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

This document is being distributed to the permanent missions and will be presented to the Permanent Council of the Organization.

COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURÍDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZATION OF AMERICAN STATES
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Rio de Janeiro, February 1, 2006

CJI/O/01/2006

Excellency:

I have the honor to address Your Excellency to ask that you kindly forward to the Permanent Council of the Organization of American States the attached *Annual Report of the Inter-American Juridical Committee to the General Assembly* ((OEA/Ser.Q/VI.36 CJI/doc.207/05), regarding the activities of the committee in 2005.

Accept, Excellency, the renewed assurances of my highest consideration.

Mauricio Herdocia Sacasa
Chair
Inter-American Juridical Committee

To His Excellency
Mr. José Miguel Insulza
Secretary General
Organization of American States
Washington, D.C
U.S.A.

ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

IAJC

67th REGULAR SESSION
August 1 to 19, 2005
Rio de Janeiro, Brazil

OEA/Ser.Q/VI.36
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ANNUAL REPORT

OF THE INTER-AMERICAN JURIDICAL COMMITTEE

TO THE GENERAL ASSEMBLY

2005

EXPLANATORY NOTE

Until 1990, the OAS General Secretariat had published the *Minutes of meetings* and *Annual Reports* of the Inter-American Juridical Committee under the series classified as *Reports and Recommendations.* In 1997, the International Law Department of the Secretariat for Legal Affairs of the OAS General Secretariat now published those documents under the title *Annual report of the Inter-American Juridical Committee to the General Assembly.*

Under the *Classification manual for the OAS official records series,* the Inter-American Juridical Committee is assigned the classification code OEA/Ser.Q, followed by CJI, to signify documents issued by this body (see attached lists of resolutions and documents).

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INTRODUCTION

The Inter-American Juridical Committee is honored to present its *Annual Report to the General Assembly of the Organization of American States*. This report concerns the Committee's activities in 2005, and is presented pursuant to the provisions of Article 91.f of the *Charter of the Organization of American States*, Article 13 of the Committee's *Statutes*, and to the instructions contained in General Assembly resolutions AG/RES.1452 (XXVII-O/97), AG/RES.1669 (XXIX-O/99), AG/RES.1735 (XXX-O/00), AG/RES.1787 (XXXI-O/01), AG/RES.1883 (XXXII-O/02), AG/RES.1952 (XXXIII-O/03), AG/RES.2042 (XXXIV-O/04) and AG/RES.2136 (XXXV-O/05), all of which concern the preparation of the annual reports submitted to the General Assembly by the Organization's organs, agencies and entities.

During the period covered in this *Annual Report,* the Inter-American Juridical Committee's agenda included topics, such as the following: joint efforts of the Americas in the struggle against corruption and impunity; legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions; legal aspects of the interdependence between democracy and economic and social development; Seventh Inter-American Specialized Conference on Private International Law – CIDIP VII; consideration on the codification and standarization of international law in the Americas; preparation for the Centennial commemorations of the Inter-American Juridical Committee; International Criminal Court; principles of judicial ethics; right to information: access to and protection of information and personal data; legal aspects of inter-American security; follow-up on the application of the Inter-American Democratic Charter; and preparation of a draft inter-American convention against racism and all form of discrimination and intolerance.

This *Annual Report* contains mostly the work done on the studies associated with the aforementioned topics and is divided into three chapters. The first discusses the origin, legal bases and structure of the Inter-American Juridical Committee and the period covered in this *Annual Report.* The second chapter considers the issues that the Inter-American Juridical Committee discussed at the regular sessions in 2005, and the texts of the resolutions adopted at both regular sessions and related documents. Lastly, the third chapter concerns the Juridical Committee's other activities and resolutions adopted by it. Budgetary matters are also discussed. Annexed to the *Annual Report* are lists of the resolutions and documents adopted, subject and name indexes, to facilitate the reader in locating documents in this *Report*.

Dr. Mauricio Herdocia Sacasa, Chairman of the Inter-American Juridical Committee, approved the language of this *Annual Report.*

CHAPTER I

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

The forerunner of the Inter-American Juridical Committee was the International Board of Jurists in Rio de Janeiro, created by the Third International Conference of American States in 1906. Its first meeting was in 1912, although the most important was in 1927. There, it approved twelve draft conventions on public international law and the Bustamante Code in the field of private international law.

Then in 1933, the Seventh International Conference of American States, held in Montevideo, created the national commissions on codification of international law and the Inter-American Committee of Experts. The latter's first meeting was in Washington, D.C. in April 1937.

The First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics, held in Panama, September 26 through October 3, 1939, established the Inter-American Neutrality Committee, which was active for more than two years. Then in 1942, the Third Meeting of Consultation of Ministers of Foreign Affairs, held in Rio de Janeiro, adopted resolution XXVI, wherein it transformed the Inter-American Neutrality Committee into the Inter-American Juridical Committee. It was decided that the seat of the Committee would be in Rio de Janeiro.

In 1948, the Ninth International Conference of American States, convened in Bogotá, adopted the *Charter of the Organization of American States,* which *inter alia* created the Inter-American Council of Jurists, with one representative for each member State, advisory functions, and the mission to promote legal matters within the OAS. Its permanent committee would be the Inter-American Juridical Committee, consisting of nine jurists from the member States. It enjoyed widespread technical autonomy to undertake the studies and preparatory work that certain organs of the Organization entrusted to it.

Almost twenty years later, in 1967, the Third Special Inter-American Conference, convened in Buenos Aires, Argentina, and adopted the *Protocol of Amendments to the Charter of the Organization of American States* or *Protocol of Buenos Aires,* which eliminated the Inter-American Council of Jurists. The latter's functions passed to the Inter-American Juridical Committee. Accordingly, the Committee was promoted as one of the principal organs of the OAS.

Under Article 99 of the *Charter,* the purpose of the Inter-American Juridical Committee is 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 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.

Although the seat of the Committee is in Rio de Janeiro, in special cases it may meet elsewhere that may be appointed after consulting the member State concerned. The Committee consists of eleven jurists who are nationals of the member States of the Organization. Together, those jurists represent all the States. The Committee also enjoys as much technical autonomy as possible.

