63] (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.[64])

An exception to these rules is provided, however, for historic bays. Under the Convention, the preceding rules do not apply to such bays, although the term "historic bay" is not defined by the Convention.[65] Rather, "historic bay" is a term taken from general international law which provides for claims by States to sovereignty (or more limited rights) over bays where justified by constant and longstanding treatment and the acquiescence of other States.[66]

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

56 Art. 74.
57 Art. 76(4).
58 Art. 7(1).
59 Art. 7(5).
60 Art. 7(2).
61 Art. 9.
62 Art. 10 (4).
63 Art. 10(5).
64 Art. 10.
65 Art. 10(6).
66 See INTERNATIONAL COURT OF JUSTICE. *Fisheries Case (U.K. v. Norway) – 1951.* 2 v. Netherlands: A.W. Sifthoff, [1985?]. (Pleadings, oral arguments, documents). Note: Merits. Churchill, R.R., LOWE, A.V. *The law of the sea.* 2.ed. [s.l.:s.n.], 1988. p. 36-38.

sufficiently closely linked to the land domain to be subject to the regime of internal waters.67 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.[68] 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.[69]

### C. Sovereignty and sovereign rights

The Convention recognizes the sovereignty or sovereign rights of coastal States over adjacent waters. Apart from the sovereignty States exercise over their internal waters, the extent and quality of the rights States have over adjacent waters vary significantly depending on the distance of the waters in question from land. States possess sovereignty over their internal waters, which are the waters on the landward side of the baseline of the territorial sea.[70] 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.[71]

Sovereignty of the coastal State also extends to its territorial sea, which may extend up to 12 nautical miles from the State's baselines.[72] 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.[73] 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.[74]

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 may extend 200 nautical miles from the baselines from which the territorial sea is measured,[75] 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 sea-bed, as well as of the sea-bed and its subsoil. These sovereign rights include other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents, and winds.[76] 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.[77]

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67 Art. 7(3).
68 Art. 7(4).
69 Art. 7(6).
70 Art. 2(2); Art. 8(1).
71 Art. 8(2).
72 Art.2; Art. 3.
73 Art. 33.
74 Art. 33(1).
75 Art. 57.
76 Art. 56(1)(a).
77 Art. 56(1)(b).

This broad definition of a State's rights over resources in its exclusive economic zone, includes the resources of the seabed and subsoil, and thus encompasses rights to the resources of the continental shelf (for which see immediately below.) To the extent that the definition of a State's sovereign rights includes rights to resources of the continental shelf, there is perceived to be a legal anomaly or duplication in the Convention.)

There is a question as to whether a State needs to proclaim its exclusive economic zone in order to exercise its sovereign rights therein; the Convention does not require a proclamation to that end, but State practice since 1982 has strongly suggested that many States view their exercise of rights as requiring such a proclamation.

The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea and which are a natural prolongation of its land territory. This area may extend 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.[78] 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.[79] The Convention specifies that these rights do not depend on any express proclamation on the part of the coastal State.[80] (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 should establish the outer edge of the continental margin as prescribed in the Convention.[81] 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.[82] Furthermore, where the State exploits the continental shelf beyond 200 nautical miles, it must make payments or contributions through the International Sea-Bed Authority as provided for in the Convention.[83]

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.[84] The high seas are open to all States and all are granted substantial freedom to use them.[85] No State may validly purport to subject any part of the high seas to its sovereignty.[86]

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

78 Art. 76(1).
79 Art. 77.
80 Art. 77(3).
81 Art. 76(4).
82 Art. 78.
83 Art. 82.
84 Art. 86.
85 Art. 87.
86 Art. 89.

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.[87]

## 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.[88] 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."[89] A State must also publicize any sea lanes and traffic separations schemes that it establishes,[90] any danger to navigation of which it has knowledge,[91]and any temporary suspension of innocent passage through its territorial sea.[92]

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).[93] Importantly, a coastal State must give due publicity to the geographical coordinates of its exclusive economic zone limits.[94] It must also publicize the outer limits of its continental shelf95 and show them on charts (or lists of geographical coordinates), which it must deposit with the Secretary-General.[96] Finally, if a State establishes requirements for the prevention, reduction and control of pollution in the marine environment, it must give them due publicity as well.[97]

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87 Art. 111.
88 Art. 16.
89 Art. 5.
90 Art. 21(3); Art. 22(4).
91 Art. 24(2).
92 Art. 25(3).
93 Art. 60(3).
94 Art. 75(2).
95 Art. 84(2).
96 *Ibid*.
97 Art. 211(3).

### 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.[98] 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.99 Passage is innocent only so long as it does not prejudice the peace, good order, or security of the coastal State.[100] 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.[101] It may also designate sea lanes and traffic separation schemes,[102] may levy charges for services rendered on a foreign ship passing through its territorial waters,[103] and may suspend innocent passage of foreign ships temporarily in specified areas of its territorial sea when necessary for protection of its security.[104] Finally, the coastal State may exercise very limited criminal jurisdiction over foreign ships exercising the right of innocent passage through the territorial Sea.[105]

### 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.[106] 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;[107] it must also promote optimum use of the living resources in the exclusive economic zone,[108] cooperate with other coastal States to conserve and develop overlapping stocks,[109] cooperate with other States whose nationals fish for highly migratory species regarding the harvesting of those species,[110] cooperate to conserve marine mammals,[111] take responsibility for anadromous stocks that originate in the State's waters,[112] 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.[113]

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.[114]

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98 Art. 17; Art. 24.
99 Art. 18(2).
100 Art. 19.
101 Art. 21.
102 Art. 22.
103 Art. 26.
104 Art. 25(3).
105 Art. 27.
106 Art. 57.
107 Art. 61.
108 Art. 62.
109 Art. 63.
110 Art. 64.
111 Art. 65.
112 Art. 66.
113 Art. 67.
114 Art. 60.

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.[115] Although the coastal State is expected to permit other States to conduct pure research in its exclusive economic zone,[116] 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.[117] 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.[118]

### D. Continental shelf

As mentioned above, the continental shelf of a coastal State is the sea-bed and subsoil of the submarine areas extending from 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.[119] 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.[120] 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.[121]

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.[122] 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.[123]

Finally, if a coastal State exploits its continental shelf beyond 200 nautical miles, it is required to make payments or contributions in kind to the States Parties through the International Sea-Bed Authority established under the Convention.[124]

### 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.

### 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.

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115 Art. 58.
116 Art. 246(3).
117 Art. 246(5).
118 Art. 58(3).
119 Art. 76.
120 Art. 83.
121 Art. 76; Art. 84.
122 Art. 79.
123 Art. 80.
124 Art. 82; Art. 156(1).

### 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 FOR STATES PARTIES WITH SPECIFIC GEOGRAPHIC FEATURES

Rights 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.[125]

A host of unique rights are also granted to States that border straits which lie within their 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. During “transit passage” (i.e., passage through those straits[126]) 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.[127] States bordering straits may designate sea lanes and prescribe traffic separation schemes where necessary to promote the safe passage of ships.[128] They are also permitted to adopt laws and regulations concerning navigation, pollution, fishing vessels, and loading and unloading.[129] Notably, however, in contrast to other coastal States and in particular in contrast to the rules governing the territorial sea, States bordering straits must permit aircraft the right of transit passage over the straits.[130]

### B. Archipelagic States

Archipelagic States—States constituted wholly by one or more archipelagos that may include other islands[131]—are also granted some unique rights 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 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.[132]

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125 See *supra* Part IV.B.
126 Art. 38(1).
127 Art. 40.
128 Art. 41.
129 Art. 42.
130 Art. 38(1); Art. 39; Art. 17.
131 Art. 46.
132 Art. 47.

In addition, within its archipelagic waters, the archipelagic State may draw closing lines for the delimitation of internal waters.[133] 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.[134] Within and above the archipelagic waters and the adjacent territorial sea, an archipelagic State may, within certain specified limits,[135] designate sea lanes and air routes suitable for the continuous and expeditious passage of foreign ships and aircraft,[136] as well as traffic separation schemes for the safe passage of ships.[137] 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.[138]

### C. Geographically disadvantaged states

"Geographically disadvantaged" States possess a non-transferable right to participate in the exploitation of part of a coastal State's surplus living resources within its exclusive economic zone. That right applies only to coastal States in the same region or subregion, however, and not where the coastal State's economy is overwhelmingly dependent on the exploitation of the living resources of its exclusive economic zone.[139]

In addition, geographically disadvantaged States may request technical assistance from other States in developing their marine scientific and technological capacity.[140] States Parties must endeavor to coordinate and cooperate in the effective transfer of marine technology.[141] In addition, neighboring land-locked and geographically disadvantaged States shall be given, whenever feasible, the opportunity to participate in marine scientific research, and must be given information regarding such research when appropriate.[142]

### 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.[143]) Land-locked States are granted (*mutatis mutandis*) rights similar to those of developing States under the Convention. Land-locked States may request technical assistance from other States in developing their marine scientific and technological capacity[144] just as developing States may do,[145] States Parties are required to endeavor to cooperate in the effective transfer of marine technology to such States.[146] 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.[147]

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133 Art. 50.
134 Art. 49.
135 Art. 53.
136 *Ibid*.
137 Art. 53(6).
138 Art. 53(12).
139 Art. 69-72.
140 Art. 266.
141 Art. 269; Art. 272.
142 Art. 254.
143 *Cf*. Art. 87.
144 Art. 266.
145 See *infra* Part VII.A.
146 Art. 269; Art. 272.
147 *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.[148] They must, however, take appropriate steps to claim and ensure this right.[149]

## VI. ADDITIONAL DUTIES FOR STATES PARTIES WITH SPECIFIC GEOGRAPHICAL FEATURES

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

### A. States bordering straits

Examples of such correlative duties include that States bordering straits must grant the right of "transit passage" to ships and aircraft,[150] may not hamper or suspend innocent or transit passage in the strait,[151] 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.[152] All such sea lanes and traffic separation schemes must be clearly indicated on charts that the State gives due publicity.[153]

States bordering straits may issue laws and regulations relating to transit passage through the strait,[154] but may not discriminate against foreign ships and must publicize such laws and regulations.[155] 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.[156]

### 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 it must assemble lists of geographical coordinates of points on the baselines and give due publicity to them.[157] 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.[158]

Archipelagic States must permit innocent passage through archipelagic waters but—unlike States bordering straits—may temporarily suspend this right if necessary for security reasons.[159] Archipelagic States may not, however, hamper "archipelagic sea lanes passage,"

148 Art. 125.
149 Arts. 125-130, 132.
150 Art. 38.
151 Art. 44; Art. 45.
152 Art. 41.
153 *Ibid*.
154 Art. 42(1).
155 Art. 42.
156 Art. 43.
157 Art. 47.
158 Art. 51.
159 Art. 52.

which is equated to transit passage under the Convention.[160] Just as in the case of straits, when an archipelagic State 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.[161] 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.[162]

### 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"[163]—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.[164]

### D. States bordering land-locked States

States bordering land-locked States, or "transit 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.[165] 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.[166]

## 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.[167] Developing States may also request technical assistance from other States in developing their marine scientific and technological capacity.[168] States Parties are also required to endeavor to cooperate in the effective transfer of marine technology.[169]

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

160 Art. 54.
161 Art. 53.
162 Art. 42; Art. 54.
163 Art. 122.
164 Art. 123.
165 Arts. 125-32.
166 Arts. 125, 127-132.
167 Art. 202.
168 Art. 266.
169 Art. 269; Art. 272.

research when appropriate.[170] A coastal State must grant to developing States in the same region or subregion a non-transferable right to participate in the exploitation of surplus living resources within its exclusive economic zone, unless the coastal State's economy is overwhelmingly dependent on the exploitation of those resources.[171]

### B. Port States

An example of a "factual background" or context is the existence of a port on the coast of a State Party, which renders that State into a "port State." 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 or regulations regarding the prevention, reduction and control of pollution from vessels, so long as those laws were adopted in accordance with the Convention or applicable international rules and standards.[172] Similarly, a State may undertake investigations and institute proceedings in respect of any discharge emitted in violation of applicable international rules and standards by a vessel voluntarily within a port or at an off-shore terminal of the State.[173] For a State to exercise jurisdiction in either case, however, the violation in question must occur within the territorial sea or exclusive economic zone of that State. 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.[174]

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.[175]

### C. Flag States

Every State, including land-locked States, may grant its nationality to ships, but must fix the conditions for the grant of such nationality, and must issue nationality documents only to those ships that meet those conditions.[176] When a State grants nationality to a ship, it is known as the "flag State" of that ship. 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.[177] 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.[178]

Flag States also bear the duty of taking measures to prevent the transportation of slaves,[179] to cooperate in the repression of piracy,[180] to cooperate in the suppression of illicit

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170 Art. 254.
171 Art. 69-72.
172 Art. 220.
173 Art. 218.
174 Art. 226.
175 Art. 219.
176 Art. 91.
177 Art. 94.
178 Art. 98.
179 Art. 99.
180 Art. 100.

traffic in narcotic drugs or psychotropic substances,[181] and to cooperate in suppressing unauthorized broadcasting from the high seas.[182]

Finally, since all States are permitted to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf,[183] 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).[184]

### 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,[185] 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.[186]

### E. Researching States

States or nationals of States that undertake marine scientific research incur specific duties under the Convention. 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 duration of the project.[187] It must also comply with several specific conditions,[188] and must give notice of the proposed research project to any neighboring land-locked and geographically disadvantaged States, and advise the coastal State of that notification.[189] (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.[190])

States or nationals of States that deploy any type of scientific research installations or equipment in any areas of the marine environment must also observe several specific requirements. First and foremost, they must honor the conditions prescribed in the Convention for the conduct of research in any such area.[191] Furthermore, they must ensure that the installations and equipment bear identification markings indicating the State of registry or the international organization to which they belong, and contain adequate warning signals to ensure safety of sea and air navigation.[192] States also must not interfere with international shipping routes when deploying and using any type of scientific research

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181 Art. 108.
182 Art. 109.
183 Art. 112.
184 Art. 113.
185 Art. 114.
186 Art. 115.
187 Art. 248.
188 Art. 249.
189 Art. 254.
190 Art. 255.
191 Art. 258.
192 Art. 262.

installation or equipment[193] and all States must ensure that their vessels respect any safety zones created around such installations.[194]

### 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. In certain ice-covered areas, particularly severe climactic conditions and the presence of ice 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. Coastal States with such 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. [195.] In passing such laws and regulations, States must pay due regard to navigation and the protection and preservation of the marine environment.[196]

## VIII. CONCLUSIONS

As is clear from the foregoing, the Convention establishes numerous rights and duties for States Parties. Members of the Inter-American system who are also States Parties to the Convention should prepare themselves to take advantage of all the rights , and comply with all the duties, that the Convention establishes. In order to do so, a member State that is also a State Party would be well advised to designate persons in its legal advisor's (or equivalent) office to become familiar with three central aspects of the Law of the Sea Convention: (1) the rights 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 under the Convention, several merit 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.[197] 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.[198] Land-locked States may also obtain access to and from the sea for the purpose of exercising their rights under the Convention.[199] Moreover, all States are permitted to participate in harvesting and using the resources of the Area of the high seas,[200] and all States may seek resolution of disputes.[201] Finally, States possessing specific geographical features possess certain particular rights as a consequence.[202]

(2) Most significantly, there are numerous duties under the Convention that member States should consider assigning to a legal officer with responsibility for monitoring and compliance. Furthermore, 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.[203] All States bear the additional burden of protecting and

193 Art. 261.
194 Art. 260.
195 Art. 234.
196 *Ibid*.
197 *See* Part IV.
198 *See* Part III.
199 *See ibid*.
200 *See ibid*.
201 *See ibid*.
202 *See* Part VI.
203 *See* Part II A. and D.

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.[204]

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 with the Secretary General of the United Nations.[205] 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 the exclusive economic zone (foremost among which being the conservation of the natural resources of the zone), delineate and publicize the outer limits of their continental shelves, and observe the rights of others in their continental shelf areas.[206]

In addition, member States possessing specific geographical features must observe specific enumerated requirements established by the Convention.[207] 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.[208]

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 action that the State takes in response to the maritime activities of others is within the limits and controls of the Convention. In this connection, as well as generally, member States that are States Parties should be cognizant of the Convention's specific and mandatory dispute resolution provisions.[209] Member States in the Inter-American system that are also States Parties would do well to recall these rights and obligations as regards any pending maritime disputes with other States Parties to this Convention.

## ANNEX

### A. States Parties to the Convention[210]:

Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bahrain, Barbados, Belgium,Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Cameroon, Cape Verde, Chile, China, Comoros, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic Republic of the Congo, Djibouti, Dominica, Egypt, Equatorial Guinea, *European Community*, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Iceland, India, Indonesia, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Lao People's Democratic Republic, Lebanon, Malaysia, Mali, Malta, Marshall Islands, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Myanmar, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Oman, Pakistan, Palau, Panama, Papua New Guinea, Paraguay, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Sweden, the former Yugoslav Republic of Macedonia, Togo,

204 *See* Part II B., C. and E.
205 *See* Part V A.
206 *See* Part V B., C., and D.
207 *See* Part VII.
208 See Part VIII.
209 See Part II E.
210 As updated by May 5 2000.

Tonga, Trinidad and Tobago, Tunisia, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Vanuatu, Viet Nam, Yemen, Yugoslavia, Zambia and Zimbabwe.

Although the Convention does not admit reservations,[211] States may, when signing, ratifying, or acceding to the Convention, make "declarations or statements," provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of the Convention in their application to that State.[212]

211 Article 308.
212 Article 310.

## 9. Democracy in the inter-American system

**Resolution:**

CJI/RES.17(LVII-O/00): *Democracy in the inter-American system*
Annex: *Explanation of vote*
(presented by Dr. Eduardo Vío Grossi)

**Document:**

CJI/doc.35/00 rev.1: *Democracy in the inter-American system. Follow-up report: a new methodological approach. Instrument, declaration or inter-American treaty on democracy*
(presented by Dr. Eduardo Vío Grossi)

During the 57th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August. 2000), Dr. Eduardo Vío Grossi, rapporteur for the topic, presented document CJI/doc.35/00 rev.1, *Democracy in the inter-American system*. *Follow-up report: a new methodological approach. Instrument, declaration or inter-American treaty on democracy*.

Dr. Vío Grossi indicated that this new focus on the topic reflected recent events within the hemisphere, in particular the sending of OAS election observer missions and their activities in several countries of the region. The rapporteur suggested that the Inter-American Juridical Committee might undertake a study of representative democracy, with a view to determining inter-American standards defining it, for use in addressing the situation in a given country and evaluating whether or not international rules and obligations had been violated, thereby establishing a framework within which member States could fix their own parameters. Such a study should take into account the OAS Charter and the American Convention on Human Rights and should, in light of those documents, examine the essential elements such as the principle of the separation of powers, the electoral system and the independence of surveillance bodies, the role of the judiciary and the armed forces, etc. The Juridical Committee might also examine what verification mechanisms might be used to determine whether a State was fulfilling its obligation to exercise effective representative democracy, and the advisability of establishing a special procedure to this end.