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

A. 66th regular session

The Inter-American Juridical Committee held its 66th regular session in Managua, Nicaragua, at the invitation of that country's government, from February 28 to March 11, 2005. The formal opening session took place in the *Palacio de la Cultura*.

The members of the Inter-American Juridical Committee present at that regular session are listed below, in the order of precedence determined by lot during the first session, in accordance with Article 28.b of the *Rules of Procedure of the Inter-American Juridical Committee*.

Mauricio Herdocia Sacasa	(Chair)
Jean Paul Hubert	(Vice Chair)
Luis Marchand Stens	
Ana Elizabeth Villalta Vizcarra	
Antonio Fidel Pérez	
Stephen C. Vasciannie	
Luis Herrera Marcano	
Galo Leoro Franco	

Drs. João Grandino Rodas, Eduardo Vio Grossi, and Alonso Gómez-Robledo Verduzco did not attend the 66th regular session.

On behalf of the General Secretariat, technical and administrative support was provided by Dr. William Berenson, Director of the Department of Legal Affairs; Dr. Jean-Michel Arrighi, Director of the Office of Inter-American Law and Programs; and Drs. Manoel Tolomei Moletta and Dante Negro, principal legal officers with that office.

In keeping with Article 12 of the Rules of Procedure of the Inter-American Juridical Committee, Dr. Mauricio Herdocia, Chair of the Juridical Committee, presented his report on the Committee's activities since its last session.

He also welcomed Dr. Galo Leoro Franco (Ecuador) and Dr. Antonio Fidel Pérez (United States), who had recently been elected as members by the General Assembly at its thirty-fourth regular session, held in Quito, Ecuador, in June 2004, as well as Dr. Stephen C. Vasciannie (Jamaica), who had been elected as a member by the Permanent Council of the Organization in October 2004 to fill the vacancy and complete the term of office of Dr. Kenneth O. Rattray.

Further, the Chair of the Inter-American Juridical Committee announced the recent death of Dr. Kenneth O. Rattray (Jamaica) on January 4, 2005, and of Dr. Philip Telford Georges (Dominica) on January 13, 2005. Both were former members of the Inter-American Juridical Committee. The Committee adopted resolutions CJI/RES.85 (LXVI-O/05), "*Tribute to the Memory of Justice Philip Telford Georges*," and CJI/RES.86 (LXVI-O/05), "*Tribute to the Memory of Dr. Kenneth Osborne Rattray*," which appear below:

CJI/RES.85 (LXVI-O/05)

TRIBUTE TO THE MEMORY OF JUSTICE PHILIP TELFORD GEORGES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND the untimely passing of Justice Philip Telford Georges eminent jurist from Dominica and former member of this Body, on January 13, 2005;

ACKNOWLEDGING the important contribution of Justice Philip Telford Georges to the development and codification of the Inter-American and international law;

TAKING INTO ACCOUNT the significant contribution made by Justice Philip Telford Georges as a member of the Inter-American Juridical Committee between 1992 to 1995,

RESOLVES:

1. To record its deeply felt and sincere respect and recognition to the memory of Justice Philip Telford Georges, whose passing constitutes an irreparable loss, not only for his country, Dominica, but for the inter-American and international community as well, especially for the Inter-American Juridical Committee.

2. To honour the memory of Justice Philip Telford Georges during the solemn session to be held during the celebrations of the centennial of the Inter-American Juridical Committee in August 2006.

3. To forward a copy of this resolution as a way of expressing its condolences to the family of Justice Philip Telford Georges.

The present resolution was adopted at the session held on March 10, 2005 by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

CJI/RES.86 (LXVI-O/05)

TRIBUTE TO THE MEMORY OF DR. KENNETH OSBORNE RATTRAY

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND the untimely passing of Dr. Kenneth Osborne Rattray eminent jurist from Jamaica and former member of this Body, on January 4, 2005;

ACKNOWLEDGING the important contribution of Dr. Kenneth Osborne Rattray to the development and codification of the Inter-American and international law;

TAKING INTO ACCOUNT the significant contribution made by Dr. Kenneth Rattray as a member of the Inter-American Juridical Committee between 1973 to 1977; 1986 to 1989; 1998 to 2001; and 2002 to 2004,

RESOLVES:

1. To record its deeply felt and sincere respect and recognition to the memory of Dr. Kenneth Osborne Rattray, whose passing constitutes an irreparable loss, not only for his country, Jamaica, but for the inter-American and international community as well, especially for the Inter-American Juridical Committee.

2. To honour the memory of Dr. Kenneth Osborne Rattray during the solemn session to be held during the celebrations of the centennial of the Inter-American Juridical Committee in August 2006.

3. To forward a copy of this resolution as a way of expressing its condolences to the family of Dr. Kenneth Osborne Rattray.

The present resolution was adopted at the session held on March 10, 2005 by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

Lastly, the Inter-American Juridical Committee decided to adopt resolution CJI/RES.87 (LXVI-O/05), "Date and Place of the 67th Regular Session of the Inter-American Juridical Committee," whereby it resolved to hold the 67th regular session at its seat, in Rio de Janeiro, beginning on August 1, 2005.

CJI/RES.87 (LXVI-O/05)

DATE AND PLACE OF 67TH REGULAR SESSION OF THE

INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its statutes provides for the holding of two regular sessions annually,

RESOLVES to hold its 67th regular session at the headquarters of the Inter-American Juridical Committee in the city of Río de Janeiro after August 1st, 2005.

This resolution was adopted unanimously during the session of March 10, 2005, by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

During this session, the Inter-American Juridical Committee had before it the following agenda, adopted by resolution CJI/RES. 78 (LXV-O/04), "Agenda for the 67th Regular Session of the Inter-American Juridical Committee":

CJI/RES.78 (LXV-O/04)

AGENDA FOR THE 66TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Rio de Janeiro, Brazil, February 28 to March 11, 2005)

A. Topics under consideration

1. Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions
   Coordinator: Dr. Luis Herrera Marcano
2. Legal aspects of inter-American security

   Rapporteurs: Drs. Eduardo Vio Grossi, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra and Mauricio Herdocia Sacasa
3. Joint efforts of the Americas in the struggle against corruption and impunity
   Rapporteur: Dr. Ana Elizabeth Villalta Vizcarra
4. Legal aspects of the interdependence between democracy and economic and social development
   Rapporteurs: Dr. Jean-Paul Hubert

5. Right to information: access and protection of information and personal data
   Rapporteur: Dr. Alonso Gómez Robledo

6. Preparations for the commemoration of the Inter-American Juridical Committee centennial
   Coordinators: Drs. Eduardo Vio Grossi, João Grandino Rodas, Mauricio Herdocia Sacasa and Luis Herrera Marcano

7. Reexamination of the conventions on private international law
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and João Grandino Rodas

B. Topics for follow-up

1. Application of the Inter-American Democratic Charter
   Rapporteur: Dr. Eduardo Vio Grossi

2. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and João Grandino Rodas

3. Preparation of a draft Inter-American convention against racism and any kind of discrimination and intolerance
   Rapporteur: Dr. Felipe Paolillo

This resolution was adopted unanimously at the session held on August 13, 2004 in the presence of the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Brynmor T. Pollard, Ana Elizabeth Villalta Vizcarra, Felipe Paolillo, Eduardo vio Grossi and Luis Herrera Marcano.

At the conclusion of this session, the Inter-American Juridical Committee adopted resolution CJI/RES. 90 (LXVI-O/05), "*Thanks to the Government and People of Nicaragua*."

CJI/RES.90 (LXVI-O/05)

THANKS TO THE GOVERNMENT AND PEOPLE OF NICARAGUA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING ACCEPTED the cordial invitation of the Government of Nicaragua made through Dr. Mauricio Herdocia Sacasa, the Chairman of the Inter-American Juridical Committee, to hold its 66th Regular Session in Managua, Nicaragua from the 28th February to the 11th March 2005;

RECOGNIZING the efforts made by the Government of Nicaragua to ensure that the organization and holding of the regular session of the Committee would be fully successful,

RESOLVES:

1. To express it's most sincere gratitude to the government and people of Nicaragua for their generous and warm hospitality, and especially the important task carried out by Dr. Mauricio Herdocia Sacasa, Chairman of the Inter-American Juridical Committee for the organization of the 66th Regular Session.

2. To note the importance for the Juridical Committee of holding one of its regular sessions in a Central American country for the first time.

3. To highlight the opportunity that the Juridical Committee had in meeting the President of the Republic of Nicaragua, the Foreign Minister of Nicaragua, the Magistrates of the Supreme Court of Nicaragua, the Magistrates of the Central American Court of Justice and the President and other members of the Central American Parliament.

4. To transmit this resolution to Mr. Norman Caldera Cardenal, the Foreign Minister of Nicaragua, via Dr. Mauricio Herdocia Sacasa, the Chairman of the Juridical Committee as an expression of thanks to the Government and people of Nicaragua.

This resolution was adopted unanimously in regular session held on the March 10, 2005, by the following members: Drs. Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

B. 67th regular session

The 67th regular session of the Inter-American Juridical Committee was held from August 1 to 19, 2005, at its seat, in Rio de Janeiro, Brazil.

The members of the Inter-American Juridical Committee present at that regular session are listed below, in the order of precedence determined by lot during the first session, in accordance with Article 28.b of the *Rules of Procedure of the Inter-American Juridical Committee*.

Mauricio Herdocia Sacasa	(Chair)
Jean Paul Hubert	(Vice Chair)
Luis Herrera Marcano	
Galo Leoro Franco	
Antonio Fidel Pérez	
Eduardo Vio Grossi	
Ana Elizabeth Villalta Vizcarra	
Stephen C. Vasciannie	
Luis Marchand Stens	
João Grandino Rodas	

Dr. Alonso Gómez-Robledo Verduzco was unable to attend. With regard to the note sent by Dr. Gómez-Robledo to the Chair of the Inter-American Juridical Committee in which he explained his failure to attend for health reasons, the Committee decided to adopt by a majority resolution CJI/RES.101 (LXVII-O/05), "*Absence of Dr. Alonso Gómez-Robledo from the Regular Session of the Inter-American Juridical Committee of August 2005*," whereby it accepted Dr. Gómez-Robledo's excuse, in accordance with Article 9 of the *Statutes*. Dr. Antonio Fidel Pérez stated for the record that he did not support the resolution.

The resolution in question appears below:

CJI/RES.101 (LXVII-O/05)

ABSENCE OF DR. ALONSO GÓMEZ-ROBLEDO FROM THE REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE OF AUGUST 2005

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THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING TAKEN NOTE of the message sent by Dr. Alonso Gómez-Robledo Verduzco in which he states that for health reasons he will be unable to attend the 67th regular session of the Inter-American Juridical Committee in August 2005;

Deleted: ¶

WHEREAS article 9 of the *Statutes of the Inter-American Juridical Committee* makes provision for a vacancy in the membership of the Juridical Committee to occur in the event of the absence of a member for two consecutive periods of sessions, unless the Inter-American Juridical Committee considers the absence fully justified;

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RESOLVES:

1. To accept Dr. Alonso Gómez-Robledo´s excuse in the terms of article 9 of the Statutes, as mentioned above.

2. To reiterate to Dr. Alonso Gómez-Robledo our best wishes for a speedy recovery.

This resolution was adopted by majority of votes at the session held on August 19, 2005, in the presence of the following members: Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

On behalf of the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Director of the Department of International Legal Affairs, and Drs. Manoel Tolomei Moletta and Dante Negro, principal legal officers with that department.

In keeping with Article 12 of the *Rules of Procedure of the Inter-American Juridical* Committee, the Chair of the Juridical Committee presented his report on the Committee's activities since its last session.

Likewise, the Chair of the Inter-American Juridical Committee reported that Dr. Jaime Aparicio (Bolivia) and Dr. José Manuel Delgado Ocando (Venezuela) had been elected members of the Juridical Committee by the General Assembly at its thirty-fifth regular session (Fort Lauderdale, June 2005). He also reported that Dr. Ana Elizabeth Villalta Vizcarra (El Salvador) had been reelected. The terms of those three members begin on January 1, 2006, and last four years.