Several members of the Juridical Committee stressed the importance and timeliness of this issue. They also asked the rapporteur whether the study would cover only regional standards or also those flowing from general international law on representative democracy. It was suggested that it would be premature to speak of a treaty on the topic, but that consideration could indeed be given to a general legal instrument, without prejudging its exact nature. Other members noted that both Resolution 1080 and the Washington Protocol of Reforms to the Charter of the Organization of American States are exceptions to the general rule which calls for noninterference in the internal affairs of States, and to the manner in which they

organize their domestic legal structure. This means that, at least for now, it is not possible to think of a political body to determine the degree of a State's compliance with the concept of democracy itself. Several members indicated that for the time being the Inter-American Juridical Committee should limit its work to examining rules and practices as they relate to democracy and later, on that basis, it might evaluate the kind of contribution that the Committee could make in this area.

Other members suggested that it might be premature to take a decision on this point during the current regular session, and that the next step could well be to examine such aspects as electoral processes in various member States and the role, functions and limitations of OAS election observer missions.

Other members called for a study of OAS member States' practice in recent years to determine the legal issues arising therefrom. Subsequently, the Juridical Committee might consider whether it could suggest standards applicable to those aspects, through some form of legal instrument.

The rapporteur took note of all these comments and pointed out that the issue is not limited to the electoral question. As a methodology, he proposed that the Juridical Committee might first determine what is the substance of the right to democracy, and then examine the functions of international surveillance bodies in that light. He was not, he said, proposing a progressive development of that right, but merely a stocktaking of current standards in this area.

On the basis of this discussion, the Inter-American Juridical Committee approved resolution CJI/RES.17 (LVII-O/00), *Democracy in the inter-American system*, with the abstention of Dr. Eduardo Vío Grossi, who submitted a reasoned vote. In that resolution, the Juridical Committee decided to include on its agenda for its coming regular sessions the topic of Democracy in the Inter-American System, for priority consideration; it thanked Dr. Eduardo Vío Grossi for his significant contribution to its study of this issue and invited him to present to the Juridical Committee a proposal, in accordance with his report CJI/doc.35/00 rev.1; invited other members of the Juridical Committee wishing to propose initiatives in this area to submit them to the Secretariat for distribution before the next session of the Committee; and requested the other bodies of the Organization that are also concerned with this matter within their respective jurisdictions, and in particular the General Secretariat, through the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy, to cooperate with members of the Committee in preparing any reports or proposals.

Following is the text of the resolution of the Inter-American Juridical Committee, with the reasoned vote accompanying it and the report of Dr. Eduardo Vío Grossi.

**CJI/RES.17 (LVII-O/00)**

**DEMOCRACY IN THE INTER-AMERICAN SYSTEM**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that, on the basis of the all the inter-American juridical antecedents that have existed prior to that date concerning Democracy, it was stated in resolution CJI/RES.I-3/95, of 23 March 1995 that

> in accordance with the Charter of the Organization of American States and the Resolutions of its Organs, the Organization and its Member States have observed the following principles and norms with regard to the effective exercise of representative democracy:
>
> ONE: Every State in the Inter-American System has the obligation to effectively exercise Representative Democracy in its political organization and system. This obligation exists with regard to the Organization of American States, and to comply therewith, every State in the Inter-American System has the right to choose the means and forms that it deems appropriate thereto.
>
> TWO: The principle of non-intervention and the right of each State in the Inter-American System to elect its political, economic and social system with no outside intervention and to organize itself in the manner most convenient thereto may not include any violation of the obligation to effectively exercise Representative Democracy in the above-mentioned system and organization.
>
> THREE: The Organization of American States is competent to promote and consolidate Representative Democracy in each and every one of the Member-States. In particular, the Organization is responsible, through the ad Hoc Meeting of Ministers of Foreign Affairs or the General Assembly sitting in an Extraordinary Sessions period, to decide under the terms of the Resolution on "Representative Democracy" [AG/RES.1080 (XXI-O/91)], whether one of its Member-States has violated or ceased to comply with the obligation to effectively exercise Representative Democracy.
>
> FOUR: The abrupt or irregular interruption of the democratic institutional political process or the legitimate exercise of power by a democratically-constituted government within the Inter-American System shall continue non-compliance with the obligation to effectively exercise Representative Democracy.
>
> FIVE: Any State in the Inter-American System that fails to comply with the obligation to effectively exercise Representative Democracy acquires the obligation to re-establish the effective exercise thereof. The Resolutions that the Organization of American States may adopt under such circumstances should be designed to bring about such re-establishment.

IN VIEW OF THE FACT that the practice observed by the States and the Organization with regard to the Electoral Observation Missions created by resolution [AG/RES.991 (XIX-O/89)], of 18 November 1989, which undertake their work on the invitation or with the consent of the interested States, has made it clear that it would be appropriate to analyze some matters related to their work from the juridical point of view;

CONSIDERING that the Special Mission sent to Peru on that country's invitation, in accordance with resolution [AG/RES.1753 (XXX-O/00)], of 5 June 2000, has the objective, of "exploring, with the Government of Peru and other sectors of the political community, options and recommendations aimed at further strengthening democracy in that country, in particular measures to reform the electoral process, including reform of judicial and constitutional tribunals, as well as strengthening freedom of the press";

CONVINCED that in order for such missions to fulfill their objectives, it would be useful if they had available generally accepted guidance as to the principles, norms, criteria and practices concerning the effective exercise of representative democracy as related to their functions;

CONSIDERING that, in general, the principle of juridical security in inter-American relations makes it advisable to seek a more precise definition of the international principles, norms, criteria and practices concerning the matter within the inter-American context;

HAVING CONSIDERED the document presented at this regular session by the rapporteur of the topic, Dr. Eduardo Vío Grossi, entitled *Democracy in the Inter-American System. Follow-up report: a new methodological approach. Instrument, declaration or inter-American treaty on democracy* (CJI/doc.35/00 rev.1, 17 August 2000);

TAKING INTO ACCOUNT the observations and initiatives formulated by several members during the course of the lengthy consideration of the topic at this regular session,

RESOLVES :

1. To include as a priority topic on the agenda for the next regular sessions, Democracy in the Inter-American System.

2. To thank Dr. Eduardo Vio Grossi for his important contribution to the study of this topic and to invite him to present to the Juridical Committee a draft on the subject, as mentioned in his report CJI/doc.35/00 rev.1.

3. To invite the members of the Juridical Committee who wish to formulate proposals or initiatives on this question, to send them to the Secretariat for distribution before the next session of the Committee.

4. To request the other agencies of the Organization that are also involved in this issue in the framework of their respective responsibilities, and especially the General Secretariat, through the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy, to lend their collaboration to the Juridical Committee members in preparing their reports or drafts.

**EXPLANATION OF VOTE**

(presented by Dr. Eduardo Vío Grossi)

Rio de Janeiro, 25 August 2000

I abstain from voting on resolution CJI/RES.17 (LVII-O/00) of 19 August 2000, on *Democracy in the Inter-American System*, in view of the fact that it limits the juridical scope both of the circumstances that gave rise to it and therefore also of the orientation of the work that it consequently determines to undertake.

As a matter of fact, and precisely as stated in document CJI/doc.35/00 rev.1 of 17 August 2000, which bears the title *Democracy in the Inter-American System. Follow-up report: a new methodological approach. Instrument, declaration or inter-American treaty on democracy*, the documents that establish the Electoral Observation Missions and the Special Mission sent to Peru reveal the need to define which international juridical norms with regard to Democracy are to serve as comparison with the pertinent national norms and practices, so that it may be ascertained whether Representative Democracy is indeed exercised in the State under observation.

What this entails, then, is that, based on the prevailing obligation to exercise effectively Representative Democracy in the States of the Inter-American System (an obligation that is clearly declared by the Inter-American Juridical Committee itself in its resolution CJI/RES.I-3/95 of 23 March 1995), an attempt should be made to decide jointly on the content of this inter-American juridical obligation in a solemn juridical document, be this a simple instrument, a declaration or even an inter-American treaty on Democracy. Such a methodological option was proposed in the above-mentioned document CJI/doc.35/00 rev.1 and in Draft Resolution CJI/doc.40/00 of 17 August 2000, both presented by the undersigned and nonetheless limited by the above-mentioned resolution CJI/RES.17 (LVII-O/00) to an individual work by the proponent.

Accordingly, my abstention aims not only to defend the methodological alternative of attempting collectively to draw up as soon as possible a Draft Democratic Pact of the Americas that gathers together the prevailing inter-American juridical norms, principles and practices as regards the contents of the inter-American juridical obligation of effectively exercising Representative Democracy, but also to draw attention to the importance and transcendence of this eminently juridical urgent task as well as the equally juridical result that it might yield.

**CJI/doc.35/00 rev.1**

## DEMOCRACY IN THE INTER-AMERICAN SYSTEM<br>FOLLOW-UP REPORT: A NEW METHODOLOGICAL APPROACH.<br>INSTRUMENT, DECLARATION OR INTER-AMERICAN TREATY ON DEMOCRACY

(presented by Dr. Eduardo Vío Grossi)

1. In its resolution CJI/RES.5/LII/98 of 19 March 1998, the Inter-American Juridical Committee, in addition to recalling the validity and scope of the international juridical obligation of the Member States of the Inter-American System to effectively exercise Representative Democracy, an obligation that is set forth in resolution CJI/RES.I-3/95 of 23 March 1995, resolved "*to place on record that, in its view, there are other aspects of this topic that could be analyzed (such as the party political system, the decision-taking system, election campaign financing and others), but due to the scope and complexity thereof, the funding that would be needed to study them exceeds the amounts currently available.*"

2. In its considerations on the above-mentioned resolution CJI/RES.5/LII/98, the Inter-American Juridical Committee expresses that "*issues linked to election processes and the exercise of Representative Democracy have not yet been covered by the international juridical arrangements, and consequently form part of the reserved domain or internal or exclusive jurisdiction of the State,*" and that *"the new paths for the treatment of this topic, such as for instance the study of the ideas and institutions that form part of Representative Democracy, are matters falling under comparative law."*

3. Since the above-mentioned resolution, the Inter-American System has witnessed one

international juridical event that probably calls for a new focus for dealing with this question, seeing that this material might be changing or affecting the reserved domain or internal or exclusive jurisdiction of Representative Democracy in the States of the Inter-American System.

4. In fact, through resolution OAS/Ser.P AG/RES.1753 (XXX-O/00) of 5 June 2000, the General Assembly of the Organization of the American States resolved "*to send to Peru, immediately, a Mission comprising the Chair of the General Assembly and the General Secretary of the OAS with the purpose of exploring, with the Government of Peru and other sectors of the political community, options and recommendations aimed at further strengthening democracy in that country, in particular measures to reform the electoral process, including reform of judicial and constitutional tribunals, as well as strengthening freedom of the press.*"

5. The General Assembly likewise agreed "*that the Mission report to OAS foreign ministers, in a manner to be determined by the Mission, in order for full consideration of its findings and recommendations and to initiate follow-up as appropriate.*"

6. Certainly, and just as it is stated in the resolution under consideration, the General Assembly of the Organization of the American States, before approving it, took into proper account the norms pertaining to the Charter of the Organization as far as Democracy is concerned, as well as the Santiago Commitment to Democracy and the Renovation of the Inter-American System of 1991, the Declaration of Managua of 1993, and the Declarations and Plans for Action of the Summits of the Americas of 1994 and 1998.

7. Nevertheless, the General Assembly of the OAS noted "*the conclusions presented in the report of the Electoral Observation Mission to the Peru National Elections for the two electoral rounds held April 9 and May 28, 2000 and the presentation made by the Government of Peru*", manifested its concern *"that both the process and the outcome of those elections has been undermined by persisting reports of irregularities that have not been satisfactorily addressed, including immediate electoral process concerns and existing institutional deficiencies"* and recognized "*that both Peru and the Electoral Observation Mission's report have called attention to the urgent need further to strengthen democratic institutions in that country, in particular the Judicial Branch, the Public Ministry, the Constitutional Tribunal and the National Council of Magistrates, together with reforming the electoral process and strengthening freedom of the press,"* all good reasons for accepting, in the terms referred to above, "*the invitation of Peru to send a Mission for the purpose of strengthening democratic institutions.*"

8. In this regard, it should be recalled that the Electoral Observation Missions originate in resolution AG/RES.991 (XIX-O/89), which, after mentioning the norms of the Charter of the Organization relating to Democracy, provides on the one hand "*to reiterate to the Secretary General the recommendation that, when a member state so requests in the exercise of its sovereignty, missions should be organized and sent to said state to monitor the development, if possible at all stages, of each of its electoral processes,"* and on the other hand, "*to request the Secretary General of the OAS to periodically issue public reports as a result of the on-site monitoring of the electoral processes.*"

9. As may be seen from the above transcriptions, obviously the resolution AG/RES.1753 (XXX-0/00) has a greater scope than was foreseen in resolution AG/RES.991 (XIX-O/89), which is in itself also of undeniable juridical importance.

10. Indeed, the latter, while it establishes that the Electoral Observation Mission proceeds solely and exclusively at the request of the particular State as formulated in the exercise of its sovereignty, it is nevertheless likewise evident that the corresponding observation is

carried out in accordance with the parameters that the Mission itself or the Secretary General of the OAS deems appropriate to the case, and it is with regard to such criteria that the latter should periodically issue public reports, these consequently and in the last instance becoming instruments for an international evaluation of the efficiency and even the legitimacy of the corresponding national electoral process system.

11. However, resolution AG/RES.1753 (XXX-O/00) is not limited to the electoral question but also refers, as it expressly indicates, to studying not only with the Government of Peru but also with other sectors of that country's political community, opinions and recommendations aimed at further strengthening Democracy there at the invitation of that Government and in accordance with non-specified norms that are not necessarily those of Peru.

12. The question, then, is to specify which norms, criteria and/or parameters should be used by the Electoral Observation Missions and Missions such as the one sent to Peru, that is to say, which law these Missions should apply respectively to obtain their conclusions and recommendations in the corresponding reports to be issued both about the electoral processes under observation and the options and recommendations towards further strengthening democracy in the particular State being visited.

13. There is no doubt that not only should this law not be solely and exclusively that of the country concerned, since in that case there would be no need for a Mission of an inter-American nature, but also that this law should among other things be evaluated in terms of whether it really and truly allows, as pointed out in resolution AG/RES.991 (XIX-O/89), "*the periodic holding of honest electoral processes in which the will of the people is freely expressed and respected in the election of officials, without external interference.*"

14. As far as Missions such as the one sent to Peru are concerned, obviously the national juridical system has to be considered by the special Mission and even by the Government of the State and other sectors of the political community in order to determine, by comparison with norms of another nature, whether or not national democracy is strengthened and what changes might be required to fulfill that goal.

15. The exercise that the above-mentioned resolutions demand involves comparing the law and national practices of the States under observation with international norms, not all of which are included in treaties in force, which in turn were not all drawn up for the specific purpose of regulating electoral processes in the Member States of the OAS, let alone democracy, but rather human rights, that is to say, one of the elements of democracy.

16. Given these circumstances, it is logical to conclude that norms applicable in electoral observations and in cases like Peru, seem to derive from the sources of International Law dealt with in article 38 of the Statutes of the International Court of Justice, from international custom, and above all from the general principles of law, in particular those that originate in the various American juridical systems, norms that by their very nature are nevertheless insufficiently precise and even insufficiently known by the national communities involved.

17. It would thus seem necessary, for the purpose of fostering greater inter-American juridical security and more efficacy on the part of the Electoral Observation Missions and Missions such as the one sent to Peru, to try as far as possible by conventional means to make those general principles of law applicable in such cases.

18. In this sense and even at the risk of reiterating, this time by conventional means, norms that might appear obvious, it is a matter of initiating a process similar to what happened to the international juridical texts on human rights, corruption or Indian populations, texts which have the merit of not only repeating the provisions set down by

most of the constitutions of the Member States of the Inter-American System but also of lending them an international juridical scope in conformity with the minimum standard of civilization in this regard.

19. From this point of view, it is not a question of excluding totally from internal, domestic or exclusive State jurisdiction everything relating to electoral processes and democracy, but rather simply that if this State consents to international observation, equally international norms should be made available for the mission to be carried out.

20. Such as set of international juridical norms would thus be the mark for each State to determine its political system while exercising its sovereignty and without external interference, or, in other words, the way of complying with the inter-American juridical obligation of effectively exercising Representative Democracy. Such a mark, therefore, would not necessarily lead to political uniformity of the Member States of the Inter-American System.

21. The new approach proposed for the treatment of the topic on Democracy in the Inter-American System is for the Inter-American Juridical Committee to prepare, as a new methodological element, a Draft Project of an Instrument, Declaration or Inter-American Treaty on Democracy that would include such topics as the development of the norms of the Charter of the OAS on democracy, the connection between democracy and human rights, the segregation of State powers, State judicial and comptroller agencies, electoral systems and citizen participation, respect for minorities, the party political system, the statute of the armed forces, pressure groups, and so on, in addition to all that represents a challenge not only to the juridical development of the Inter-American System in this matter but also what can be expected of it in the foreseeable future.

## 10. Preparations for celebration of the Inter-American Juridical Committee centennial

During its 56th regular session (Washington D.C., March, 2000), the Inter-American Juridical Committee added this topic to its agenda, in light of the approach of the centenary in the year 2006, and named Dr. Eduardo Vío Grossi as rapporteur. The Committee did not consider this topic during its 56th and 57th regular sessions (Washington D.C., March 2000 and Rio de Janeiro, August 2000).

## 11. Inter-American cooperation against terrorism

The Inter-American Juridical Committee did not consider this topic during its 56th and 57th regular sessions (Washington D.C., March 2000, and Rio de Janeiro, August 2000).

It should be noted that the 30th OAS General Assembly (Windsor, June, 2000) requested the Inter-American Juridical Committee, by means of resolution AG/RES. 1704, to continue its studies on inter-American cooperation against terrorism, in particular with respect to strengthening mechanisms for legal and judicial cooperation, especially in the area of extradition, and to cooperate with the Inter-American Committee against Terrorism (CICTE) when CICTE so requests.

## 12. Convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)

During its 56th regular session (Washington D.C., March, 2000), the Inter-American Juridical Committee received an oral report from the Director of the OAS Department of International Law on the Meeting of Government Experts in preparation for the Sixth Inter-American Specialized Conference on Private International Law (CIDIP VI), which was held at the headquarters of the General Secretariat between February 14 and 18, 2000. Dr. Jean-Michel Arrighi referred to the three topics on the agenda of that meeting and the follow-up mechanisms agreed for each of those topics. Those topics were: standardized commercial documentation for international transportation, with special reference to the 1989 Inter-American Convention on Contracts for the International Carriage of Goods by Road, with the possible incorporation of an additional protocol on bills of lading; international loan contracts of a private nature, in particular the uniformity and harmonization of international laws governing transactions secured with movable property, commercial, and financial guarantees; and conflict of laws with respect to extra-contractual liability, with an emphasis on the issue of competent jurisdiction and applicable laws with respect to international civil liability arising from cross-border pollution. He reported that CIDIP-VI would be held in 2001 and that Guatemala had offered to host that meeting. Finally, he announced that the report of the

meeting is available to members of the Inter-American Juridical Committee as document REG/CIDIP-VI/doc.6/00.