The Inter-American Juridical Committee also adopted resolutions CJI/RES. 92 (LXVII-O/05) and CJI/RES. 94 (LXVII-O/05), whereby they expressed appreciation for the work performed by Dr. Luis Herrera Marcano and Dr. Stephen C. Vasciannie in their capacity as Committee members. The two completed their terms on December 31, 2005.

CJI/RES.92 (LXVII-O/05)

HOMAGE TO DR. LUIS HERRERA MARCANO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW that 31 December 2005 is Dr. Luis Herrera Marcano's last day as a member of this organ of the inter-American system, elected in 1982 and re-elected on six consecutive occasions;

CONSIDERING that, in the aforementioned position, Dr. Herrera Marcano played an active role in the discussions and resolutions of the Inter-American Juridical Committee on matters of the utmost importance to the inter-American system, and those wherein he was rapporteur, such as, for example, preparing treaties, use of weapons and methods of combat, intellectual property, consular protection, peaceful settlement of disputes, facilitation of international activities of individuals, promotion and reciprocal protection of investments, international cooperation against corruption, unjust enrichment and transnational bribery, inter-American cooperation against terrorism, international legal system of the indigenous peoples and compliance with international resolutions, as well as acting as lecturer in the Course on International Law given each year by the Inter-American Juridical Committee;

RECALLING, moreover, that between 13 August 1990 and 4 August 1992 Dr. Herrera Marcano acted as Chairman of the Inter-American Juridical Committee, during

which period the Juridical Committee could again hold a second regular session, to also be in session in the OAS headquarters in Washington D.C., tightening the ties with the latter's key political bodies, advancing considerably in meeting its objectives in a timely and efficient manner, significantly upgrading its administrative management and, consequently, making a marked improvement to its image before the other bodies of the Organization and its member States;

BEARING IN MIND that as a member of the Inter-American Juridical Committee, Dr. Herrera Marcano showed, among other qualities, solid and in-depth legal knowledge principally in public international law, outstanding professionalism, a comprehensive academic, cultural and scientific background, valuable skills in helping to reach agreements, unsurpassable ability to guide or contribute toward discussions, outstanding clarity and elegance of prose when drafting reports, opinions and resolutions, and a generous working and cooperative spirit;

STATING that throughout Dr. Herrera Marcano's time on the Inter-American Juridical Committee he earned the trust, respect, admiration and affection of his colleagues and the staff who work in its Secretariat, especially because of his extremely humane attitude, unlimited spirit of companionship and solidarity, genuine humility and simplicity, his sincere joie-de-vivre and generous spirit, his conduct founded on good faith and respect for the opinions of others, and the dignified, respectful and pleasant approach to all alike,

RESOLVES:

1. To express its most sincere acknowledgment and homage to Dr. Luis Herrera Marcano for his outstanding and productive work during his time on the Inter-American Juridical Committee, and whose absence from 1 January 2005 will be a real loss for the inter-American system as a whole.

2. To wish every success in any duties that Dr. Herrera Marcano will undertake in the future in the hope that they will permit him to continue to contribute to the Inter-American Juridical Committee whenever required.

3. To give Dr. Luis Herrera Marcano the original document duly signed hereunder.

This resolution was unanimously adopted at the session on August 11, 2005, attended by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Stephen C. Vasciannie, Luis Marchand Stens, and João Grandino Rodas.

CJI/RES.94 (LXVIIO/05)

RECOGNITION TO DR. STEPHEN C. VASCIANNIE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2005, the term of office of Dr. Stephen C. Vasciannie as a member of the Inter-American Juridical Committee expires;

IN VIEW OF the active participation played by Dr. Stephen C. Vasciannie in the discussion of all the topics studied during the period he performed his duties as a member of the Inter-American Juridical Committee;

ACKNOWLEDGING the high esteem in which he is held by his colleagues in the Committee;

RESOLVES:

To express its recognition for the contributions made by Dr. Stephen C. Vasciannie towards advancing the activities of the Inter-American Juridical Committee both in the analysis of the topics on its agenda as well as professor in the Course on International

Law.

To express to Dr. Stephen C. Vasciannie the esteem of the Inter-American Juridical Committee both because of his personal virtues as well as his distinction as an international jurist.

To transmit this resolution to Dr. Stephen C. Vasciannie and to the organs of the Organization.

This resolution was unanimously adopted at the session held on August 11, 2005, in the presence of the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Luis Marchand Stens and João Grandino Rodas.

The Inter-American Juridical Committee also adopted resolution CJI/RES. 93 (LXVII-O/05), "*Homage to Dr. Enrique Lagos*," in recognition of his work over many years as Assistant Secretary for Legal Affairs.

CJI/RES.93 (LXVII-O/05)

HOMAGE TO DR. ENRIQUE LAGOS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW of the fact that between 1990 and 1996 Dr. Enrique Lagos was Director of the Department of Codification and Development of International Law of the Secretariat for Legal Affairs of the Organization of American States (OAS) and that between 1996 and 2004 he occupied the position of Assistant Secretary for Legal Affairs of the Organization;

BEARING IN MIND that, when holding both positions, Dr. Lagos was personally and constantly concerned with the aforementioned Department of Codification and Development of International Law and the OAS Secretariat for Legal Affairs, providing efficient and timely services to the Inter-American Juridical Committee as stated in its Statutes;

RECALLING that Dr. Lagos, as Director of the aforementioned Department of Codification and Development of International Law and OAS Assistant Secretary for Legal Affairs, regularly attended the sessions of the Inter-American Juridical Committee, contributing directly, timely and continuously toward the work of this Committee;

CONSIDERING that, in his work with the Inter-American Juridical Committee, Dr. Lagos always showed great willingness to cooperate and facilitate the duties of this body, especially concerning its links with the other organs in the inter-American system;

BEARING IN MIND that Dr. Lagos was also an excellent professional in those activities, with fundamental contributions of inestimable value to the analyses undertaken by the Inter-American Juridical Committee on matters submitted to him for his information, and playing an active role in the preparation and undertaking of the Course on International Law held each year as part of the Committee's activities; and

HIGHLIGHTING the fact that, when occupying the aforementioned positions, Dr. Lagos earned the appreciation and acknowledgment of the members of the Inter-American Juridical Committee, principally for his humility, respect and generosity with which he provided valuable input,

RESOLVES:

1. To place on record its acknowledgment of Dr. Enrique Lagos and express its most sincere gratitude for his very efficient, professional and generous contribution as Director of the Department of Codification and Development of International Law and OAS Assistant Secretary for Legal Affairs to the Inter-American Juridical Committee.