The Inter-American Juridical Committee did not consider this topic at its 57th regular session (Rio de Janeiro, August 2000).

## 13. Study of the system for the promotion and protection of human rights in the inter-American sphere

The Inter-American Juridical Committee did not consider this topic at its 56th and 57th regular sessions (Washington D.C., March 2000, and Rio de Janeiro, August 2000).

## 14. The struggle against tobacco: the necessity and advisability of combating smoking

**Resolution:**

CJI/RES.7(LVI-O/00): *The struggle against tobacco: the necessity and advisability of combating smoking*

**Document:**

CJI/doc.1/00: *Proposal for an inter-American convention to fight the use of tobacco: tobacco use in Latin America and its possible control* (presented by Dr. Gerardo Trejos Salas)

During the 56th regular session of the Inter-American Juridical Committee (Washington D.C., March 2000), Dr. Gerardo Trejos Salas, rapporteur for this topic, presented document CJI/doc.1/00, *Proposal for an inter-American convention to fight the use of tobacco: tobacco use in Latin America and its possible control*.

The rapporteur explained that the World Health Organization (WHO) was currently examining a Framework Convention on Tobacco Control and it would be therefore appropriate to remove the topic from the agenda of the Juridical Committee or keep it in suspension until that Convention were approved.

With this in mind, the Inter-American Juridical Committee approved resolution CJI/RES.7 (LVI-O/00), *The struggle against tobacco: the necessity and advisability of combating smoking*, in which it thanked Dr. Gerardo Trejos Salas for his report and agreed to terminate its consideration of this topic.

The texts of these documents are repeated below.

**CJI/RES.7 (LVI-O/00)**

**THE STRUGGLE AGAINST TOBACCO:
THE NECESSITY AND ADVISABILITY OF COMBATING SMOKING**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING SEEN the document *Proposal for an inter-American convention on the fight against tobacco: tobacco use in Latin America and its possible control* (CJI/doc.1/00), presented by Dr. Gerardo Trejos Salas; and

BEARING IN MIND that the World Health Organization (WHO) is continuing to study a Framework Convention on Tobacco Control,

RESOLVES:

1. To thank Dr. Gerardo Trejos Salas, rapporteur for this topic, for presenting the report on the matter during this regular session.

2. To formally close the deliberations on the matter.

**CJI/doc.1/00**

**PROPOSAL FOR AN INTER-AMERICAN CONVENTION TO FIGHT THE USE OF TOBACCO: TOBACCO USE IN LATIN AMERICA AND ITS POSSIBLE CONTROL**

(presented by Dr. Gerardo Trejos Salas)

Introduction

During the previous period of regular sessions, a report was introduced on this same topic (OEA/Ser.Q CJI/doc.30/99, July 14, 1999). Such report was divided in two parts: I) a medical description of the impact that tobacco makes on society at large, and II) a legal analysis of the claim for reimbursement for medical expenses that Latin American States have against tobacco companies.

In the past year, the World Health Organization (WHO) has proposed the Framework Convention on Tobacco Control[1]. The main goal of such proposed convention is to help achieve international tobacco control. That is, precisely, the same main objective that the OAS proposed convention had in mind.

Given this identity of goals, and considering that the WHO initiative is in a more advanced state, it seems advisable to momentarily suspend the project of an Inter- American Convention while waiting for the WHO proposal to gain strength.

While awaiting for such results, it seems also prudent to expand on part II of the previous report, clarifying why is it that Latin American States do have standing to bring their claims. Said clarification is important, since during the past year some arguments were made stating, erroneously, that such standing did not exist.

Part II of the previous report mentioned that the claim for reimbursement for medical expenses was already present in Roman law[2], it analyzed the State's duty to protect its citizens' health, it mentioned a similar rule in international law[3] and it dealt with a variety of related topics like evidence, statute of limitations, possibility of additional actions and punitive damages.

The rest of the present report focuses on the issue of standing. Together with the action for reimbursement, various related issues are mentioned, as the protection of children, the prevention of nicotine manipulation (spiking), publicity restrictions, etc. It is held that the State has legal authority to bring a claim about all these issues. The general reason behind this is that the State must take all the legal measures –including filing a lawsuit– to protect and to improve the health of its citizens.

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1 The text of the Framework Convention, and related news, can be consulted at http://www.who.int/inf-pr-199/fr/cp99-06.html (in French), and at http://www.who.org/toh/fete/feteintro.html (in English).

2 The *actio utilis*, of classical Roman law, conferred such right (Digest, 9, 3, 7 and 9, 2, 13).

3 This duty in clearly stated in the Constitution of the WHO, which is an international treaty signed by most countries in the world.

1. Sovereign nature of the claim

**Constitutional obligation**. The State's action stems from its duty to provide medical assistance to its citizens, which is usually mandated by the Constitution[4]. The important role played by the State in protecting the health of its citizens is a clear attribute of sovereignty, recognized all over the world. It would be inconceivable for a State to express lack of concern about whether its population is healthy or unhealthy.

Nobody disputes today that smoking causes serious diseases with the corresponding expense to the State's budget. It is equally clear that the State has the right (and the duty) to sue, to protect the health of its citizens. Accordingly, several Latin American States have filed actions claiming the reimbursement of the medical expenses caused or aggravated by tobacco, as well as other related measures. These lawsuits are then a calculated step to improve the health of the population as a whole.

The actions that individual smokers may file are entirely different. Meritorious as they may be, they lack a sovereign motivation and they are meant to redress a purely private wrong. That accounts for the fact that the State has a right *and a duty* to bring these actions. For the individual smoker it is only a right.

2. Damages: different categories and content

A comparison as to the damages that could be claimed by the State and by the individual smokers shows how different these two types of lawsuits are.

**Amounts in question**. The reimbursement that the State may claim is entirely diverse from what an individual smoker may request. The State can directly claim the money it actually expended, but not the money that citizens spent with their private health care providers. Conversely, citizens can demand the money they expended with their private physicians, but not the money that the State spent.

**Types of loss**. The loss that the State suffers is basically economic: the added medical cost caused by tobacco use. The loss suffered by individual smokers is first physical, then emotional and, in third places only, monetary.

**State has no physical damages**. The individual smoker has an action for pain and suffering, which normally would be the most important aspect of the damages claimed. The State lacks such a cause of action.

**Absenteeism**. It is proven that tobacco diseases, as any other type of generalized illness, causes absenteeism from work. Naturally, labor absenteeism reduces the State's revenues and, consequently, the corresponding redress may be sought. The individual smoker has no such claim. Or, if he has, it only concerns his personal lost profits.

**Fire losses**. Another area for reimbursement that the State may claim is the loss and expenses that burden the State and are caused by cigarette fires. Citizens can claim for fire losses too, but only for their own property. The State's claim would be concerning public property, and the adverse incidence of fires on tax revenue, the medical treatment of injured people and the added cost of maintaining a bigger fire department than would otherwise be necessary[5].

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4 The Constitutions of Chile (art. 19, par. 1, 8 and 9), Bolivia (art. 158), Brazil (art. 196) and Guatemala (arts. 93, 94 and 95), for instance, include such duty.

5 According to the federal Consumer Product Safety Commission, 25 percent of fatal residential fires start when a smoker falls asleep in bed, or a lighted cigarette is dropped on a couch or chair. In 1977 about 900 people, including 140 children, were killed in such fires. (Philip Morris Says It Has A Safer Paper, article by Barry Meier, New York Times, 1/11/00).

**State's and individuals' actions remain separate**. It is clear that the reimbursement actions filed by the State belong to the State alone. Consequently the State does not need the authorization from, or even notice to, its citizens. The converse is also true. Individuals may file their own private actions without obtaining leave from their State and even without notifying the State about their intention of filing.

**The lawsuit is not for the benefit of smokers now injured**. The State is suing to recover money it has already spent. The reimbursement, if obtained, would primarily be used to cure new generations of smokers. This is another reason supporting the independence and the originality of the State's claim. Normally, the reimbursement would not be destined to cure those who already have been treated by the State. By the time the money is collected, these people may be dead or beyond any significant medical improvement. The reimbursement would be used to fund the treatment of new generations of smokers. An important part of them would be, in all probability, the children that are now being addicted, through tobacco marketing strategies aimed at minors. Incidentally, the cessation of these programs is one of the goals that the State actions try to achieve. And here, again, the beneficiaries of publicity restrictions, and of eliminating predatory marketing strategies, will not be the current smokers but those who otherwise would have become smokers.

**Citizens may bring their own actions**. Individuals injured by tobacco –not only smokers, but passive smokers too- are entirely free to pursue their own actions before whatever court has jurisdiction. Nobody denies this. However, such fact is irrelevant against the plaintiff State since the latter's action is a different one. Individual plaintiffs may file their own actions, including pain and suffering and whatever money *they* (not the State) respectively spent with their tobacco diseases, subject to whatever personal defenses defendants may have.

**The private and the public injury do not get confused**. It is true that if the smokers were not injured, the State would have no injury either. Still, the converse is just as true: smokers are injured and the State is too. However, the injuries, as mentioned above and below, are quite of a different in origin, scope and nature. The fact that tobacco companies injure two different sections of society (the citizens and the State) does not mean that the injuries get confused. The double injury caused by tobacco companies indicates how extensive the harm they cause happens to be. It is not a reason to play one type of injury against the other, as in an offset, preventing one type of injury (the State's) from being actionable[6]. By its very nature the State's injury is public while the citizen's injury is private. The two injuries are distinct and clearly identifiable. The two types of actions are so diverse that the State probably could not intervene as a third-party plaintiff (*tercero interesado*) in a private smoker's action and vice versa[7].

**Individual defenses are irrelevant**. Against a plaintiff State, defenses as to individual smokers are irrelevant. For instance, it does not matter if a particular citizen-smoker was addicted or not, or if he personally knew that smoking caused cancer. It does not even matter if the individual smoker became addicted on purpose, or if his admitted goal was to shorten his life by acquiring a terminal disease.

Such defenses cannot be raised against the State since the latter has the duty to cure *all* smokers, without inquiring as to their personal circumstances.

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6 There could not be a setoff, among other reasons, because the State and the individual smoker are two different creditors. See, for instance, the Civil Code of Guatemala, art. 806.

7 See, for instance, the Code of Civil Procedure of Argentina, art. 90 (*intervención de terceros*).

3. State's action is direct

This section shows that the State's claim is independent, direct and that it satisfies completely the requirement of causal connection.

**Factual inter-dependence does not amount to the same action**. It cannot be said that, since the State's damages arise through the damages to its citizens the State's action fails as to proximate causation. The law recognizes many instances where one injury is predicated on another, without such factual interdependence being able to defeat a claim. One could mention the case of the passenger in a taxi that is crashed by another vehicle, whose driver is drunk. The passenger could certainly sue the drunk driver independently from whatever rights the owner of the taxi had or wished to exercise. Obviously, without the taxi being crashed there would be no wrong to redress and the passenger would lack a claim. But such reasoning does not diminish the case of the passenger who did suffer damages. Another instance would be if a person, A, (negligently or purposefully) sets fire to the house of his neighbor, B. Assume that the fire extended to a public park and that the State later sued A for damages. Could A raise as a defense that the State's claim was derivative? Certainly not. It is of no consequence that the public park would not have burnt if B's house did not burn first. The relevant fact here is that A caused the fire. As in the tobacco cases, neighbor B and the State owning the adjacent park have different types of damages. Further, the damages caused to the State by the tobacco companies are more distinct and more foreseeable than the fire damages caused by neighbor A, in the present hypothesis.

**Action not derivative**. The fact that the injury felt by the State is predicated on its citizens' tobacco diseases does not mean that the injury is derivative or in any other way diminished. This is so because the State is *constitutionally obligated* to treat such diseases. It is the *State's* duty to provide adequate medical services and to pay for them. The legal basis of the action is different from a private smoker's lawsuit and the actual concepts that can be claimed for are different as well.

**No subrogation**. The State is claiming what the State *itself* spent, or will have to spend. The State is *not claiming* what its citizens have spent or may have spent. A subrogation cannot happen in this context because the citizens who get treated are not debtors of the State. Without the State being a creditor and the citizens not being debtors, there is no subrogation possible[8]. When the citizen gets cured by the State, he is just exercising his right to receive medical attention.

**No remoteness**. The causation link established by the State is direct, strong and short. No sophisticated or far-fetched theories are needed to explain this. Assume the following two simple facts:

a) State **A** spends **Y** dollars per year in its health budget;
b) Statistically and medically it is proven that **Z** dollars (an integral part of **Y**) were caused by tobacco diseases**.**

Now **A** is suing for the reimbursement of the **Z** dollars spent during that given year. What citizens may have privately spent in medical services does not form part of **Z**. Citizens may sue, if they want to, but for their own expenses, their own pain and suffering, etc… Citizens may not sue for **Z**. The State may not sue for the money that the citizens spent privately on their own treatments.

8 Compare, for instance, with the Brazilian Civil Code, arts. 985 – 990, where the issue of *pagamento com subrogação* is contemplated. Without a debt between the two original parties, there is nothing to subrogate.

Clearly, there is nothing remote about **A** asking to be reimbursed for the **Z** dollars.

**The State is not a third party payer**. The State has the direct and inexcusable constitutional obligation to provide health care to its citizens, without excluding tobacco diseases. The State is the *direct* and the *only* payer for the services it so provides. The fact that citizens may, at their discretion, seek alternative health care providers, like private doctors, does not mean that the amounts paid *by the State* are not reimbursable *to the State*, by those responsible.

**State's claim can be quantified**. The State's claim is not contingent but certain. It is a medically well-known fact that certain diseases are caused and/or aggravated by smoking. There is no reason why the added cost of tobacco could not be quantified with reasonable certainty in any given health budget. Such calculation is not too speculative but supported by recognized sciences like statistics and medicine. In a great variety of cases, courts routinely assess damages for concepts such as pain and suffering, emotional distress, etc… The State's claim for reimbursement is more objective and easier to determine in a scientific way.

**Injury to State was foreseeable**. Informed that the State has been harmed by their actions, the defendants can hardly claim surprise. The companies knew full well that when smokers became ill, as they invariably would, the State would have to step in and provide medical services for them.

**Identical battle by American States was not "too remote"**. It is also noteworthy that not too long ago, the tobacco companies settled identical claims with American States, to the tune of 256 billion dollars. Some of these claims reached quite an advanced stage, with trials well under way before defendants settled. The issues of "remoteness", "derivative action", "subrogated action", etc… were raised by defendants, but they were rejected by the courts[9]. Why then would such defenses be an obstacle for Latin American States?

**Latin American claims could be stronger than US ones**. Comparing the claims filed by the American States to those filed by Latin American States, the conclusion is that the latter could be stronger. This is so for two reasons: a) the abuse by the companies in Latin America is greater (stronger publicity, later placement of health warnings or no warnings at all, warnings in a foreign language, etc…) and b) the US States were better placed to find out sooner the truth about smoking. Even today, it is American companies that control the technology that goes into cigarettes. It is not a Latin American technology.

4. Public policy considerations

**Public health system for the benefit of citizens, not of torfeasors**. The public health system has not been created to reduce the financial exposure of corporations that harm consumers. Such interpretation, other than being illegal in itself, would run against public policy since it would encourage irresponsible behavior by corporations with the corresponding detriment to the life, health and general wellbeing of the population.

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9 See, for instance, State of Florida v. American Tobacco Co., (Fla. Cir. Ct., Sept. 16, 1996), State of Montana v. Philip Morris, Inc. (Mont. Dist. Ct. Sept. 22, 1998), State of Idaho v. Philip Morris, Inc. (Id. Dist. Ct., Sept. 2, 1998), Rosello (Puerto Rico) v. Brown & Williamson Tobacco Corporation (D.P.R., June 3, 1998), Moore ex rel. Mississippi v. American Tobacco Co., (Chancery Ct., Jackson City, Feb. 21, 1995), State of Hawaii v. Brown & Williamson Tobacco Corp. (Hi. Cir. Ct, April 30, 1998), State of Vermont v. Philip Morris, Inc. (Vt. Super. Ct., March 25, 1998), City and County of San Francisco v. Philip Morris, Inc. (N.D. Cal., March 3, 1998), County of Los Angeles v. R. J. Reynolds Tobacco Corp. (Cal. Super. Ct., Dec. 23, 1997), People of the State of Illinois v. Philip Morris, Inc., (Ill. Cir. Ct., Nov. 13, 1997, State of Texas v. American Tobacco Co. (E.D. Tex. 1997), State of Iowa v. R.J. Reynolds (Iowa Dist. Ct., Aug. 26, 1997), State of Arizona v. American Tobacco Co., (AZ. Super. Ct., June 26, 1997), State of Washington v. American Tobacco Co. (Wash. Super. Ct., June 6, 1997), State of Maryland v. Philip Morris, Inc., (Md. Cir. Ct., May 21, 1997), McGraw (West Virginia) v. American Tobacco Co., (W. VA. Cir. Ct., Feb. 13, 1997).

**State cannot be forced to subsidize foreign tobacco industry**. Holding that the State's claim is derivative because one injury presupposes another and denying damages because of that, forces the State to subsidize the tobacco industry. The diseases that trail the tobacco industry are a part of the cost of doing business and they should be ultimately paid by the companies that caused them and profited from them.

**Similar battle against drugs by the US**. Nicotine is a drug as addictive as cocaine or heroine. What the Latin American States are trying to obtain is not much different from how the US deals with its own drug problem. The US is using its weight and influence trying to change the legal system in other countries, particularly in reference to criminal law, extradition treaties for drug offences, etc…. One might note that the harm the US suffers "occurs only as a consequence of the harm to individual drug addicts", or that "without any injury to drug addicts [and their victims], the US would not have incurred in the additional expenses or detriment." Still, nobody opposes the US efforts by saying that US claims in this sense are "indirect", "derivative", "too remote", etc…. Both the US and Latin America resort to legal strategies, within their means, to combat their respective problems with addictive substances: cocaine, heroine, nicotine, and others. It is not fair or logical for the US to expect Latin American cooperation if the US, through its judiciary branch, block similarly meritorious claims from Latin American States.

5. The issue of taxation

**Not an argument**. Occasionally it is heard that tobacco companies have a big tax burden and, since it is paid to the State, the State should not sue such taxpayer. The reasoning is flawed. Taxation and legal liability are completely different and one does not offset the other. Imagine an oil company saying that it should not pay for the pollution it may cause because it pays its taxes. It would certainly be a disingenuous argument. If the tobacco companies disapprove of the taxation rates in any Latin American country they have the freedom to peddle their merchandise elsewhere. The tax they pay does not go into a current account to offset the damage they cause. From an economic point of view the taxation argument is also flawed. A study by the World Health Organization, cited in the previous report, indicates that multinational tobacco companies cause a drain –not an improvement- in the economies of third-world countries where they do business. A study by the World Bank reaches the same conclusion[10].