2. To wish Dr. Lagos every success in the new tasks assumed by him in the Organization.

3. To forward the original of the Resolution herein to Dr. Lagos, duly signed hereunder.

This resolution was unanimously approved at the session on August 11, 2005, attended by the following members Drs.: Mauricio Herdocia Sacasa, Jean-Paul Hubert, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Stephen C. Vasciannie, Luis Marchand Stens, and João Grandino Rodas.

During its 67th regular session, the Inter-American Juridical Committee had before it the following agenda, adopted by resolution CJI/RES.88 (LXVI-O/05), "*Draft Agenda for the 67th Regular Session of the Inter-American Juridical Committee*":

CJI/RES. 88 (LXVI-O/05)

DRAFT AGENDA FOR THE 67TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio De Janeiro, Brazil, After August 1st 2005)

A. Topics under consideration

1. Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions
   Coordinator: Dr. Luis Herrera Marcano

2. Legal aspects of inter-American security
   Rapporteurs: Drs. Eduardo Vío Grossi, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra and Mauricio Herdocia Sacasa

3. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez

4. Legal aspects of the interdependence between democracy and economic and social development
   Rapporteurs: Dr. Jean-Paul Hubert

5. Right to information: access and protection of information and personal data
   Rapporteur: Dr. Alonso Gómez Robledo

6. Preparations for the commemoration of the Inter-American Juridical Committee centennial
   Coordinators: Drs. Eduardo Vío Grossi, João Grandino Rodas, Mauricio Herdocia Sacasa and Luis Herrera Marcano

7. Reexamining of the conventions on private international law
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez

8. Principles of Judicial Ethics
   Rapporteur:

B. Topics for follow-up

1. Application of the Inter-American Democratic Charter
   Rapporteur: Drs. Eduardo Vío Grossi and Antonio Fidel Pérez

2. Joint efforts of the Americas in the struggle against corruption and impunity
   Rapporteur: Dr. Ana Elizabeth Villalta Vizcarra

3. Preparation of a draft Inter-American convention against racism and any kind of discrimination and intolerance
   Rapporteur:

The present resolution was adopted at the session held on March 10, 2005 by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

During this regular session, the Inter-American Juridical Committee also adopted its agenda for the 68th regular session, as set forth in resolution CJI/RES.99 (LXVII-O/05), "*Agenda for the 68th Regular Session of the Inter-American Juridical Committee*," and decided, by resolution CJI/RES.97 (LXVII-O/05), "*Date and Place of the 68th Regular Session of the Inter-American Juridical Committee*," to hold that session at the headquarters of the Organization of American States, in Washington, D.C., from March 20 to 31, 2006.

CJI/RES.99 (LXVII-O/05)

AGENDA FOR THE 68TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (WASHINGTON, DC, MARCH 20TH TO 31ST, 2006)

-

A. Topics under consideration

1. Legal aspects of the interdependence between democracy and economic and social development
   Rapporteur: Dr. Jean-Paul Hubert
2. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez
3. Consideration on the codification and standardization of international law in the Americas
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez
4. Right to information: access and protection of information and personal data
   Rapporteur: Dr. Alonso Gómez Robledo
5. Principles of Judicial Ethics
6. Preparations for the commemoration of the Inter-American Juridical Committee centennial
   Coordinators: Drs. Eduardo Vio Grossi, João Grandino Rodas, Mauricio Herdocia Sacasa and Luis Herrera Marcano
7. International Criminal Court
   Rapporteur: Dr. Mauricio Herdocia Sacasa

B. Topics for follow-up

1. Legal aspects of the inter-American security
   Rapporteurs: Drs. Eduardo Vio Grossi, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra and Mauricio Herdocia Sacasa
2. Joint efforts of the Americas in the struggle against corruption and impunity
   Rapporteur: Dr. Ana Elizabeth Villalta Vizcarra

3. Follow-up on the Application of the Inter-American Democratic Charter
   Rapporteurs: Drs. Eduardo Vío Grossi and Antonio Fidel Pérez

4. Preparation of a draft Inter-American convention against racism and any kind of discrimination and intolerance

This resolution was adopted unanimously at the session held on August 18, 2005 in the presence of the following members: Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

CJI/RES.97 (LXVII-O/05)

DATE AND PLACE OF 68TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its *Statutes* provides for the holding of two regular sessions annually,

RESOLVES to hold its 68th regular session at the headquarters of the Organization of American States, in Washington, D.C., from March 20th to 31st, 2006.

The General Secretary will be asked to take all the necessary steps so that the 68th regular session of the Inter-American Juridical Committee proceeds normally.

This resolution was adopted unanimously during the session of August 17, 2005, by the following members: Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vío Grossi, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2005

In 2005, the Inter-American Juridical Committee held two regular sessions. During both meetings, the Juridical Committee had the following topics on its agenda: joint efforts of the Americas in the struggle against corruption and impunity; legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions; legal aspects of the interdependence between democracy and economic and social development; Seventh Inter-American Specialized Conference on Private International Law – CIDIP VII; consideration on the codification and standarization of international law in the Americas; preparation for the commemorations of the Inter-American Juridical Committee Centennial; International Criminal Court; principles of judicial ethics; right to information: access to and protection of information and personal data; legal aspects of inter-American security; follow-up on the application of the Inter-American Democratic Charter; and preparation of a draft inter-American convention against racism and all form of discrimination and intolerance.

A description of each of these topics follows. Where appropriate, the documents prepared and adopted by the Inter-American Juridical Committee on the subject matter are included.