6. The issue of "legality"

A recurrent argument made by the tobacco companies is that cigarettes are a legal product. Consequently they cannot be punished by selling it. Such reasoning is simplistic and wrong. First, it is a *non sequitur*. Legality of the product does not mean that the companies are immune from the consequences such product causes. The same is true for any other merchandise. Second, when goods or services are imported in Latin America, the importer has the affirmative duty to declare any adverse effects of such products[11]. The defendants, for decades imported cigarettes and tobacco technology while concealing from Latin American States the risks of smoking.

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10 Cited by the American Society of International Law, International Law in Ferment: A New Vision for Theory and Practice? Preliminary program, at p. 15.

11 In Brazil, for instance, the *Código de Defesa do Consumidor* (Code for the Defense of the Consumer) establishes that:
The supplier cannot insert in the market a product or services that said supplier knows, or should know, causes a high degree of harm. (CDC art. 10).
The supplier of products or services that are potentially harmful or dangerous must inform, expressly and adequately, about such harmfulness or danger. (CDC art. 9).

7. Defendants' bad faith

Important legal records reveal that the tobacco defendants acted with extreme bad faith and with fraud. They conspired jointly for decades in a successful effort to conceal, from the American government, foreign governments and from consumers all over the world, the truth about the consequences of smoking and about the addictive power of nicotine. That was judicially established when the following was determined:

> […] the defendants' knowledge of the addictive nature of nicotine; the defendants' knowledge of the effect smoking has had o health dating from the 1950's; the industry's efforts to keep that information from the public, to mislead the public; and its efforts to hide or destroy documents that would reveal guilty knowledge." (Alaska v. Philip Morris, Alaska Super. Ct., Oct. 1998).

The tobacco companies' fraud is an important element in determining damages, degree of liability and in judging the defenses they may raise. To mention just one example, a fraudulent act committed by two or more parties generates joint and several liabilities for all those involved[12].

8. Conclusion

Latin American States have the legal capacity to sue the tobacco companies. That is, among other things, because the action held by the States is original, direct and independent from the lawsuits that might be filed by individual smokers. It is not a derivative or a remote action. It is not a subrogated action either.

Latin American States may claim for several concepts: reimbursement of medical expenses, publicity restrictions, special protection for children, ending the manipulation of nicotine levels, etc.

The WHO has already presented a Framework Convention to control the use of tobacco, and which is in an advanced state. Due to the similarity of goals, it seems convenient to suspend momentarily the present project for a Latin American convention and lend our support to the WHO project.

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12 This is a clear rule in Latin American law. See, for instance, the Ecuadorean Civil Code, art. 2244.

## 15. Possibilities and problems of the Statute of the International Criminal Court

**Resolution:**

CJI/RES.19(LVII-O/00): *International Criminal Court*

**Document:**

CJI/doc.21/00: *The International Criminal Court*"
(presented by Dr. Sergio González Gálvez)

During the 57th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2000), Dr. Sergio González Gálvez presented document CJI/doc.21/00, *The International Criminal Court*. He said that, although the Statute of the Court had been approved two years ago, the number of ratifications is still less than 20, and since its adoption a number of problems have been identified that will require adoption of a series of measures to resolve them. Those measures are suggested in section III of his document, and are intended to provide interpretations that might help resolve the problems facing countries of the region in adopting the Statute. Efforts to this effect are already underway in other forums such as the Asian-African Legal Consultative Committee.

During the same regular session, the Inter-American Juridical Committee approved resolution CJI/RES.19 (LVII-O/00), *International Criminal Court*, whereby it decided to include the topic of “Possibilities and problems of the Statute of the International Criminal Court” on its agenda, without prejudice to the substance of the matter, and named as rapporteur for the topic Dr. Sergio González Gálvez. As well, it requested the General Secretariat to seek from the United Nations General Secretariat the latest reports of the Preparatory Committee for the International Criminal Court and to present them to the Inter-American Juridical Committee, together with any other documentation that it deemed relevant, in consultation with the rapporteur.

Following is the text of the resolution approved and the document presented by Dr. González Gálvez:

**CJI/RES.19 (LVII-O/00)**

**INTERNATIONAL CRIMINAL COURT**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING NOTE, without making any statement with regard to its content, of the report (OEA/Ser.Q CJI/doc.21/00) that Dr. Sergio González Gálvez presented on this topic;

TAKING INTO CONSIDERATION that prompt enactment of the Statutes of the International Criminal Court will be an important contribution towards the struggle against

impunity on the international level;

STRESSING that it is important that the countries that voted against or abstained from voting on this international instrument at the Conference of Rome should reconsider their position in the light of their legitimate concerns.

RESOLVES :

1. Without any prejudgment as to the importance of the matter, to include in the agenda the topic entitled "Possibilities and problems of the Statutes of the International Criminal Court".

2. To designate Dr. Sergio González Gálvez as rapporteur of this topic.

3. To request the Secretary General to receive from the Secretary General of the United Nations the latest reports of the Preparatory Committee of the International Penal Court and present them to the Inter-American Juridical Committee together with any other documentation that is deemed relevant after consulting the rapporteur.

**CJI/doc.21/00**

**THE INTERNATIONAL CRIMINAL COURT**

(presented by Dr. Sergio González Gálvez)

OPENING REMARKS

The approval of the International Criminal Court Statute on July 17, 1998 in Rome, Italy, has been assessed by Bruce Broomhall,[1] a founding member of the International Criminal Court Society, under the following wording:

> The achievements of the Statute of Rome, which was conceived by the States as a system to coordinate an efficient answer for the most serious crimes, are quite diversified. Above all, the Court [*sic*] will encourage the States to investigate and prosecute genocide, war crimes and other crimes of lesa humanity and, under the appropriate circumstances, to carry out the corresponding inquiries and hearing. This will promote its main objective of dissuading abuse commissions and reducing the crimes that have so cruelly stained with blood the twentieth century. By diminishing crime levels, the Court will lessen the strain and tensions that threaten the peace and security of all nations. Furthermore, it will also significantly reduce the costs incurred by the States and the international community when the armed conflicts end, to repair their consequences.
>
> Furthermore, the Court will also offer a neutral space for the trials, in order to reduce the discord that may arise from any doubt regarding the extradition of an individual to a specific State, the jurisdictional capacity between the States to the right to file procedures against a given suspect or the legal recourse available to the States to take an aggressive and unilateral executory action. The Court will help the victims to draw a line regarding the past through the reparations they can obtain, and the implicit recognition of their

1 BROOMHALI, Bruce. *La Corte Penal Internacional: visión general, y la cooperación con los Estados*. Italia: Instituto Legal Internacional de Derechos Humanos, Instituto internacional para Altos Estudios en Ciencias Penales. 1998. p. 46-47.

suffering during the trial. It will thus help the States to achieve a national (or international) reconciliation and sustainable peace. According to the statement made during the Conference of Rome by Lamberto Dini, Minister of Foreign Affairs of Italy, if co-existence between the people becomes less insecure, the Court "will make a big leap forwards in society, not only in the political but also in the moral sense. As mentioned by Professor Cherif Bassiouni, President of the Drafting Committee of the Diplomatic Conference, this would entail the culmination of a history that began at the end of the First World War.

Notwithstanding the above, it is our opinion that this important and legitimate effort was left unfinished. Thus, in order to achieve such a worthy objective, a series of actions should be undertaken which we will try to explain. The Inter-American Juridical Committee should assess the reasons why the Statute, only two years after its adoption, has not entered into force and, in this case, to propose actions that the OAS member States could consider in order to support this international instrument.

1. Main objective of the Statute

An assessment of the situation during the post-war period until our times is given in an interesting article published in January 1997, by the international secretary of Amnesty International;[2] however, although some of its conclusions are debatable, due to its importance to position the problem it has been reproduced below:

> Several States started investigating or filing legal procedures since the Second World War, covering actions committed on their territory or in others. These actions were based on the universal jurisdiction applicable to facts that constitute severe violations of humanitarian rights or systematic or generalized abuse that could be considered crimes committed against humanity. Only a small number of States have carried out these investigations or indictments against the Government authorities that ruled at that time, among which are Bosnia and Herzegovina, Croatia, the United States and the Federative Republic of Yugoslavia. However, most of the investigations and trials did not entail a direct threat to these Governments. For example, in 1994, a private citizen was declared guilty of genocide in Brazil for acts committed in 1963.
>
> Just a few States have exercised universal jurisdiction on people suspected of having committed crimes in other States to judge them in their own courts, some of them are: Austria, Belgium, Denmark, Spain, Italy and the Netherlands, or to transfer them to an international tribunal, such as: Germany, Belgium, Bosnia and Herzegovina, Cameroon, France, Kenya, the Netherlands, Switzerland and Zambia. The majority of the States did not start their investigations or procedures until a new government came into power, among them: Germany, Argentina, Bolivia, Cambodia, Cuba, Ethiopia, Equatorial Guinea, Greece, Honduras, Latvia, the Central African Republic, the Republic of Korea, Rwanda and South Africa, or after their victory in a small war, such as Bangladesh, India and Kuwait. Nevertheless, in the majority of these States only a small percentage of the total number of potential suspects has been investigated or prosecuted.
>
> Additionally, amnesty laws and peace agreements have hindered or interrupted investigations or trials in many States, such as Argentina, Bangladesh, Brazil, Chile, Croatia, El Salvador, Haiti, Honduras, India, Liberia,

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2 Amnistía Internacional. *Corte Penal Internacional: la elección de las opciones correctas-parte I.* Spain, Idex: AI:10R 40/01/975, January 1997. p. 11.

Nicaragua, Peru, South Africa, Suriname and Uruguay. Furthermore, many of the procedures have not adjusted to the international norms or have even resulted in fraudulent trials.

2. Problems arising from the Statute of Rome regarding the constitution of an International Penal Court

a) Complexity of the negotiation

First of all, it must be highlighted that we are referring to a Statute text that was imposed at the last minute, with no previous consultation, despite the fact that a consensus text had been negotiated throughout a day, in good faith, with the President of the Plenary Committee, that had reached quite an advanced phase. The final text presented was only discussed at the final stage, with a very small group of countries, thus restricting the possibility of further discussing the negotiation already started.

It was informally suggested that, under this scenario, the negotiations should stop for a few days or weeks in order to continue at a later date, in order to reach a consensus text, which was heading the right way. The host country was against this motion, seconded by the group known as the *like-minded* countries, in other words, the main promoters supporting the constitution of this Court. Unfortunately, the text finally presented granting us less than 24 hours to consult our authorities, incorporated many of the proposals that had been expressly rejected during the negotiations, among others, those mentioned in the sections listed below:

b) Nexus between the International Criminal Court and the United Nations Security Council

Under the framework of the Statute negotiations, no attempt was made to solve old discrepancies related to the interpretation of some Clauses of the UN Charter, and even less to ignore the main responsibility –but not the only one– of the Security Council as regard safekeeping peace, in accordance with Chapter VII of this international instrument; additionally, neither could it be accepted that the instrument under negotiation consecrated theses that implied, in any way whatsoever, a policy of subordination of the International Criminal Court with regard to Security Council.

During the negotiations, and in step with this line of action, some countries managed to eliminate from the Statute text the reference made to the Security Council as the only body that represented a nexus with the Court, in two instances: first, in the text that states that when a country does not comply with the Statute, the Assembly of the States Parties must notify this fact to the Security Council in order to enable it to "take the measures it deems appropriate"; and the second, when due to the pressure exercised by the Arab countries and other African and Latin American countries "aggression" was incorporated in Article 5$^{th}$ —which defines the scope of the Statute —as a crime that falls under the jurisdiction of the Court. Subject to an adequate definition of its constitutive elements, it was possible to avoid the reference made to the Security Council, and to substitute the term *aggression* whenever it was mentioned by the concept that the way in which "aggression" is typified must be compatible with the "pertinent provisions contained in the UN Charter". Nevertheless, despite the success of these efforts, the Statute contains the following references to the Security Council, which are difficult to accept:

i) The power granted to the Security Council to request the Court to postpone the investigation or prosecution trial of a crime already underway, without setting any maximum timeframe (the terms established are renewable). This provision, in addition to the fact that it excludes the UN General Assembly, unduly

canceling the empowerment granted to this body as per Chapter VII of the Charter, may even come to paralyze the Court from performing its tasks, through the action of the Council.

ii) The erroneous interpretation of Chapter VII of the Charter - accepting that only the Security Council can refer a situation to the Court to initiate the proceedings whenever it deems that a situation has arisen wherein it appears that one or several crimes that fall under the jurisdiction of the Court have been committed, unduly excluding the General Assembly --also empowered in accordance with the above-mentioned Chapter of the Charter-- is an error in accordance with the law, that may have consequences in the Court's future.

The opposition to these references is based on the following juridical sources:

1) To accept, as per Chapter VII, that the action of the Court should remain subject to the action of the Security Council, many of whose decisions are restricted by the right to veto, rightfully used but also abused by the five Permanent Members of the body under reference is --in our personal opinion-- a serious political error for countries that have been struggling since San Francisco to foster the democratization of the UN Organization.

2) We share the point of view expressed on this subject by the American Association of Jurists, that states that a Treaty whose objective is to constitute an International Court, includes clauses that subordinate the jurisdictional activity of the Court – in any way whatsoever--, to the decisions of another international body or organization, either to be its driving force, suspend the action, and delay or paralyze it, may be null by law, in accordance with Article 53 of the Vienna Convention on the Law of Treaties that stipulated this sanction for any Convention that goes against an imperative rules of the general International Law *(jus cogens)*.

As it has been duly ascertained by the above-mentioned American Association of Jurists, the clauses that consecrate this subordination to the Security Council go against the principle of independence of the judicature and the right every person has to appeal to an independent court to solve a pertinent matter that constitutes an imperative and duly consecrated rule in Articles 10 of the Universal Declaration of Human Rights, 14 of the International Pact of Civil and Political Rights, and 1st and 2nd of the Basic Principles Related to the Independence of the Judicature, duly approved by the UN General Assembly in Resolutions 40/32 and 40/46, issued in 1985.

3) Thus - why should we insist in not recognizing the Security Council as the only body of the UN Organization empowered according to Chapter VII of the Charter?

This is done on the basis of an important precedent established by a Resolution that deals with the Unity of Action in Favor of Peace, approved by the UN General Assembly in 1950 which was the basis of a new rule, as it is has been correctly defined by the Mexican jurist Jorge Castañeda in one of his papers referring to the juridical value of the resolutions issued by the United Nations, based on the criteria that if the Security Council, due to the lack of an unanimous agreement among its Permanent Members, does not comply with its main responsibility of safekeeping international peace and security in a case in which a threat to peace is strongly perceived, or violation of peace or any act of aggression, the General Assembly must examine the issue and adopt the pertinent recommendations applicable to the case.

4) Article 24 of the United Nations Charter empowers the Security Council with the *main* responsibility of safekeeping international peace and security, which

logically and legally implies that the Charter takes into account a *subsidiary* responsibility that may only correspond to the General Assembly.

5) The attribution of this main responsibility on a non-exclusive status to the Council, lies on the hypothesis that, in fact, this body could act efficiently in safekeeping or restoring peace. Nevertheless, when a situation actually arises that paralyzes the Council (mainly due to the veto) in the fulfillment of the actions for which it is institutionally responsible, the General Assembly must necessarily undertake a *subsidiary* responsibility in matters related to international peace and security.

Notwithstanding the above, it should be clearly explained that, as it is only logical to suppose, the Charter does not refer to the punishment of those guilty of international crimes among the powers granted to its main bodies. However, it is a commonly accepted practice to suppose that if we examine a threat to peace or an act of aggression, this must also include the possibility that the Security Council and the General Assembly should be able to request the International Criminal Court to investigate the facts already analyzed, and if applicable, to punish the individuals responsible.

The theory of recognizing in the Statutes the subsidiary jurisdictional capacity of the UN General Assembly, in compliance with the proposal forwarded during the Conference of Rome, was rejected by the Security Council Permanent Members --except China-- and by their military allies at the Conference of Rome and was supported by a group of nations --among which the Arab Group-- faced by the indifference of the greater majority of the members of the African Group as well as the majority of the Latin American countries which, perhaps due to their lack of understanding the full implications this issue could represent, preferred to abstain instead of clashing with the Security Council Permanent Members in this forum.

c) The need to prepared a typification of weapons for mass destruction as war crimes

Another aspect that raised concern was the rejection to include on the list weapons whose use was typified as war crimes, in other words, a weapon for mass destruction --chemical, bacteriological and nuclear--, thus, when the Statute enters into force we will be facing the absurd situation of recognizing as a typical war crime the use of poison or poisoned weapons and not the use of weapons intended for mass destruction.

*The non-inclusion of weapons for mass destruction as war crimes* is incompatible with the traditional thesis supported by the vast majority of the United Nations member States, that sustains that not only a general and total disarmament should be reached as soon as possible, starting with nuclear disarmament, but that a rule of International Law already exists which has been confirmed by custom and recognized in Resolution 1653 issued in 1961 by the UN General Assembly. This Resolution expressly declares these weapons illegal, and was duly supported by the International Court of Justice in its historic Consultative Opinion dated July 8, 1996, which in its core text points out that “in general, the threat represented by the use of nuclear weapons is contrary to the international law rules applicable in cases of armed conflicts and, in particular, goes against the principles and rules of humanitarian rights“.

Regarding the juridical effect mentioned in Resolution 1653 issued by the UN General Assembly, we are already aware of the doubts raised by the fact that a resolution issued by an international body of this nature could create a right. Nevertheless, at least the contrary theory or, in other words, the probable recognition of the legality of the weapons is placed in serious doubt, in view of the fact that the outstanding majority of the UN Member countries voted the above-mentioned Resolution issued by the most representative body of the

international community interests, wherein this illegality is expressly stated.

Despite the fact that in paragraph 2, item b) number XX of Article 8th on war crimes of the approved Statute, a mention is made regarding the possibility of adding other weapons such as missiles, war materials and methods "which by their own nature cause superfluous damage and unnecessary suffering or result in indiscriminate effects that violate the international humanitarian law applicable to armed conflicts" to the list of prohibited weapons, the inclusion of a padlock --by the mere statement that other weapons may be considered *war crimes* "subject to the fact that these weapons are covered by a total prohibition and are included in an Annex of the current Statute, due to an amendment approved in compliance with the provisions contained in Articles 121 and 123 on this matter"-- which makes it extremely difficult to add, on a short time basis, other weapons on the list included in the Statute.

Furthermore, the previous wording implies that not even chemical or bacteriological weapons --that are already banned according to a Treaty-- may be considered as *war crimes* until they are included in an Annex of the Court Statute. Also implying that nuclear weapons, due to the position of the nuclear powers in general – with the probable exception of China – that refuse to allow multi-lateral negotiations to advance towards a nuclear disarmament through a treaty, will remain in limbo for many years to come.

Undoubtedly, just as in the case of the nexus that exists between the Security Council and the Court, the negotiation of the Statute to create the Tribunal is not the proper channel to decide such a complex matter as the inclusion of weapons for mass destruction as typical war crimes. This is the reason why we looked for other formulas that could protect the different positions, which were emphatically rejected. On the other hand, neither can we accept precepts that were interpreted against the positions we have traditionally sustained in all fora on this subject, and which directly contradict the aforementioned Consultative Opinion handed down by the International Court of Justice.

With regard to the threat posed by nuclear weapons, it must be stressed that in 1987 in the United States the Pentagon lifted the ban against consulting some of their documents that show that there have been real instances when other cities have been threatened with the use of nuclear weapons. In other words, to talk about the threat of using nuclear weapons is not a mere theoretical hypothesis, all to the contrary, there are some actual instances of this nature; for example:

1) On May 20, 1953, President Eisenhower and the United States military High Command approved the use of nuclear weapons against China, in the case that the war with Korea tended to worsen.

2) In April 1954, President Eisenhower offered two atomic bombs to the French to break the communist siege in Dien Bien Phu, Vietnam, although it was already too late.

3) On November 1, 1969, President Nixon approved the plans presented to use nuclear weapons in the war against Vietnam.

4) In 1970, in the middle of a civil war in Jordania, Kissinger threatened the Soviet Union that the United States would use tactical nuclear weapons in the Middle East if King Hussein was not deposed.

Moreover, in the document entitled *The threats of use of nuclear weapons*, by David

R. Morgan,[3] we find the following critical situations mentioned, among several others:

> 1946.- 10 months after the Second World War ended, the Soviet Union demanded oil concessions similar to those the British held in Iran. To reinforce their claim, Soviet troops remained posted in the North of Iran and deployed their tanks alongside the border. Despite the fact that the withdrawal of the troops and tanks from Iran was agreed during the Conference of Ministers of Foreign Affairs held in London on March 2, 1946, when the deadline set in the agreement arrived the Soviet Union had still not withdrawn its troops. In view of the above, President Truman convened Soviet Ambassador Gromyko, and through him granted a 48 hours peremptory term to his country to withdraw all their armed forces from Iran or they would drop an atomic bomb on Soviet territory. The troops were withdrawn in 24 hours.
>
> 1948-1949.- Right in the middle of the tense relationship that existed between the Western power and the Soviet Union and its satellite countries at the beginning of the Cold War, on June 24, 1949 the Russians cut-off all access to Berlin by land, giving rise to the beginning of the blockade. The United States Navy Secretary as well as the State Department Secretary and the Commander-in-Chief, Forrestal, George Marshall and Omar Bradley, met to decide if, in reply to the Soviet blockade of Berlin, they were going to execute the *Broiler Plan.* This plan of attack entailed the destruction of 24 Soviet cities by launching 34 atomic bombs. On September 30, 1949, the access to Berlin was opened and the blockade ended.
>
> 1956.- During the crisis at the Suez Canal, Premier Krushev threatened to use nuclear bombs against London and Paris, to which the United States government replied that if such an attack occurred, it would automatically trigger a nuclear reply from their side.
>
> 1962.- Crisis due to the Soviet missiles placed in Cuba. After the failure of the Bay of Pigs invasion that had the support of the United States, the Soviet Union offered Cuba to secretly install some nuclear missile heads for their defense, but these facilities were discovered by U-2 planes through some photographs while overlying the region. After a few extremely stressful days had elapsed, both governments mutually threatened each other with nuclear attacks. When both Krushev and Kennedy almost lost control of the military forces, the Soviet leader offered to withdraw the missiles from Cuba but before doing so, he was able to obtain guarantees that this Caribbean country would not be invaded by the United States.

d) Expansion of the jurisdictional capacity of the International Criminal Court to cover other international crimes (Final Minutes of the Conference of Rome, Resolution E)

The greater majority believes that the International Criminal Court Statute should restrict itself to those crimes on which a consensus is reached, which in summary are: genocide, war crimes and lesa humanity crimes --strongly supporting the addition of aggression-- which at the last minute was extended to include *illegal drug traffic and terrorism.*

It is quite probable that this extension does not justify a formal objection to the Statute, but it is nevertheless a new element that must be assessed by the authorities of each country in the light of the situation related to the first of these crimes throughout the

3 Cfr. Morgan, David R., *Summaries of the threats of use of nuclear weapons during the sixteen known nuclear crisis of the cold war 1946-1985. Veterans against nuclear arms*, Vancouver, 22 Octubre 1995.

continent.

e) Restrictions to the scope of the chapter related to “war crimes” (Article 8th)

A general restriction was included in the opening text of the Chapter related to “war crimes”, by pointing out that the International Criminal Court will be empowered to rule on these crimes “especially when they are committed as part of a plan or policy, or as part of the commissioning of said crimes on a large scale”. All of this was expressed despite the fact that the list on these crimes only includes the most aberrant acts that may be committed during an armed conflict.

Although this issue must also not be considered as a serious impediment to endorse the Statute, its incorporation in the text must be taken into account to show the influence exercised by the countries with bellicose traditions and policies throughout the negotiations, that sought a way to ensure that the actions performed by the armed forces would not be subject to a trial by the International Criminal Court, based on the premise that, due to their experience in warlike activities, their legislations were sufficient to judge all war criminals of their nationality. Notwithstanding the above, there are some commentators that pointed out that the use of the term *in particular* contained in this Article, recognizes that typical cases of war crimes do not necessarily have to be part of a plan or policy to fall under the jurisdiction of the International Criminal Court.

f) Another problem related to the application of the Chapter on “war crimes” (Article 124)

In order to offer the total scope of the extra safeguards favorable to the countries that are military powers and have or may have troops beyond their borders, a provision was incorporated in the Statute which had not been previously negotiated with the countries participating in the Conference. When applied to the issues covered by this Convention, it points out that any State Party may declare that over a period of 7 years, as of the date in which the Statute enters into force in that State, the latter is empowered to declare that it will not accept the jurisdictional capacity of the International Criminal Court on matters related to *war crimes,* whenever these crimes are committed by one of its nationals or on its territory.

This is another advantage for the military powers that has no justification, and if it was decided to keep it in the text without consulting *all* the other participating countries, it should have been extended to other crimes that fall under the jurisdiction of the International Criminal Court or, otherwise, eliminated.

g) Definition of a non-international armed conflict (Article 8th, paragraph f)

A number of doubts arise regarding the definition of a *non-international armed conflict* incorporated in the Statute which, as it is explained further on,[4] was taken from a sentence handed down by the Tribunal created by the Security Council for former Yugoslavia.

h) Provisions that may be considered incompatible with the majority of the legislations in force in the OAS member States

a. Article 20. *Res Judicata* or *non bis in ídem*

In its paragraph 3, this Article stipulates several exceptions to the principle of *res judicata*when it is pointed out that the International Criminal Court will not prosecute anyone that has already been judged by another tribunal for the crimes incorporated in the Statute,

4 See number 5, item 5), of this paper.

*unless* the other tribunal, *in the opinion of said International Tribunal,* believe that the decision:

a) complied with the purpose of removing from the accused the penal responsibility for crimes that fall under the jurisdiction of the International Criminal Court, or

b) it had not been informed in an independent and unbiased manner, in accordance with the procedural guarantees duly recognized by International Law, or if this had been done in such a manner that, under those circumstances, it was incompatible with the intent of submitting the individual to legal proceedings.

It is considered that with its present wording, this precept could affect the principle of *res judicata* contained in Article 20, as it offers a possibility to the International Criminal Court to reopen trials on which a sentence has already been handed down, in order to grant extradition and to judge once again the individual of that nation that is presumed responsible for an international crime.

b. Article 27. Illegality of the official post

This Article establishes that "the official post held by a person, either as a Chief of State or Government, member of a government or parliament, duly elected representative or working as a civil servant, may under no circumstances whatsoever be exempted from any penal responsibility, nor will this constitute *per se* a reason to reduce the sentence"; further on it adds that: "the immunities and special rules and procedures that are applicable to the official position held by a person, as an arrangement of a national law or international law, will not impede the International Criminal Court from exercising its legal jurisdiction over this individual".

This provision could be inconsistent with the criteria adopted by the majority of our legislations on this subject matter.

c. Article 29. Imprescriptibility of crimes

This precept establishes in a clear and express manner, that "the crimes that fall under the jurisdictional capacity of the International Criminal Court will not prescribe". Although the imprescribility is not contemplated in many of our legislations as this could be interpreted as a violation of the individual guarantees of the defendant. The opinion is that this clause should not become a real impediment to subscribe to this convention, taking into account above all else the seriousness and importance of the international crimes incorporated in the Statute.

d. Article 54. Functions and attributions of the prosecutor regarding the investigations

Defining the powers granted to the prosecutor, this precept gave rise to some doubts as it established that the International Criminal Court prosecutor could carry out investigations in the territory of a State; further on, in Article 57 bis, it is made clear that said international official will only be able to carry out this investigation if a cooperation agreement is obtained from the State in question; or when it is expressly stated that same lacks the necessary conditions to carry out this cooperation request; or, *de facto,* there is no authority or competent body belonging to its juridical system to fulfill the cooperation request.

It should be noted, that the exercise of this power by the prosecutor is subject to the authorization of the Court of Preliminary Issues of the International Criminal Court, that is a certain type of control and supervision mechanism to avoid the possibility of any interference situations arising in the reserved domain of a State. There is no doubt, however, that the precept is highly controversial.

e. Article 72. Protection of information that affects national security

This Article is applicable to all cases wherein the dissemination of information or documents of a State Party, in the latter's opinion, could affect national security. Regarding the above, paragraph 5 of this precept defines the measures that an acting State may take jointly with the prosecutor, defense attorney, and the Court of Preliminary Issues of the International Criminal Court, in order to satisfy its concern regarding the dissemination of information that affects its security interests; subsection c) is included among these measures, as its text mentions that among other restrictions the *doors closed* or *ex parte* limitations can be used, which could be incompatible with the Mexican legislation in force as regard the minimum guarantees of the accused.

Furthermore, no agreement was ever reached through any type of negotiations regarding this Article; it was simply included as part of a package that the President of the Preparatory Committee imposed on the last day, without previously consulting all the delegations. Its main problem lies in the fact that sub-section d) of paragraph 5 allows the presentation of *ex parte* information, that only the judges would know about, which is contrary to the scope that the Mexican courts have granted to the constitutional guarantees contained in Articles 14 and 20.

f. Article 77, paragraph 1, item b. Applicable penalties, life imprisonment.

This Article establishes the penalties applicable by the International Criminal Court, among which is included "life imprisonment, when justified by the extreme seriousness of the crime committed and the personal circumstances of the accused".

Although life imprisonment is not accepted in many of our legislations, its application is clearly found in the marginal annotations contained in Article 110, paragraph 3, of the International Criminal Court Statute, that stipulates the possibility of reviewing the sentence after 25 years of it have elapsed. Perhaps this marginal annotation could make it more feasible.

3. <u>The International Criminal Court: a proposal that could ensure its feasibility</u>

It should be clearly understood that, in our opinion, no State should renounce its participation in the International Criminal Court. However, their incorporation to it demands, in our opinion, that some action should be taken, although other options may exist to achieve the objective of ensuring the feasibility of such a Court. We have expressed below some explanations covering the ideas we wish to propose:

1) Nexus between the Court and the United Nations Security Council

*Recommendation*

We must ensure that the UN General Assembly issues a resolution that clearly explains the matter related to the responsibilities of the General Assembly and the Security Council, in accordance with Chapter VII of the Charter of this world organization. If this is not

feasible from a parliamentary point of view, to find a way for the General Assembly to request a consultative opinion from the International Court of Justice on this issue, in order to hand down an opinion on this specific problem as well as the restrictions regarding the nexus that may be acceptable between an international body of a political nature and a world court, always bearing in mind the need to preserve the independence of the latter.

2) The need to prepare a typification of weapons of mass destruction as “war crimes”

*Recommendation*

Taking into account the fact the Preparatory Committee of the Court will meet in order to approve other elements of the crimes that fall under the jurisdictional capacity of the Court, we must explore the possibility of presenting and approving an Interpretative Statement that bridges the existing gap between the prohibitions related to weapons for mass destruction.

This will be a very difficult parliamentary battle that we must take to other United Nations fora once the Preparatory Committee has finished its task. Notwithstanding the above, we consider it necessary due to the political importance entailed in maintaining our positions in issues related to disarmament.

3) Expansion of the jurisdictional capacity of the International Criminal Court to cover other international crimes

*Recommendation*

We believe that the inclusion of other crimes under the jurisdiction of the International Criminal Court, such as drug traffic and terrorism, must not represent an insurmountable impediment to subscribe the Statute, always subject to the fact that the elements that characterize the existence of these crimes must be compatible with the major problem issues that exist in our continent.

4) Restrictions to the scope of the chapter related to “war crimes”

*Recommendation*

Although it is true that none of the elements referred to in this item must be considered as a serious impediment to subscribe the Statute, its incorporation in the text must be taken into account to show the influence exercised by the countries with bellicose traditions and policies throughout the negotiations, that sought a way to ensure that the actions performed by their armed forces would not be subject to a trial by the International Criminal Court, which is the reason of their concern regarding the institutional nexus recognized between that Court and the Security Council. This is why a statement should be made pointing out that each act typified as a crime in accordance with the Statute must be assessed, regardless from the fact that it may be part of a State policy. As a matter of fact, this position is duly guaranteed by the International Committee of the Red Cross.

5) Difficulties encountered to define non-international armed conflicts incorporated in the Statute

Another problem we face is that the definition of non-international armed conflicts incorporated in the Statute, was not even taken from the one adopted by the Additional

Protocol II of the 1949 Geneva Agreement on non-international armed conflicts, approved by a considerable number of States, but was instead taken from a decision of the Court of Appeals of the International Penal Tribunal for former Yugoslavia, in the TADIC case, with the following wording: "It applies to armed conflicts that take place in the territory of a State, when there is a long-standing armed conflict between the government authorities and organized armed groups or between said groups".

By rejecting the definition given to a non-international armed conflict included in the Statute, we do not try to avoid any type of commitment regarding this type of conflict, as the contractual obligations applicable to non-international conflicts are already included in Article 3rd, which is related to the 1949 Geneva Agreements, which we recognize with no reservation whatsoever. Notwithstanding the above, neither could we accept a definition of non-international armed conflicts that was vague in nature and, due to being vague, dangerous.

The only breakeven point of the definition that was finally included can be found in the paragraph added at the end of the above-mentioned Article 8th, that indicates that "nothing of what has been set forth in paragraphs 2 c) and e) [in other words, the definition of a non-international conflict] will affect the responsibility that concerns all Governments, which entails safekeeping and restoring public order in the State and to defend the territorial unity and integrity of the State by any legitimate means", despite the fact that by incorporating a rather dubious definition taken from the Tribunal created by the UN Security Council, it does not consider the issue of compensations strongly enough, which is what robs it of its full juridical validity.

It is undoubtedly true, that this is one of the points that should be reopened for discussion once the Statute enters into force and amendments may be presented for the terms already fixed. This would require an arrangement of positions between the countries that have already accepted this international instrument and others, that prefer to wait until this issue is solved before taking any part in it.

6) National Legislations and the International Criminal Court

The situation of the provisions of the Statute that may be incompatible with national legislations and that, at least in some cases, could have been salvaged with their respective reservations. Nevertheless, it was complicated even further when at the last minute and without holding any wide-ranging prior consultations, the clause that *allowed reservations* was eliminated from the agreement, without taking into account that in order for these reservations to be accepted, the requirement is that they do not affect the spirit and letter of the instrument in the understanding of the other States Party, while granting the necessary flexibility to the States to define the scope of the commitments they will have to undertake.

In addition to the strategy presented herein, there are also other actions that each State must take individually, for example, to trigger an internal effort to assess how the military and penal jurisdictions can be improved, by preparing a typification of the crimes that have an international scope but have not been included in our legislations. For this purpose, the sources used --among others-- could be the definition of crimes incorporated in the International Criminal Court Statute and the military legislation of friendly countries, regardless from the fact that if this international instrument is accepted which, when it happens, would certain constitute a very important step forwards to grant validity to the principle of *supplementarity.*

Proposal for the Inter-American Juridical Committee

Taking into account that:

The existence of an International Criminal Court completely independent from any other political body, would be an extremely important contribution in the fight against impunity at the international level.

Bearing in mind that the Statute of Rome is not an agreement to protect human rights, but an Agreement that develops International Humanitarian Law, whose original purpose is to rule the activity of armed conflicts and, thus, is more directly related to the countries that participate in peace operations or which, for any reason whatsoever, have their troops outside of their borders or which make use of armed force with greater frequency. Although the typification of many of these crimes has been included in the Statute, they may also occur in time of peace.

Highlighting that it is essential that the countries that voted against this international instrument or abstained, and that represent more than half of the world population and are vital to ensure the strategic balance of the world, must reconsider their position if we manage to take actions such as those described in this document, to solve our legitimate concerns.

An important contribution in this search for a solution to the problems expressed above, could be that the Inter-American Juridical Committee issues a well-founded opinion on the feasibility of this Court, taking into account all the issues described in this paper.

Resolves:

1. To include and issue on the Agenda of the Committee entitled "Possibilities and Problems of the International Criminal Court Statute”.

3. Appointing as rapporteur of this topic ....... …………….

# CHAPTER III

# OTHER ACTIVITIES

## 1. Activities carried out by the Inter-American Juridical Committee during the year 2000

### A. Presentation of the *Annual report of the Inter-American Juridical Committee*

Dr. Jonathan T. Fried, representative of the Inter-American Juridical Committee to the 30th OAS General Assembly (Windsor, June, 2000), presented the document CJI/doc.27/00, *Report of the Inter-American Juridical Committee to the General Committee of the 30th regular session of the OAS General Assembly*. He noted that several delegations had intervened during presentation of the report, stressing the importance of the topics relating to the administration of justice and to international trade and integration, and giving their support to the Course on International Law.

The Director of the Department of International Law referred to document DDI/doc.08/00, *Resolutions approved by the General Assembly at its 30th regular session that require action by the Inter-American Juridical Committee*, prepared by the Department, and containing the mandates issuing from the Windsor General Assembly.

Several members of the Inter-American Juridical Committee expressed their concern over the short amount of time devoted to presentation and consideration of the Committee's *Annual report* during the OAS General Assembly. It was suggested that the Committee on Juridical and Political Affairs should be asked to devote one or two meetings to consideration of the report before its presentation to the General Assembly, in order to ensure that there is real dialogue within that Committee, given the nature of the delegations represented there and the likelihood that the General Assembly would be unable to devote more time to reports from the various bodies of the Organization.

### B. Course on International Law

During its 54th regular session (Rio de Janeiro, January 1999), the Inter-American Juridical Committee had approved resolution CJIRES.1/LIV/99, *27th Course on International Law*, transcribed below:

**CJI/RES.1/LIV/99**

**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.*

On the basis of that resolution, the Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs organized the 27th Course on International Law, between July 31 and August 25, 2000, with the participation of 25 professors, 30 OAS fellowship holders selected from among more than 100 candidates, and 7 students who paid their own costs of participation.