1. Joint efforts of the Americas in the struggle against corruption and impunity

Resolution

CJI/RES.84 (LXVI-O/05)	*Joint efforts of the Americas in the struggle against corruption and impunity*

Annexes:

CJI/doc.181/05 rev.4	*Opinion of the Inter-American Juridical Committee on the joint efforts of the Americas in the struggle against corruption and impunity*
CJI/doc.177/05	*Joint efforts of the Americas in the struggle against corruption and impunity* (presented by Dra. Ana Elizabeth Villalta Vizcarra)

At the 66th regular session of the Inter-American Juridical Committee (Managua, February 28 – March 11, 2005), its Chairman recalled that at its 65th regular session (Rio de Janeiro, August 2004), the Committee reviewed General Assembly resolution AG/RES.2022 (XXXIV-O/04), *Joint Efforts of the Americas in the Struggle Against Corruption and Impunity.* In this resolution it requested the Inter-American Juridical Committee to prepare a report on the legal effects of giving safe haven in regional or extra-regional countries to public officials and persons accused of crimes of corruption after having exercised political power; and cases in which appealing to the principle of dual nationality may be considered a fraud or abuse of the law.

At its 66th regular session, the Inter-American Juridical Committee examined document CJI/doc.177/05 "*Joint Efforts of the Americas in the Struggle Against Corruption and Impunity,*" presented by the topic's rapporteur, Dr. Ana Elizabeth Villalta.

Dr. Villalta explained the structure of said document that elaborates on the content of Juridical Committee resolution CJI/RES.77 (LXV-O/04) and the history of the topic in the Inter-American and world systems. She also referred to the 1930 *Hague convention* on matters related to conflict of nationality laws as well as to several cases decided internationally, *inter alia*, the Canevaro, Mergé and Nottebohm cases. Finally, she referred to the development of the topic within the United Nations International Law Commission, and she ended with some conclusions and recommendations.

The rapporteur stated that corruption constitutes one of the new threats to security, making international cooperation to struggle against it necessary. She also pointed out that the phenomenon of corruption must be understood as a transnational one. She also concluded that the States should make rules on international judicial cooperation effective, so that extradition and mutual judicial assistance be efficient, swift, and effective through compliance with international treaties, in order that corrupt officials that have exercised political power in their respectives States may be made available to the corresponding authorities of the countries in which these crimes were committed for prosecution by their national courts. It is necessary, she said, that all States apply these rules so as not to become safe havens or paradises for persons accused of crimes of corruption after having exercised political power.

Dr. Ana Elizabeth Villalta added that in private international law, the relevant principle is that of one nationality, so that persons cannot evade certain legislation and, in the case of a conflict of nationality, the principle establishes criteria to decide the effective nationality, which in turn makes it possible to determine applicable legislation. The rapporteur expressed that the criterion of dominant or effective nationality as a bond/tie between a person and a State, has been applied in cases of diplomatic protection. In extradition cases, what is established by treaties on the matter with respect to domestic legislation of the States concerned prevails; however, they may also serve as a legal basis for international

cooperation and thus for proceeding with extradition.

Dr. Galo Leoro Franco remarked that the report was a good starting point but he added that the problem that arises is of a constitutional nature, *i.e.*, that almost all countries adopt the position of not extraditing one of their own nationals, which constitutes a legal padlock of sorts. He expressed his doubts regarding the effectiveness of international conventions until constitutional reforms in this matter were made. He indicated that a reform of this nature could establish an exception to the rule of non-extradition for cases of corruption. He also said that he perceived a problem in those treaties that governed dual nationality, because in these cases the definition of nationality does not represent necessarily a fraud of the law. Dr. Leoro inquired which nationality could or should govern in these cases. He suggested that these aspects be considered in dealing with the topic. Finally, he suggested that the concept of "safe haven" be approached not in legal but in real terms.

Dr. Galo Leoro Franco later stated that it should be borne in mind that there could be cases in which dual nationality, obtained by fraud of the law, could be directed not towards avoiding extradition, but for other reasons. He also expressed that to define fraud or abuse of the law would be difficult and might be unwise.

Dr. Luis Marchand Stens remarked that extradition practices and the cases in which extradition is not granted have become more flexible, and he underscored the importance of the fact that corruption can no longer be considered a political crime. He stated that, in using the term "safe haven," the General Assembly attempted to go beyond an institution that does not exist in other countries, *i.e.*, political asylum, which is distinctively Latin American in character, in order to be able to refer to countries outside the region. For this reason, he observed, it is preferable not to use the term "safe haven" in delivering a response. He further said that the rapporteur's report included all those aspects that could be necessary to discharge the mandate given by the General Assembly, and suggested that the rapporteur's report be forwarded to the General Assembly as a progress report, and he requested a supplementary report on the matter.

Dr. Luis Herrera Marcano stressed that the two key concepts in the study before them were those of "safe haven" and "fraud of the law." In his opinion, the term "safe haven," used in the General Assembly resolution, does not have a purely legal content; it could refer to three diferent situations, *i.e.*, non-extradition of nationals, territorial asylum and the granting of the status of refugee. Regarding the general scope of the topic, Dr. Herrera asserted the importance of determining the differences between the Inter-American and the international spheres. Regarding the reasons for granting safe haven, he affirmed that some aspects required analysis, *inter alia*: the individual's condition as a national, the absence of double incrimination, the argument that the case at hand is about a political crime or a crime related to a political crime, the lack of guarantees in the country requesting the extradition, the absence of guarantees of non-joinder of proceedings, and the absence of an extradition treaty. Dr. Herrera also suggested the analysis of the topic of the duty to prosecute when extradition is denied for one of the above-mentioned reasons. Regarding fraud of the law, this topic's interest derives from the denial of extradition, but he said that he did not know of the existence of any history with respect to it. Generally, in his opinioin, the concepts of safe haven and nationality are indissoluble for the purposes attached to the response to be given to the General Assembly. To treat them differently would entail giving too general a response. The main question, in his judgment, is to determine whether the type abuse or fraud of the law is applicable to nationality in an extradition case. To date, he commented, it has been applied in private law, in domestic law and in cases related to diplomatic protection, but it is not clear if it can be applied to extradition cases. Finally, he expressed the opinion that it was unwise to define the term "safe haven," because it is not a legal concept.