The central theme of the course was "Universalism and Regionalism"; the program for the course was as follows:

**First week**

Monday 31

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| 10:00-12:00 | Opening Ceremonies. João Grandino Rodas, Chairman of the Inter-American Juridical Committee<br>“Homage to Dr. Isidoro Zanotti” |

Tuesday 1

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|---|---|
| 09:00-11:00 | Andrés Rigo, Deputy General Legal Counsel, World Bank.<br>"The World Bank and regional development banks I". |
| 11:00-13:00 | Louis Perret, Dean, Faculty of Civil Law, University of Ottawa.<br>"Evolution of juridical systems in the Americas and in the world". |
| 15:00-17:00 | Heber Arbuet Vignali, Director, Institute of International Public Law, University of Uruguay.<br>"Current Diplomatic Law I". |

Wednesday 2

| | |
|---|---|
| 09:00-11:00 | Antônio Augusto Cançado Trindade, President, Inter-American Court of Human Rights.<br>"The international law of human rights at the threshold of the 21st century I". |
| 11:00-13:00 | Louis Perret.<br>"Canada and free trade in the Americas and the world". |
| 15:00-17:00 | Heber Arbuet Vignali.<br>"Current diplomatic law II". |

Thursday 3

| | |
|---|---|
| 09:00-11:00 | Andrés Rigo.<br>"The World Bank and regional development banks II". |
| 11:00-13:00 | Antônio Augusto Cançado Trindade.<br>"The international law of human rights at the threshold of the 21st |

century II".
15:00-17:00 Heber Arbuet Vignali.
"Current diplomatic law III"

Friday 4
09:00-11:00 Andrés Rigo.
"The World Bank and regional development banks III".
11:00-13:00 Antônio Augusto Cançado Trindade.
"The international law of human rights at the threshold of the 21st century III".
15:00-17:00 Jean-François Olivier, Head of Delegation, Brazilian International Committee of the Red Cross.

**Second week**

Monday 7
09:00-11:00 Henry Saint Dahl, Lawyer.
"International extra-contractual civil liability I".
11:00-13:00 Henry Saint Dahl.
"International extra-contractual civil liability II".
15:00-17:00 Hélio Bicudo, President, Inter-American Commission on Human Rights.
"The death penalty in the inter-American system".

Tuesday 8
09:00-11:00 Antonio Remiro Brotóns, Professor, Autonomous University of Madrid.
"A new order against international Law? I".
11:00-13:00 Orlando R. Rebagliati, member of the Inter-American Juridical Committee.
"Functions and powers of the United Nations Security Council and the OAS with respect to peacekeeping and international security I".
15:00-17:00 Alonso Gómez Robledo, Professor, National Autonomous University of Mexico.
"Extradition in international law I".

Wednesday 9
09:00-11:00 Antonio Remiro Brotóns.
"A new order against international Law? II".
11:00-13:00 Orlando R. Rebagliati.
"Functions and powers of the United Nations Security Council and the OAS with respect to peacekeeping and international security II".
15:00-17:00 Alonso Gómez Robledo.
"Extradition in international law II".

Thursday 10
09:00-11:00 Antonio Remiro Brotóns.

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| | "A new order against international Law? III". |
| 11:00-13:00 | Elizabeth Spehar, Executive Coordinator of the OAS Unit for the Promotion of Democracy. |
| 15:00-17:00 | Jaime Aparicio, Director, OAS Office of Summit Follow-up. "The OAS, political and juridical forum for a new regionalism I". |

Friday 11

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| 09:00-11:00 | Sergio González Gálvez, member of the Inter-American Juridical Committee. "The future of regionalism in an asymmetric society". |
| 11:00-13:00 | Elizabeth Spehar |
| 15:00-17:00 | Jaime Aparicio. "The OAS, political and juridical forum for a new regionalism II". |

**Third week**

Monday 14

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|---|---|
| 09:00-11:00 | Ralph Carnegie, Professor, University of the West Indies (UWI). "The conflict of international law regimes I". |
| 11:00-13:00 | Claude Heller, Permanent Representative of Mexico to the OAS. "Perspectives on the inter-American system in the age of globalization I." |
| 15:00-17:00 | Claude Heller. "Perspectives on the inter-American system in the age of globalization II.” |

Tuesday 15

| | |
|---|---|
| 09:00-11:00 | Ralph Carnegie. "The conflict of international law regimes II". |
| 11:00-13:00 | Luis Marchand Stens, member of the Inter-American Juridical Committee. "Relations between the OAS and the United Nations in the area of peacekeeping and security." |
| 15:00-17:00 | Claude Heller. "Perspectives on the inter-American system in the age of globalization II.” |

Wednesday 16

| | |
|---|---|
| 09:00-11:00 | Ralph Carnegie. "The conflict of international law regimes III". |
| 11:00-13:00 | Roberto Puceiro Ripolll, Professor, University of the Republic of Uruguay. "Standards of *jus cogens*, an exclusively universal phenomenon or also a regional one?  I". |
| 15:00-17:00 | Cláudia Lima Marques, Professor, Federal University of Rio Grande do Sul. "Consumer protection: aspects of regional and |

general private law I."

Thursday 17

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|---|---|
| 09:00-11:00 | Roberto Puceiro Ripoli.<br>"Standards of *jus cogens*, an exclusively universal phenomenon or also a regional one? II". |
| 11:OO-13:00 | Cláudia Lima Marques.<br>"Consumer protection: aspects of regional and general private law II." |

Friday 18

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|---|---|
| 09:00-11:00 | Roberto Puceiro Ripoli.<br>"Standards of *jus cogens*, an exclusively universal phenomenon or also a regional one? III". |
| 11:00-13:00 | Free |

**Fourth week**

Monday 21

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| 09:00-11:00 | Antônio Celso Alves Pereira, Rector, University of the State of Rio de Janeiro.<br>"State sovereignty: Universalism and regionalism I". |
| 11:00-13:00 | Jean-Michel Arrighi, Director of the OAS Department of International Law.<br>"Legal and institutional aspects of the inter-American system I". |
| 15:00-17:00 | Charles Siegel, Lawyer.<br>“Disputes on transnational torts liability I” |

Tuesday 22

| | |
|---|---|
| 09:00-11:00 | Antônio Celso Alves Pereira.<br>"State sovereignty: Universalism and regionalism I". |
| 11:00-13:00 | Alejandro Garro, Professor, Columbia University.<br>"The Latin-American perspective on regionalism and universalism I." |
| 15:00-17:00 | Charles Siegel, Lawyer.<br>“Disputes on transnational torts liability II” |

Wednesday 23

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|---|---|
| 09:00-11:00 | Yves Nouvel, Professor, University of Paris XIII.<br>"The UN and military intervention in Kosovo: international security and regional security I". |
| 11:00-13:00 | Alejandro Garro.<br>"The Latin American perspective on regionalism and universalism II." |
| 15:00-17:00 | Fernando Jaramillo, Chief of Staff of the Secretary General of the OAS.<br>"The Role of the OAS Secretary General". |

<u>Thursday 24</u>

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|---|---|
| 09:00-11:00 | Yves Nouvel.<br>"The UN and military intervention in Kosovo: international security and regional security I". |
| 11:00-13:00 | Jean-Michel Arrighi.<br>"Legal and institutional aspects of the inter-American system II". |
| 15:00-17:00 | Free |

<u>Friday 25</u>

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|---|---|
| 10:00 | Closing session and award of certificates.<br>Remarks by João Clemente Baena Soares, former Secretary General of the OAS<br>Remarks by Eduardo Vío Grossi, member of the Inter-American Juridical Committee |

During its 55th regular session (Rio de Janeiro, August, 1999), the Inter-American Juridical Committee decided, by means of resolution CJI/RES.13/LV/99, *28th Course on International Law*, that this event should be held from July 30 to August 24, 2001, and that it should have as its central theme "The Human Being in Contemporary International Law". By means of resolution CJI/RES.21 (LVII-O/00), *Course on International Law*, the Inter-American Juridical Committee reiterated the contents of the preceding resolution. The text of that resolution is repeated below:

**CJI/RES.21 (LVII-O/00)**

**COURSE ON INTERNATIONAL LAW**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND:

That the 27th Course in International Law was held in the city of Rio de Janeiro from the 31st July to the 25th August 2000 on the core theme *Universalism and regionalism*;

That it was determined by resolution CJI/RES.13/LV/99, *Course on International Law*, that the 28th Course on International Law would be held from the 30th July to 24th August 2001 on the core theme *The human being in contemporary international law*;

The timely publication of the annual volumes regarding the Course on International Law, and in particular the volume relating to the 26th Course on International Law held in 1999; and

The importance of the Course on International Law in the diffusion the inter-American system of international law in general, as well as the necessity to achieve a wider and more equitable participation of students in said Course,

RESOLVES:

1. To reiterate that the 28th Course on International Law will be held from the 30th July

to the 24th August 2001on the core theme *The human being in contemporary international law*.

2. To request that the Secretary General make provisions for the Course on International Law to have simultaneous translation into Spanish and English and vice-versa during its duration in order to guarantee greater participation of the students from other countries in the hemisphere without prejudice to their maternal language.

3. To request that the General Assembly consider the possibility of granting the Course further budgetary support by means of a significant increase in the value of the available scholarships, in view of the cost of living in the city of Rio de Janeiro, without this reducing the number of such scholarships. To this end, it is further suggested that the Secretary General intermediate the obtaining of scholarships via external financing.

4. To exhort the Member States of the OAS to sponsor the participation of their national students in the Course on International Law through direct financing of said participation.

5. To congratulate the General Secretariat on the work carried out in organizing the Course on International Law, and on the subsequent timely publication of the respective volumes.

With respect to publications concerning the Course on International Law, a new edition of the course index was published in February 2000 ("Indice General. Cursos de Derecho Internacional, 1974-1998), and the volume corresponding to the course for 1999 was published in June 2000.

With respect to the 28th Course on International Law, members of the Inter-American Juridical Committee requested the Secretariat to prepare and distribute, as widely as possible among universities of the hemisphere, a poster in the four official languages of the OAS, and to make all efforts to provide the financial resources necessary for conducting the course. As well, it requested that this poster be included on the Internet page of the Inter-American Juridical Committee.

## C. Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS

During its 56th regular session (Washington, D.C., March, 2000), the Inter-American Juridical Committee held the Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS. This meeting was held on March 23 and 24, and the central theme was an analysis of the inter-American juridical agenda. The legal advisors participating in this meeting were:

Brazil: Minister Haroldo Valladão Filho
Advisor of the Legal Department of the Ministry of Foreign Affairs

Canada: Mr. Michael R. Leir
Legal Advisor, Department of Foreign Affairs and International Trade

Colombia: Dr. Héctor Adolfo Sintura Varela
Chief of the Legal Department of the Ministry of Foreign Affairs

Equador Dr. Andrés Montalvo Sosa

Alternate Representatitve of the Permanent Mission of Equador to the OAS
Guyana: Ms Deborah Yaw
Alternate Representative of the Permanent Mission of Guyana to the OAS
Jamaica: Ms Rolande Pryce
Alternate Representative of the Permanent Mission of Jamaica to the OAS
Mexico: Dr. Miguel Ángel González Félix
Legal Advisor of the Ministry of Foreign Affairs
Venezuela: Dr. Ernesto Kleber L.,
Legal Advisor of the Ministry of Foreign Affairs

Several members of the Inter-American Juridical Committee urged that the holding of such meetings be continued, with an effort to ensure participation at the highest level. As to the date of the next Joint Meeting, the Juridical Committee decided, in principle, that this should be held in August 2001, depending on progress achieved in the period prior to the March, 2001 session.

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 acted as observers with various forums and international agencies during the year 2000. These notes also include reference to participation during 1999, written reports on which were presented to the Inter-American Juridical Committee during the year 2000:

- Dr. Orlando R. Rebagliati: 74th Meeting of the Inter-American Children's Institute and the 18th Pan-American Congress (Buenos Aires, Sept. 20-25, 1999). (See document CJI/doc.5/00)

- Dr. Gerardo Trejos Salas: Third Meeting of Ministries of Justice or of Ministers or Attorneys General of the Americas (San José, Costa Rica, March 1-3, 2000).

- Inter-American Juridical Committee: Symposium on "Security Challenges for the Americas", organized by the Inter-American Defense Board (Washington D.C., March 23, 2000).

- Dr. Jonathan T. Fried: 30th regular session of the OAS General Assembly (Windsor, Canada, June 4-6, 2000). (See document CJI/doc.27/00)

- Dr. Gerardo Trejos Salas: Second Refresher Course in International Law, organized by the Instituto del Canal of the University of Panama, the Faculty of Law of the University of Panama, the Ministry of Foreign Affairs of Panama and the General Secretariat of the OAS (Panama City, June 19-30, 2000).

- Dr. Brynmor Pollard: 52nd Session of the United Nations International Law Commission (Geneva, July 28, 2000). (See document CJI/doc.22/00)

- Inter-American Juridical Committee: 17th Rome-Brasília Seminar (Brasília, August 24-26, 2000).

- Dr. João Grandino Rodas: Permanent and Electronic Session of the Inter-American Preparatory Committee on Childhood Issues for the 2000 Summit of the Americas (CPI) (Montevideo, Sept. 11-November 30, 2000).

The texts of the reports prepared on the occasion of these presentations are transcribed below, in the order mentioned:

**CJI/doc.5/00**

**SEVENTY FOURTH MEETING OF THE DIRECTING COUNCIL OF THE INTER-AMERICAN CHILDREN'S INSTITUTE AND THE EIGHTEENTH PAN AMERICAN CHILD CONGRESS (Buenos Aires, September 20 to 25, 1999)**

(report of the Observer Dr. Orlando Rebagliati)

1. The LXXIV Meeting of the Directing Council of the Inter-American Children's Institute (IIN) and the XVIII Pan American Child Congress were held in Buenos Aires from September 20 to 25, 1999.

2. The LXXIV Meeting of the Directing Council of the IIN was chaired by its Director, Mr. Brian Ward (Canada). For its part, the XVIII Pan American Child Congress was presided over by Mr. Marcelo Jalil, head of the National Council for Children and the Family of the Argentine Republic.

Delegates from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, the United States, Uruguay, and Venezuela participated in the meetings. The Pan American Child Congress was also attended by representatives of organs and agencies that are part of the inter-American and the United Nations systems as well as of agencies and institutions associated with the Inter-American Children's Institute through cooperation agreements (A copy of the list of participants in the Pan American Child Congress is attached as Appendix I).

The LXXIV meeting of the IIN Directing Council, which met from September 20 to 22, adopted the following resolutions (Appendix II):

- CD/RES. 02 (74-R/99): "Commitment of the Inter-American Children's Institute to Issues Affecting Children and Youth with Disabilities";
- CD/RES. 03 (74-R/99): "Support for Ending the Use of Children and Young People under 18 as Soldiers";
- CD/RES. 04 (74-R/99): "Prevention of Domestic Violence: Its Impact on Children";
- CD/RES. 05 (74-R/99): "The Inter-American Preparatory Committee on Children's Issues for the 2001 Summit of the Americas";

- CD/RES. 06 (74-R/99): "Strengthening Inter-American Cooperation to Avoid International Abduction of Children by One of Their Parents."

It is said that the last resolution would be of special relevance to the Inter-American Juridical Committee.

3. The XVIII Pan American Child Congress was held from September 22 to 25. As may be recalled, the topic addressed was "Information and Children's Rights."

At the second meeting (September 23), the Congress Secretariat distributed to the plenary and to Working Group N° 8 (See below) the information document prepared by the observer for the Inter-American Juridical Committee, Dr. Orlando R. Rebagliati, classified as document OEA/Ser.K/XXIV.18.1 CPN/doc.23/99, which is attached as Appendix III.

The activities of the Congress focused, on the one hand, on the papers of the special guests and the analysis of documents presented by experts and, on the other, on the discussions of the working groups and the documents they prepared.

In that regard, the eight working groups established by the Secretariat considered the following topics:

- Working Group N° 1: Integral development from the perspective of health and influence of the mass media;
- Working Group N° 2: The family. Primary agent for protection and access to information;
- Working Group N° 3: Capacity for critical thought on the Internet;
- Working Group N° 4: Information media, technology, and ethics;
- Working Group N° 5: Information and the psychosocial development of children and adolescents;
- Working Group N° 6: Confidentiality of information, its legal control;
- Working Group N° 7: Political participation by children and adolescents;
- Working Group N° 8: Role of international organizations and children's right to information.

A copy of the report of Working Group n° 8 (Appendix IV) has been attached, in view of the special relevance it may have for the Inter-American Juridical Committee.

At the last plenary session of the Congress, held on September 25, the rapporteurs for the different working groups reported on their endeavors, which gave rise to comments by the participants.

Since it was impossible to complete the translation of the corresponding documents, the plenary session was not able to approve the Conclusions and Recommendations prepared by the official Congress representatives, as scheduled in the order of business.

4. The final document will be available from the General Secretariat of the OAS.

**CJI/doc.27/00**

## REPORT TO THE GENERAL COMMITTEE OF THE THIRTIETH REGULAR SESSION OF THE OAS GENERAL ASSEMBLY ON THE INTER-AMERICAN JURIDICAL COMMITTEE

(presented by Dr. Jonathan T. Fried)

Mr. Chairman, Distinguished Delegates,

On behalf of the Chairman of the Juridical Committee, Dr. Keith Highet, who very much would have wished to be with us today, I am pleased to provide the General Committee with a brief summary of the recent activities of the Inter-American Juridical Committee, as embodied in our *Annual Report to the General Assembly* [OEA/Ser.Q CJI/doc. 52/99].

Our work remains directly responsive to the priorities established by member States for the Organisation.

First, the Juridical Committee has continued to make a significant contribution to **good governance and democratic development** in the hemisphere. The Committee was an active supporter and participant in the **Meeting of Ministers of Justice of the Americas**. A preliminary report on *Right to information: access to and protection of information and personal data* (OEA/Ser.Q CJI/doc.45/99) provides a basis for action, depending on additional documentation that has been requested of member States by the General Secretariat. The Juridical Committee's report comprising *Articles for model legislation on illicit enrichment and transnational bribery* (OEA/Ser.Q CJI/doc.70/98 rev.2) builds on the previous work of the Committee in drafting the OAS Convention by providing guidance to national law-makers for implementing the Convention. **Improving the administration of justice in the Americas** remains on the Juridical Committee's agenda; although the Committee's recommendations on the adoption of principles and guidelines has yet to be acted on by the political organs of the Organisation, the Juridical Committee is giving increasing focus to access to justice. And the Juridical Committee has begun an examination on aspects of **Human rights and biomedicine**.

Second, the Committee's work continues to complement the work of political organs on **peace and security**. Our examination of juridical aspects of the fight against **terrorism** has highlighted the potential for enhanced inter-American cooperation in this field. We have begun a comprehensive review of **Juridical aspects of hemispheric security**, to provide decision-makers with a thorough analysis of the relevant instruments, including the Charter and the Rio Treaty (TIAR), as well as of relevant principles of international law, such as humanitarian intervention, non-interference in matters essentially within domestic jurisdiction, and human security. The reports of the co-rapporteurs, Drs. Sergio González Gálvez (OEA/Ser.Q CJI/doc.11/00 rev.1), Luis Marchand Stens (OEA/Ser.Q CJI/doc.4/00 corr.1), and Eduardo Vío Grossi (OEA/Ser.Q CJI/doc.9/00), which are reproduced in our *Annual Report*, are rich in analysis and worthy of reading in their entirety. The Juridical Committee's report on *Rights and duties of States under the United Nations 1982 Law of the Sea Convention: an informal guide* (OEA/Ser.Q CJI/doc.48/99 rev.3) should result in the production of a practical guide on implementation of this complex convention with a view to preventing future disputes in this field. The Juridical Committee also highlighted the contribution of the OAS to the development of international law on peace and security in its comments on the *Centennial of the 1899 International Peace Conference* (OEA/Ser.Q CJI/RES.10/LII/98).

Third, in addition to our work on bribery and corruption, the Juridical Committee maintained its traditional role in promoting **prosperity** in the hemisphere. Our ongoing studies on **Juridical aspects of integration** gives the Trade Unit, FTAA negotiators, and member governments better understanding of key issues, such as the application of the most-favoured-nation principle to the Lome Convention and sub-regional integration. The codification and progressive development of **private international law**, including in helping to develop the agenda for the Sixth Inter-American Specialised Conference on Private International Law [CIDIP VI], remains a core Committee activity.

Fourth, as a continuing investment in training the next generation of international lawyers and diplomats, the Juridical Committee sponsored the **XXVI Course on International Law** in Rio de Janeiro, with classes covering both public and private international law, and with some emphasis on legal aspects of managing natural resources.

Finally, as directed by our Charter, the Juridical Committee maintained and sought to expand its program of **outreach** with other international organisations, professional associations and the legal community more generally. In addition to participating in the meetings of Ministers of Justice of the Americas, as mentioned, Committee members met with their counterparts at the UN Sixth (Legal) Committee and International Law Commission, UNIDROIT and the Hague Institute on Private International Law, and at seminars organised by the Inter-American Court on Human Rights, and others.

Before concluding, Mr. Chairman, and on behalf of all members of the Juridical Committee, I would like to convey our gratitude to Drs. Enrique Lagos, Jean-Michel Arrighi and their staff at the Secretariat for Legal Affairs. Working within the constraints of a budget that can only be described as under-funded, they have updated publications of the Juridical Committee and the Course on International Law, rationalised the Juridical Committee's library collection, and continue to look for efficiencies in the administration of the Committee. I would also underscore the importance of ensuring that the Juridical Committee itself is adequately funded to pursue its priority work and to continue to administer the Course on International Law.

I would, of course, be pleased to answer any questions or respond to any comments delegates may have.

**CJI/doc.22/00**

**REPORT OF THE OBSERVER FROM THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE FIFTY-SECOND SESSION OF THE INTERNATIONAL LAW COMMISSION (Geneva, 28 July 2000)**

(presented by Dr. Brynmor Thornton Pollard)

1. The Inter-American Juridical Committee, at its 56th regular session held in Washington, D.C., in March 2000, designated me to attend the 52nd session of the International Law Commission in Geneva, Switzerland on 28 July, 2000 as the official observer from the Committee for this year.

2. The Chairman of the Commission, Ambassador Chusei Yamada, of Japan, welcomed me to the session and invited me to address the Commission after the conclusion of the morning session of the Commission's resumed discussions on draft articles on State responsibility and the recovery of reparations being prepared by the Commission. The text of my statement to the Commission, on behalf of the Juridical Committee, is attached.

3. Following on my presentation, there were interventions by members of the Commission as follows:

a) enquiry was made of the Juridical Committee's interest in democracy having particular regard to the conclusions reached at the recently concluded meeting of the OAS in Windsor, Canada, and with particular reference to the situation in Peru. I replied that the topic "democracy" was engaging the attention of the Juridical Committee but no recommendations had as yet been made to the principal organs of the Organisation.

b) enquiry was also made of the Juridical Committee's interest in the topic "corruption". I was pleased to inform members of the Commission that the Juridical Committee had given in-depth consideration to this topic and had prepared and submitted to the Permanent Council of the Organisation, at the Council's request, draft model legislative provisions as guidelines to facilitate member States of the Organisation in giving effect to the Inter-American Convention against Corruption in their respective jurisdictions.

c) Professor Djamchid Momtaz enquired of the Juridical Committee's motivation in producing the guidelines on the UN Convention on the Law of the Sea and whether difficulties were being experienced by States in implementing the Convention. I informed the Commission that it was the Juridical Committee's view that some States, because of limited expertise and other resources at their disposal, would find that the document provides useful practical guidelines in seeking to implement and apply articles of the Convention, for example, issues relating to the delimitation of maritime boundaries, the management of the exclusive economic zone and the exploration and exploitation of the resources of the seabed and subsoil.

d) The Vice-Chairman of the Commission enquired whether the Juridical Committee made use of the Commission's reports. I replied that it was presumed that the Juridical Committee's rapporteurs on the topics engaging the Committee's attention would take into consideration the Commission's reports. This is obviously a matter to be borne in mind in our seeking to forge stronger ties with the International Law Commission.

4. Ambassador Enrique Candioti, on behalf of his colleagues, expressed deep regret at the death of Dr. Keith Highet, our late Chairman. In his view, there was no doubt that the Juridical Committee has suffered a great loss. Ambassador Candioti asked me to convey to the Juridical Committee the condolences of the Commission.

5. At the adjournment of the Commission's morning session after receiving my presentation on behalf of the Juridical Committee, in conversation with Ambassador João Clemente Baena Soares, he urged me to impress on the Committee the desirability of furnishing the Commission with its documents. It will be recalled that this request was made of Dr. Jonathan T. Fried when he attended the 50th session of the Commission on the Juridical Committee's behalf.

6. As was reported by Dr. Jonathan T. Fried with respect to the 50th session of the Commission, the present session of the Commission was attended by students assigned temporarily to members of the Commission. Prior to my presentation, a representative of the students expressed thanks and appreciation for the opportunity afforded them to be with members of the Commission.

ANNEX

**STATEMENT BY THE OBSERVER TO THE INTERNATIONAL LAW COMMISSION ON BEHALF OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Geneva, 28 July 2000)**

Mr. Chairman and other distinguished members of the International Law Commission, I consider it a signal honour and also a privilege to be afforded the opportunity to attend and address this session of your august body as an observer on behalf of the Inter-American Juridical Committee of the Organisation of American States (OAS). I bring you warm greetings from the Vice Chairman and other members of the Juridical Committee with their best wishes for fruitful deliberations at your meetings and a rewarding outcome of the current session of your Commission.

I must refer to the severe loss to our Juridical Committee occasioned by the death only three weeks ago of our distinguished Chairman whose contribution to the work of the Juridical Committee was outstanding. He had a passion for bringing our deliberations on issues before the Juridical Committee to purposeful finality and we will certainly miss his zeal, wise counsel and companionship.

The Inter-American Juridical Committee has a membership of eleven jurists, nationals of member States of the OAS nominated for election by the General Assembly of the Organization in their personal capacity for four-year terms of office and eligible for re-election pursuant to article 4 of the Statutes of the Juridical Committee. The late Dr. Keith Highet of the USA was, until three weeks ago, the Chairman of the Juridical Committee with Dr. João Grandino Rodas of Brazil as the Vice-Chairman, both of them elected by the Juridical Committee for a term of office of two years in accordance with article 10 of the Statutes of the Inter-American Juridical Committee. At the Twenty-Ninth Regular Session of the General Assembly of the Organisation in June, 1999, in Guatemala City, the late Dr. Highet was elected for another four-year term of office. The other members of the Juridical Committee are nationals of Argentina, Canada, Chile, Costa Rica, Guyana, Jamaica, Mexico, Peru, and Venezuela.

The principal purposes of the Juridical Committee as stated in Article 3 of the Statutes of the Juridical Committee, are as follows :

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

During the Inter-American Juridical Committee's $54^{th}$, $55^{th}$ and $56^{th}$ regular session in January and August 1999, and March 2000, the Committee deliberated on a number of topics, including, in particular:

i. the right of access to information, including personal information (with its limitations);
ii. improving the administration of justice in the Americas;

iii. the application of the United Nations Convention on the Law of the Sea by the States of the Hemisphere;
iv. the preparation of a report on human rights and bio-medicine or on the protection of the human body;
v. the juridical aspects of hemispheric security.

With regard to “the right to information”, the General Assembly of the Organisation, by resolution AG/RES.1395 (XXVI-0/96), had requested the IAJC to give special attention to matters concerning access to information and the protection of personal data. The Juridical Committee considered that it was desirable to ascertain the extent to which national legislation had addressed the issue as a pre-requisite to determining whether efforts should be directed towards formulating a preliminary draft of an inter-American convention on the subject in comparison with the Strasbourg Convention for the Protection of Individuals with regard to Automatic Processing of Personal Date.

The IAJC, through the Secretariat for Legal Affairs of the Organisation, requested member States to furnish information and data, but only six (6) member States responded to the request. The Juridical Committee is of the view that developments in technology suggested the need to ensure that national 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 control of governments or private entities.

The Juridical Committee, by resolution CJI/RES.9/LV/99, 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, guidelines, a model law or a draft international instrument in this sphere of activity.

The topic “Improving the Administration of Justice in the Americas” has been on the agenda of the Inter-American Juridical Committee since 1995 and has been the subject of a preliminary but comprehensive report by the Committee submitted to the Permanent Council of the Organisation.

The report provided an in-depth study of principles, procedures and mechanisms intended to safeguard the independence of the judiciary and lawyers in performing their functions including enhancing their remuneration and other conditions of service and generally for their security of tenure.

The Juridical Committee is very supportive of the initiatives of the meetings of Ministers of Justice or of Ministers or Attorneys-General of the Americas. The Committee welcomes the decision of the Ministers to establish the Justice Studies Centre of the Americas and their declared commitment to providing greater access to justice by the disadvantaged members of our societies and to developing and strengthening co-operation among member States of the Organisation in the struggle against transnational criminal activity and cyber crime.

At the instance of our late distinguished Chairman and our colleague Ambassador Orlando R. Rebagliati, a document entitled *Review of the rights and duties of States under the 1982 Law of the Sea Convention: an informal guide* was presented before the Inter-American Juridical Committee. The sponsors of the document, in introducing the document with a view to its being adopted by the Committee for circulation and dissemination among member States, advocated that, having regard to the importance of the 1982 Law of the Sea Convention to member States of the OAS, the document could be a useful guide to member States in seeking to give effect to the Convention because of its complexity and, therefore, the likelihood of difficulties being experienced by States, especially developing countries, in seeking to comply with or implement the Convention. The aim of the document, as stated, is

to provide member States of the OAS with guidance as to their specific duties, obligations, responsibilities and rights under the 1982 United Nations Convention on the Law of the Sea.

The Juridical Committee, at its 56th Regular Session held in Washington D.C., USA, during the period 20-31 March, 2000, approved the document and agreed to its being circulated to those instrumentalities of member States of the OAS with responsibility for implementing the provisions of the Convention as well as to other professional bodies and scholars specialists in the Law of the Sea. The Juridical Committee also resolved to keep the matter under review in the light of comments which may be received from member States and from the Committee on Juridical and Political Affairs of the Permanent Council of the Organisation.

- **The preparation of a report on human rights and bio-medicine or on the protection of the human body:**

The Juridical Committee, on the initiative of one of its members, commenced discussions on the above-mentioned topic. A number of issues were identified in those discussions, in particular, the right to life from the moment of conception and this issues relationship to that of excess embryos in artificial insemination or fertilisation procedures. The ultimate goal is to protect the embryo and avoid certain practices such as surrogate maternity, post mortem paternity and other situations. Should the goal be the development of a model law on the subject or a draft convention?  Some members of the Juridical Committee held the view that it would be premature to do so.

The Juridical Committee decided to inform the Pan American Health Organisation (PAHO) accordingly and also requesting information and views on the scientific, medical and technical factors which had to be considered as well as other information or observation that PAHO might consider relevant.

At the 56th regular session held in Washington D.C. from 20-31 March, 2000, during a meeting with the Legal Advisors of the Ministries of Foreign Affairs of OAS Member States, there was an exchange of views on the topic of a new concept of security in the hemisphere arising out of documents presented respectively by Ambassador Sergio González Gálvez (Mexico), Ambassador Luis Marchand Stens (Peru), and Dr. Eduardo Vío Grossi (Chile), members of the Juridical Committee and the tabling  by Dr. Jonathan Fried, also a member of the Juridical Committee, on behalf of the Ministry of External Affairs of Canada of a paper entitled *Human security: safety for people in a changing world*. The Canadian thesis advocates that State security and human security are mutually supportive. A secure world cannot be attained unless the people are secure. The other submissions raise the question of the future of hemispheric security in the context of wider global responsibilities.

The issues raised in the above-mentioned documents are presently engaging the attention of the Juridical Committee and will be the subject of further discussion at the 57th regular session of the Juridical Committee in August 2000 in Rio de Janeiro.

- **The Course on International Law**

Since 1974, the Inter-American Juridical Committee has sponsored annually in August in conjunction with its regular session its Course on International Law with the participation of well-known specialists and lecturers in various areas of international law. The Course is attended by persons from member States of the OAS being principally officers in their early careers in the foreign service nominated by their respective Governments.

At the course of lectures conducted in August 1999, your distinguished colleagues Ambassador Enrique Candioti and Ambassador Baena Soares delivered lectures.

Ambassador Baena Soares also presided over the closing ceremony and presented certificates to the participants.

- **Joint Meeting With Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS**

Joint meetings of the Inter-American Juridical Committee and Legal Advisors of the Ministries of Foreign Affairs of the Member States of the Organisation to discuss matters of common interest and of importance to the OAS to foster good relations are held every two years to coincide with a period of sessions of the Juridical Committee. The decision was taken (at the 55th regular session of the Juridical Committee that such joint meetings will be held triennially in the future. This interaction is acknowledged by the participants to be very informative and productive in furthering the objectives of the Organisation and implementing programmes.

At the 53rd regular session of the Juridical Committee held in Rio de Janeiro, Brazil, in August 1998 consideration was given to the preliminary reports of the co-sponsors of the Centennial of the Hague Peace Conference and in a joint session with representatives of the co-sponsors there was a useful exchange of views on the reports. The co-sponsors of the Centennial undertook that in finalizing the reports for the centennial, account would be taken of the views expressed at the joint session and the conclusions reached.

As mentioned earlier, a new concept of security in the hemisphere engaged the attention of the Joint Meeting with the Legal Advisors os the Ministries of Foreign Affairs of Member States of the OAS at the 56th regular session of the Juridical Committee held in Washington D.C. in March 2000.

Finally, Mr. Chairman and members of the International Law Commission, I wish to express again the deep appreciation of the Inter-American Juridical Committee for this opportunity to maintain and strengthen our association with the Commission. There is hardly any need for me, as the representative of the Inter-American Juridical Committee at your meeting today, to assure you and the other members of the Commission that we value highly this on-going collaborative exercise.

## 2. Other matters

Other resolutions approved by the Inter-American Juridical Committee

During its 56th and 57th regular sessions (Washington D.C., March 2000, and Rio de Janeiro, August, 2000), the Inter-American Juridical Committee approved resolutions CJI/RES.2 (LVI-O/00), *Absence of Dr. Kenneth O. Rattray from the regular periods of sessions of the Inter-American Juridical Committee in August 1999 and March 2000*, CJI/RES.11 (LVII-O/00), *Acknowledgment to Dr. Luis Marchand Stens*, CJI/RES.12 (LVII-O/00), *Homage to the memory of Dr. Keith Highet*, and decision CJI/DI.1 (LVII-O/00), *On the need to Improve the offices and library of the Inter-American Juridical Committee*. In adopting resolution CJI/RES.12 (LVII-O/00), the members of the Inter-American Juridical Committee and the staff of the General Secretariat observed a minute of silence in honor of the memory of Dr. Keith Highet, who died during his term as Chairman of that advisory body.

The resolutions and the decision referred to above are transcribed below:

**CJI/RES.2 (LVI-O/00)**

**ABSENCE OF DOCTOR KENNETH O. RATTRAY FROM THE REGULAR PERIODS OF SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE IN AUGUST, 1999 AND MARCH, 2000**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

AWARE that Dr. Kenneth O. Rattray, member of the Juridical Committee was unable because of temporary ill-health to attend the regular period of sessions held in Rio de Janeiro, Brazil, in August 1999;

ALSO AWARE, by his communication, that because of the professional services of the Government of Jamaica requiring Dr. Rattray's professional services in the United Kingdom and consequently, preventing him from attending also the period of sessions of the Juridical Committee held in Washington, D.C, during the period March 20 to 31, 2000;

AND WHEREAS article 9 of the Statute of the Inter-American Juridical Committee makes provision for a vacancy in the membership of the Committee to occur in the event of the absence of a member for two consecutive periods of sessions, unless the Juridical Committee considers its absence fully justified,

RESOLVES for the purposes of the said article 9 that Dr. Rattray's absence from the aforementioned two regular sessions of the Juridical Committee is fully justified.

**CJI/RES.11 (LVII-O/00)**

**ACKNOWLEDGEMENT TO DR. LUIS MARCHAND STENS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the term of office of Dr. Luis Marchand Stens as a member of the Inter-American Juridical Committee ends on 31 December 2000;

RECOGNIZING the significant contribution through relevant studies and insights consistently proffered by Dr. Marchand, throughout his tenure in the Juridical Committee;

RESOLVES:

1. To record its sincere appreciation to Dr. Luis Marchand Stens for his dedicated and enthusiastic participation in all the work and activities of the Inter-American Juridical Committee.

2. To express its particular thanks to Dr. Luis Marchand Stens for his relevant contribution towards the study of various topics on the agenda of the Inter-American Juridical Committee, especially with regard to legal aspects of the hemispheric security; improving the administration of justice in the Americas; inter-American cooperation against terrorism; and the juridical dimension of integration and international trade.

3. To convey this resolution to Dr. Luis Marchand Stens and the Organization's organs.

**CJI/RES.12 (LVII-O/00)**

**HOMAGE TO THE MEMORY OF DR. KEITH HIGHET**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING NOTED the untimely passing of its distinguished Chairman and eminent jurist on July 12th, 2000;

RECOGNISING the outstanding contribution of Dr. Keith Highet in the development and codification of International Law;

ACKNOWLEDGING the significance of the contribution of Dr. Highet in harmonising the development of the civil law and common law in the Americas;

CELEBRATING the seminal contribution of Dr. Highet in the work of the Juridical Committee and in particular the formulation of the guidelines on the United Nations Convention on the Law of the Sea,

RESOLVES:

1. To render its deeply felt and sincere homage in celebration and acknowledgement of the memory of Dr. Keith Highet, whose passing is an irreparable loss, not only to his homeland, the United States of America, but also to the Inter-American Juridical Committee and the cause of International Law.