Dr. Jean-Paul Hubert remarked that it was not advisable to introduce more issues in the final report than those that had been requested. The General Assembly's inquiry referred to the effect of granting safe haven, which is impunity, *i.e.*, the denial of accountability. In his opinion, the Juridical Committee must now provide some recommendations based on the report of the rapporteur. Constitutional reform cannot be among them, but a greater general cooperation can be recommended. Although the additional comments provided by the other members of the Committee were interesting, he said, the rapporteur's report was in itself sufficient.

Dr. Stephen C. Vasciannie suggested that a brief analysis of the problem be included, *i.e.*, whether it was a generalized problem or not. He also stated that it was not realistic to base non-extradition on dual nationality. He said that under Common Law it is judges who grant or deny extradition, independently of the Executive Branch's opinion, and that this decision sometimes takes years. The fact that corruption is defined differently in different countries brings an additional problem, because a conduct could be a crime or not depending on the State. He underscored the lack of mention and discussion, thus far, of the issue of sovereign immunity, which can shield a public servant from the law. The rapporteur's report could be supplemented with all these subjects. He also expressed that each State is free to determine the conditions under which it grants nationality to a person. Regarding the concept of asylum, he indicated that even in Latin America it did not appear to constitute a sufficiently wide practice; therefore, it could not be expanded to countries outside the region. He doubted the existence of an international norm establishing the obligation to extradite under the assumptions of the General Assembly's inquiry, at least not a greater obligation than the obligation which could have been established by the *Convention of Mérida*; for this reason it would be convenient to examine what is established by the latter convention. Finally, regarding the abuse of right, he noted that international law does not include this concept; it is basically a civil law concept. He further added that if an international obligation to not grant "safe haven" in a given case cannot be established, the only solution is to turn to the domestic legislation of the State that received the request, especially the legislation relative to the granting of nationality.

Dr. Mauricio Herdocia Sacasa spoke of accountability as one of the pillars of democracy. He noted that the crime of corruption had been the object of respective Inter-American and United Nations conventions; corruption is considered a crime that calls for international cooperation, since, besides, it has a transnational character. In his opinion, corruption should also be viewed as a phenomenon that undermines international security. He indicated that there is an international obligation to deny safe haven to corrupt officials which stems from the *Declaration of Quito*. The legal effect of non-compliance is impunity and consequently the international responsibility of the State. He stressed that nationality is governed by domestic law but within the limits of international law; therefore, nationality cannot be granted in violation of international law.

Dr. Herdocia also stressed the need, insofar as it is possible, to limit the scope and ramifications of the topic, as well as the usefulness of linking the definition of the term safe haven with the topic of the evasion of justice, *i.e.*, that it should be defined as the situation in which public officials and persons accused of crimes of corruption after having exercised political power are allowed within the territory of a State, and extradition and domestic prosecution are denied in a manner incompatible with international law Dr. Herdocia also underscored the existence of a number of problems regarding concrete situations related to extradition. He suggested that the denial of safe haven should be framed within domestic legislation and the applicable international norms, in accordance with the Declaration of Quito and the *Declaration of Nuevo León*.

Dr. Herdocia proposed additional points for consideration. He indicated that nationality obtained through fraud or abuse of the law may not be invoked as a basis to deny a legally

founded extradition, since nationality, in order to be opposed against third parties, should be obtained in a manner compatible with international law. In consequence, the violation of said principle's legal effect would be to foster impunity, harm the general purposes of international criminal justice, and give rise to State responsibility in accordance with international law. He also noted the necessity of recommending to the States to bear in mind the importance of fighting corruption and avoiding impunity before granting safe haven or asylum.

Finally, Dr. Herdocia observed that most decisions on the topic refer to diplomatic protection, but that the Committee could draw some conclusions related to extradition and nationality when the latter is obtained through fraud or abuse of the law. The main approach would be centered on a progressive development of international law. He also expressed that the rapporteur's report indeed contains the items requested by the General Assembly's resolution. He suggested the creation of a working group with Drs. Ana Elizabeth Villalta, Luis Herrera, Luis Marchand and Mauricio Herdocia to write a draft resolution to be annexed to the rapporteur's report, including some of the principles that stem from the report.

To conclude their task as a working group, the Inter-American Juridical Committee adopted resolution CJI/RES.84 (LXVI-O/05) "*Joint efforts of the Americas in the struggle against corruption and impunity*," in which the study of the rapporteur was received with satisfaction and in which the opinion annexed to resolution CJI/doc.181/05 rev.4, based on the rapporteur's study, is adopted. Finally, the Committee decided to forward the resolution and the annexed Opinion to the Permanent Council, along with Dr. Villalta's study. These documents were forwarded to the Permanent Council on March 31, 2005.

Dr. Galo Leoro Franco presented a written explanation of his vote that the Chairman of the Juridical Committee offered to read it in the presentation of the Committee's Annual Report of 2005 before the Committee on Political and Juridical Affairs of the Permanent Council. Such written explanation was included in the corresponding minute.

Dr. Galo Leoro Franco then requested that a note be attached to the resolution stating that the explanation of his vote can be found in the minutes of the Committee's tenth session; this request was accepted by the Committee.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2005), the Chairman of the Committee informed that since March 31, 2005, the Permanent Council already had in its power the documents prepared by the Juridical Committee on this theme during its previous regular session. Following is the text of the resolution, the *Opinion* approved by the Inter-American Juridical Committee and the report of the rapporteur.

CJI/RES.84 (LXVI-O/05)

JOINT EFFORTS OF THE AMERICAS IN THE STRUGGLE AGAINST CORRUPTION AND IMPUNITY

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that in Resolution AG/RES. 2022 (XXXIV-O/04), "Joint efforts of the Americas in the struggle against corruption and impunity", the Inter-American Juridical Committee was asked to prepare a study on: a) the legal effects of granting safe haven in regional or extra-regional countries to civil servants and persons charged with crimes of corruption after having exercised political power; and b) cases in which fraud or abuse of the law may be considered in relation to the principle of double nationality;

REAFFIRMING the commitment in resolution AG/DEC.36 (XXXI-O/04), "Declaration of Quito on Social Development and Democracy in the face of Corruption", which contains the commitment to "deny safe haven to corrupt civil servants .... And to cooperate with their extradition";

TAKING INTO ACCOUNT dispositions in the Inter-American Convention against Corruption, particularly in relation to the subject of Extradition, as well as assistance and cooperation;

CONSIDERING dispositions pertaining to the United Nations Convention against Corruption, especially those referring to international cooperation;

RECOGNIZING the international scope and transcendence of acts of corruption; the threat to international security that it represents, and the demands for effective cooperation between the States to prevent, combat and eradicate it,

RESOLVES:

1. To welcome with approval the study "Joint efforts of the Americas in the struggle against corruption and impunity" (CJI/doc.177/04), and to congratulate the rapporteur, Dr. Ana Elizabeth Villalta Vizcarra for the document she presented.