2. To honour the memory of Dr. Keith Highet at the 28th Course on International Law to be held in Rio de Janeiro on August 2001, in the form of a Memorial Lecture.

3. To publish the document entitled *Review of the rights and duties of States under the 1982 United Nations Law of Sea Convention: an informal guide* prepared at the initiative of Dr. Highet under the auspices of the Juridical Committee.

4. To forward a copy of this resolution as a way of expressing our condolences to the widow of Dr. Keith Highet, and his family.

**CJI/DI.1 (LVII-O/00)**

**ON THE NEED TO IMPROVE THE OFFICE AND LIBRARY OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

APPRECIATING the support lent by the Secretary General by providing the headquarters of the Inter-American Juridical Committee in Rio de Janeiro with adequate resources to update the library holdings and refurbish the furniture and equipment necessary for the activities of that Organ;

BEARING IN MIND that the above-mentioned resources made it possible to purchase a series of juridical works as well as to prepare the *Annual report of the Inter-American Juridical Committee to the General Assembly* in CD-ROM for the consultation of the Inter-

American Juridical Committee members and preparation of reports on topics being researched;

CONSIDERING that the recent computerization of the library has enabled it to interface with other juridical libraries via on-line services but also allowed the Inter-American Juridical Committee's home-page to be used to disseminate widely and adequately the work approved by this Organ of the inter-American system;

CONSIDERING that the modernization of the Inter-American Juridical Committee headquarters has not only assured that the Office has proper computer and telecommunications equipment available but likewise has enhanced the structural aspects of the installations,

RESOLVES:

1. To express its deep gratitude to the General Secretariat for the measures taken on behalf of the Inter-American Juridical Committee.

2. To request the General Secretariat to continue his efforts with the competent organs of the Organization to maintain the Juridical Committee budget at the level allocated to enable this Organ to fulfill with dignity the mandates assigned by the General Assembly and the Permanent Council, as well as the responsibilities conferred by the OAS Charter and its Statutes.

3. To appoint Drs. Sergio González Gálvez, Brynmor Pollard and Orlando Rebagliati as members of the Library Committee.

4. To request the General Secretariat to present to the Library Committee, at the next regular session of the Inter-American Juridical Committee, a report that will allow for an assessment of the situation of the Library and adoption of the necessary measures for improvement.

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**ANNEX A**

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**CJI/doc.19/00**

### REMARKS BY DR. KEITH HIGHET, CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE OPENING SESSION OF THE 56TH REGULAR SESSIONS HELD IN WASHINGTON, DC ON MARCH 20, 2000

First, may I say in my mother tongue, on behalf of the Inter-American Juridical Committee (IAJC) and all of its members, how much we appreciate the warm welcoming words of the Secretary General and of the Chair of the Permanent Council. We are delighted to be here in this beautiful city in its most beautiful season. Today is the first day of spring. The Juridical Committee is, of course, extraordinarily pleased to resume its meeting of the 56$^{th}$ regular sessions at the headquarters of our Organization of which it is so proud to form a part. It is most appropriate that the first meeting of the Juridical Committee in the 21$^{st}$ century should be held here in the historic halls of the Organization of American States. In August, we will return to Rio de Janeiro for our next regular session of meetings, thus assuring a correct balance for the first year of the new millennium.

In the past several years as you have heard, the Juridical Committee has been proud to render its opinion as requested by the General Assembly on questions provoked by unilateral legislation known as the Helms-Burton Act. It also rendered advice requested by the Permanent Council on the Draft inter-American convention on the rights of indigenous peoples, and we presented views concerning a Draft convention for the protection of the rights of the disabled. Perhaps most important to us was the assistance we were able to render in relation to the Inter-American convention on corruption in the context of international bribery and corrupt practices and illicit enrichment concerning not only the preparation and finalization of the convention, which was, as the Secretary General has noted, an historic first, but also the preparation of model legislative clauses designed for consideration by member States in order to implement and execute the obligations of the convention within their national systems.

Our present agenda is, as you've heard this morning, still well-stocked with questions important to the Organization in our capacity as an advisory body on juridical matters. The answers to the large questions presented by the study of juridical aspects of hemispheric security that is being submitted to us will, I am confident, serve as further stepping stones in the crystallization and consciousness of an international hemispheric security system. The *Comité* is also deeply involved with steps that could be taken in the improvement of the administration of justice in the Americas.

And, to this end, we have been studying since 1994 and will be reporting on further in due course of the future issues presented concerning the protection of lawyers and judges in the exercise of their official functions and issues concerning broader access to the justice system and poverty. We will coordinate our work around the final recommendations of the recent Third Meeting of Ministers of Justice of the Hemisphere. The Juridical Committee has also resolved to reexamine the important topic of juridical aspects of integration and international trade in light of the outcome of the Meeting of Ministers of Trade of the Americas and the Third Ministerial Conference of the World Trade Organization (WTO).

Finally, we are concerned with questions relating to the international removal and retention of children by one of their parents. To this end, we are awaiting information from

the Inter-American Children's Institute (III) on national legislation concerning this matter.

Other topics that will be discussed over the next fortnight here in Washington will include the question of access to and protection of personal information and data, a report on human rights in relation to biomedicine and compliance by member States with the terms of the 1982 United Nations Convention on the Law of the Sea. I should definitely add a word to what was said by Ambassador Murphy about the meeting with the legal advisors of member States. Speaking quite personally and, I think, I can speak for all the other members, my colleagues on the Juridical Committee, this is really valuable, it gives us a very direct understanding of the preoccupations and priorities of the legal chanceries of member States, and enables the legal advisories of our member States to exchange views about their concerns in a private, professional, and highly focused environment that, I think, can only be beneficial, and we intend to continue this.

This resume that I've given you would also be quite incomplete if I were not to mention the work that we do in conjunction with the Secretariat for Legal Affairs in the continuing and highly successful institution of the *Curso de Derecho Internacional*, held in August in Rio. As the Chair of the Permanent Council has noted, the *Curso* has been in existence for 27 years, and it has certainly in my own experience in the last 10 years become increasingly valuable to and appreciated by our member States and, indeed, most notably by the young lawyers that are sent by the member States to participate. And I have been a lecturer and a student in both of the Hague meetings of the Academy of International Law and ours in Rio, and we are a smaller, but very efficient replication of what has been a much longer tradition in Europe. And I think that our own tradition is now becoming worldwide and recognized and tremendously valuable.

Finally, I'm delighted to have you all here this morning, thank you for coming to welcome us. I look forward with great pleasure resuming the work of the Juridical Committee with my colleagues over the next 10 days. And let me thank you, Secretary General, for your very kind words of welcome and your encouragement and direction. And we also appreciate fully the perceptive direction offered to us by Ambassador Murphy, the Chair of the Permanent Council, and we'll take heed of your suggestions and ideas in the course of our work. And I would like to say on a personal basis how I am particularly touched by the kind and cheering words spoken by both of them in respect of my personal health. Why? With affection and support expressed in such a kind and courteous manner, one can indeed overlook the inconveniences of the day. So I thank you. I thank you both, and my dear friend this is the end of our meeting. Thank you. That is the Assistant Secretary General, and with his permission and with many thanks to our other guests, I declare the meeting closed.

**CJI/doc.17/00**

## ADDRESS BY CESAR GAVIRIA TRUJILLO, SECRETARY GENERAL OF THE OAS, AT THE OPENING SESSION OF THE 56TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

**Washington D.C., March 20, 2000**

At the outset, allow me to welcome and express greetings to all members of the Inter-American Juridical Committee. We are very pleased and honored that the OAS advisory body on juridical matters is meeting here in Washington in the house of the Americas.

I wish to convey special greetings to the Chair of the Committee, Mr. Keith Highet, from whom his colleagues on the Committee and those in frequent contact with him have

learned so much because of his keen understanding of questions of international law and especially because of his outstanding personality traits: his intelligence, his dedication, his good disposition, and his even better sense of humor. We hope that he will recover very soon from his current health problems.

In reviewing the agenda for these meetings of the Committee, I see that the priority issues you will be considering are also the fundamental questions on the inter-American agenda. This confirms once again that this organ–with its wisdom and its legal advice–is called upon to play a crucial role as it keeps step with the hemispheric dialogue process.

As you know, this process of dialogue has been considerably enriched and expanded in recent years as a result of change in the international context. With the Cold War behind us and with globalization fully under way, we are revamping the OAS and the entire inter-American system to make them correspond to the objectives outlined by our peoples and our government leaders.

We are moving toward a set of rules and regulations in the Americas that will convert the mounting interdependence and hemispheric integration into a process devoid of the negative features that have come to be associated with globalization. Only by creating that legal framework to solve our differences and conflicts, by strengthening all aspects of our legal and judicial cooperation, and by providing one another with support through a rich exchange of experiences can we move toward relations that are free from ever increasing conflict. Now that we are at the stage of addressing the problems that we should confront together to defend and strengthen our democratic institutions, we had the Committee's guidance in designing the rules that led to the Inter-American Convention against Corruption, the first of its kind in the world.

I would therefore like to draw attention to the importance and timeliness of many of the topics you will be considering at this time. Allow me to refer to three of the areas that you yourselves have defined as priorities on your agenda, all of which are related and interdependent. I am referring to the legal aspects of hemispheric security, enhancement of the administration of justice in the Americas, and the legal dimension of integration and international trade.

Changes on the world political and strategic scene over the past 10 years have made it necessary to revise the underpinnings of relations among states with regard to the maintenance of security. With the end of the Cold War, the Hemisphere has confronted the historic need to deactivate century-old tensions and to forge a commitment to peace, moving ahead toward building a new security paradigm. These topics have found in the Organization of American States a privileged setting for discussion and negotiation in a cooperative, frank, and constructive manner.

The backbone of this process has been the regional conferences on confidence- and security-building measures, held in Santiago in 1995, and in San Salvador en 1998. These conferences made it possible to address clearly and openly the different concepts and perceptions of the states on potential threats to their security and to the security of the region as a whole.

A climate of confidence has been established between parties whose prior relations were marked by distrust, which was done on the basis of transparency and the exchange of information. In this context, it has also been possible to examine the particular security concerns of the small island states, which, viewed from a multidimensional perspective, include nonmilitary aspects.

From the legal point of view, fundamental progress has been made with the adoption of the conventions on illicit arms trafficking and on transparency in arms acquisition. Regarding the former, a few days ago we were pleased to see the Consultative Committee begin its work to follow up on the measures established therein and to promote cooperation among states. In that regard, it has adopted a comprehensive work plan. For its part, the latter Convention is a milestone in the application of confidence-building measures, since we have moved to mandatory measures from actions taken voluntarily by the parties.

We all recognize today that in matters of hemispheric security we are in a transitional stage. The ideas of the past–those inherited from the Cold War–no longer help us to explain present-day realities but, at the same time, many of the problems of the past still prevail and are added to the new challenges to security and democratic stability for the nations of the Americas.

All these considerations demonstrate how important it is for the states and institutions of the inter-American system to benefit from the input of the Inter-American Juridical Committee in this area. This input is all the more important with a view to the large security conference agreed to by our leaders, which is to be held during the first part of the decade.

Another issue you will be examining has to do with integration and international trade. This is doubtless one of the most important questions. The future of the countries of the Americas is closely intertwined. We are bound to one another by the effects of political and economic circumstances and of geography, history, culture, and trade. Trade within the region exceeds US$1.5 billion a day. Of the Hemisphere's trillion dollar export trade, more than 55% is intraregional.

In this context, the trade negotiation agenda has expanded and been enhanced with topics that, in addition to their economic effects, have more sophisticated and advanced legal implications in such areas as intellectual property rights, competition policy, government procurement, and procedures for the peaceful settlement of disputes.

I have no doubt whatsoever that the Committee has a great opportunity in this area to support states, not only by studying past processes but also by playing a more proactive role in order to have a clearer and more comprehensive view of the specific challenges in each area from a legal perspective, especially with a view to the establishment of the Free Trade Area of the Americas.

Enhancement of the administration of justice in the Americas is another priority topic on the inter-American agenda. From the early 1980s, efforts have been under way in our countries to reform systems of justice, to such an extent that this has become one of the Hemisphere's priorities. Clearly, the expansion of market economies and the spread of democracy have been basic factors in this development. Today it is apparent to all that if we do not manage to enhance our systems of justice, then economic growth, social development, and the very existence of democratic institutions will be seriously compromised.

In recent years, major advances have been made in this area, within the framework of the inter-American system. Barely two weeks ago, the ministers of justice of the Americas took important decisions on the launching of the Justice Studies Center of the Americas and on the means to move forward in such areas as cybercrime, prison policies, access to justice, and alternative methods for conflict resolution.

Nonetheless, we all realize that the steps taken thus far are limited in scope, that in some cases court reform has brought about unforeseen or undesired effects, and that,

ultimately, much headway must still be made to ensure the independence and modernization of our justice systems.

I am convinced that the Committee's studies and recommendations in this area will be of tremendous use both to the organs of the inter-American system, the Justice Studies Center of the Americas, and the meetings of ministers and attorneys general in the area and to the member states of the Organization.

Members of the Juridical Committee:

The OAS has been a preeminent forum for the development of international law in the Americas. A large part of the advances made in this area is due to the work of this organ of the OAS. Given the new challenges facing us in the Americas, which include topics like those I have just mentioned, I am certain that the Committee will continue to discharge its basic function of lending support for the development and consolidation of legal institutions in the Americas.

Once again, I extend a most cordial welcome to you and I wish you every success in your deliberations.

Thank you.

**CJI/doc.18/00**

**OPENING REMARKS BY AMBASSADOR JAMES MURPHY,
PERMANENT REPRESENTATIVE OF BELIZE TO THE ORGANIZATION OF AMERICAN STATES AND CHAIRMAN OF THE PERMANENT COUNCIL,
TO THE FIFTY-SIXTH REGULAR PERIOD OF SESSIONS OF THE
INTER-AMERICAN JURIDICAL COMMITTEE
(Washington, DC, March 20, 2000)**

It is a pleasure for me to be here with you at the opening of the 56th regular session of the Inter-American Juridical Committee. Thank you for your invitation.

The Inter-American Juridical Committee is one of the oldest organs in the inter-American system, its predecessor being the International Commission of Jurists of Rio de Janeiro, established in 1906. The Committee is currently made up of eleven jurists, all nationals of member States.

While the members do not represent their individual States but rather the OAS member States as a whole, I must commend Argentina, Brazil, Chile, Canada, Costa Rica, Guyana, Jamaica, Mexico, Peru, the United States, and Venezuela for nominating the jurists in a timely fashion and making possible the formation of a solid group, one in which each member, with his particular experience and knowledge, contributes to a legal body that is unique in the hemisphere.

Just glancing at the agenda of the Inter-American Juridical Committee for this session, I am pleased to note that it not only responds to the priorities of the OAS agenda but that it is also consistent with the current progressive development of international law, which, in turn, reaffirms that the Juridical Committee can be on an equal footing with the United Nations International Law Commission. The priority issues of the Committee, specifically, the legal aspects of hemispheric security, the enhancement of the administration of justice in the Americas, the legal dimension of integration and international trade, and the international abduction of minors by one of the parents, indicate the current significance of the work of the

Committee.

At the recent Third Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas in San Jose, Costa Rica, new light was shed on the work that the various bodies in the hemisphere must continue to do. We are aware that the Juridical Committee recommended that the meeting include as topics on its agenda guarantees regarding the independence of the judiciary, the protection of judges and lawyers in the performance of their duties, and improvement of access to justice. Although these issues were not directly addressed, I would like to assure the members of the Inter-American Juridical Committee, that they are matters of deep concern to the Organization, and that the establishment of the Justice Studies Center of the Americas ensures that these concerns will remain on the OAS agenda in the future.

Moreover, the documents prepared by the Juridical Committee on the independence of the Judiciary in the member States and adequate protection for judges and lawyers in the performance of their duties, have come to the attention of our authorities and constitute extremely valuable information in the continuing effort to build a hemisphere that is more just and democratic. The Third Meeting of Ministers of Justice, in its conclusions and recommendations, called on all OAS organs to consider those formulations insofar as they fall within their purview, and I therefore urge the Juridical Committee to continue studying the issues, and furnishing us with the invaluable materials on which we have relied in the past.

Likewise, it is my hope that the Meeting of the Trade Ministers of the Americas and of the Third WTO Ministerial Conference will produce results that will shed greater light on the work of the Juridical Committee on the legal dimension of integration and international trade, and that we will soon have papers of as high a caliber as those presented by the Committee in recent years.

I underscore these two items, which are within the purview of the Juridical Committee, because of their currency owing to the recent ministerials. However, I cannot fail to mention the importance of other topics such as the right to information, biomedicine, the United Nations Convention on the law of the sea, terrorism, CIDIP-VI, human rights, the war on tobacco, and democracy, all of which are included on the agenda of the Juridical Committee and reflect the diversity of the Committee's responsibilities.

I would now like to highlight two activities of the Inter-American Juridical Committee: the Joint Meetings with Legal Advisors of the Foreign Ministries of the OAS member States and the Course on International Law.

In regard to the first of these activities, the fourth joint meeting will be held very soon. I would like to commend the Juridical Committee for making it possible for our legal advisors to debate and exchange ideas, in the context of open, *impromptu* dialogue on matters of interest to them. This opportunity for them to participate in their personal capacities without committing their respective States, facilitates this discussion, which would be difficult otherwise. I urge the member States to their best to ensure the full participation of legal advisors on future occasions.

The Course on International Law deserves separate consideration, insofar as it is arguably among the most important academic exercises in the hemisphere presently. In bringing together 30 young professionals for four weeks in beautiful Rio de Janeiro to learn new concepts, share experiences and knowledge, and establish a social and professional network encompassing all OAS member States, the Organization has been making use of a unique mechanism available to it for the past 27 years.

Despite limited resources for the Course, the number of professors and students have increased in recent years, and this has significantly expanded the impact of the Course. There has also been greater participation by professors and students from the Caribbean; five years ago there was almost no participation from the Caribbean region. Activities that facilitate a fuller appreciation of the diversity of traditions in the Americas merit support.

I would also like to commend both the Inter-American Juridical Committee and the General Secretariat for their significant effort in elevating the Course on International Law to the level of the annual course offered by the Hague Academy. We, the member States, have supported this effort through various resolutions of the General Assembly, and have sought increased funding for the Course, in particular to increase the number and amount of the fellowships awarded. I urge member States, in particular the more able, to do more.

I cannot conclude without expressing my sincerest gratitude to all the members of the Inter-American Juridical Committee for their efforts and, in particular, to Dr. Keith Highet, its Chair, for his work. Despite the health problems he has been fighting, which we hope will soon be overcome, he has been unrelenting in his capacity to work and has been an example of commitment, optimism, and good humor for all who labour and trust in the benefits of international law.

I would like to encourage the Juridical Committee to continue its efforts to develop international and regional law, to focus on the priority issues on the hemispheric agenda, and to continue to provide us with legal guidance, whether through model legislation or draft inter-American conventions, the political will of our peoples.

Thank you very much.