2. To adopt the attached Opinion (CJI/doc.181/04 rev.2), based on the study by Dr. Ana Elizabeth Villalta Vizcarra.

3. To remit the present resolution and attached Opinion to the Permanent Council together with the study carried out by the rapporteur.

This resolution was adopted at the meeting held on March 9, 2005, by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

Annexes: CJI/doc.181/05 rev. 4 and CJI/doc.177/05.

CJI/doc. 181/04 rev. 4

OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE JOINT EFFORTS OF THE AMERICAS IN THE STRUGGLE AGAINST CORRUPTION AND IMPUNITY

In Resolution AG/RES.2022 (XXXIV-0/04), the General Assembly requested the Inter-American Juridical Committee to prepare a report on a) the legal effects of giving safe haven in regional and extra-regional countries to public officials and persons accused of crimes of corruption after having exercised political power, and b) cases in which appealing to the principle of dual nationality may be considered a fraud or abuse of the law.

In order to better define this task set by the General Assembly, the Juridical Committee has assumed that the above transcribed letters "a" and "b" structure a coherent and unique whole, and that as such, each should be interpreted in relation to the other.

From this perspective, it should be understood that the consultation refers to a person accused (prosecuted or condemned) of corruption who has or claims to have, the nationality of the country that harbors him, as well as the nationality of the country in which the act of corruption was presumably committed and public power was exercised. As such, the provision of safe haven would consist of refusing a duly presented extradition request, based only on the fact that the accused has the nationality of the requested country.

It should be pointed out that international law does not impose an obligation upon States to grant extradition of its own nationals. Both, Article XIII, paragraph 6 of the Inter-American Convention against Corruption, as well as Article 44, paragraph 11 of the United Nations Convention against corruption, anticipate the possibility that a State Party may refuse an extradition solely on the ground that the requested accused is its own national, even though in such a case, both establish the obligation to prosecute the person.

International law also recognizes the authority of the State to determine which persons have the right to its nationality. In the Nottebohm case that refers to diplomatic protection, without ruling on the internal validity of the nationality granted by the Principality of Liechtenstein, the International Court of Justice nonetheless affirmed that the assertion of nationality against third States could only be governed by international law and not by national legislation.

Therefore, the issue to study is whether international law establishes any limitation on the possibility of refusing extradition due to the fact that the person, whose extradition is being requested, has the nationality of the requested State, while simultaneously having the nationality of the requesting State. In light of part “b” of the above-cited study, the case would have to be considered in which the nationality of the requested State was obtained or invoked in a fraudulent or abusive manner by the requested person.

There are precedents that refer to the limits of the right of a State to exercise diplomatic protection over a national when this nationality is not the effective or dominant nationality, regardless of whether dual nationality is involved.

In the Cannevaro Case, a tribunal of the Permanent Arbitration Court established that in a dispute with Peru, Italy could not invoke the Italian nationality of Rafael Cannevaro, due to him having exercised his Peruvian nationality by presenting his nomination to the Peruvian Senate, and having been the Consul General of Peru in the Netherlands, both positions requiring him to have Peruvian nationality.

In the above-cited Nottebohm case, the International Court of Justice ruled that Lichtenstein could not invoke the nationality acquired by Fredrick Nottebohm versus Guatemala. It stated “that, according to the practice of States, judicial and arbitral rulings and doctrinal opinions, nationality is the juridical link that establishes a social fact of adherence, a genuine existing bond, of interest, of feelings, together with the existence of obligations and reciprocal rights, that is to say that it constitutes the juridical expression of the fact that the person to whom it has been granted, whether directly by law or as a result of an act of the authorities, is in practice more closely linked with the population of the nationality- granting State than with any other State.” The Court also noticed that the links Nottebohm had with Lichtenstein were “extremely tenuous”.

In the Mergé case, an International Conciliation Commission stated that the United States could not invoke, versus Italy, the nationality of Mrs. Florence Strunsky Mergé, who held the nationality of both states, due to the fact that her United States nationality was not the “dominant nationality”.

As an additional indication it can be pointed out that the International Law Commission of the United Nations approved the following text of article 7 of its Draft Articles on Diplomatic Protection during its first reading in 2004: “The State of the nationality cannot exercise diplomatic protection over a person versus another State of which this person is also a national, unless the nationality of the first State is predominant not only at the moment of the injury, but also on the date of the official presentation of the demand”.

CONCLUSIONS:

The main precedents concerning dominant nationality and the need for an effective link in determining nationality have taken place in the context of diplomatic protection established in International Law. Nonetheless, the Juridical Committee believes that certain conclusions derived from the context of diplomatic protection could be applied in

the field of extradition although these conclusions do not necessarily reflect the current status of international law. These conclusions include:

1. In case of a conflict of nationality, the Juridical Committee considers that if the nationality of the requesting State is the dominant or predominant nationality, or the genuine and effective link, extradition should not be refused on the basis of nationality.

2. When nationality is acquired or invoked through fraud or abuse of the law, extradition should not be refused solely on the basis of nationality.

These conclusions are desirable because they would have the juridical effect of avoiding that acts of corruption go unpunished, which would otherwise affect the general aims of international criminal justice; would harm judiciary cooperation between States; would undermine the Rule of Law in international relations; and would ignore the interests of the requesting State. The Committee supports them as appropriate for progressive development of international law and in order to strengthen and achieve the aims of international justice.

NOTE: The text of Dr. Galo Leoro's explanation of vote on the Opinion of the Inter-American Juridical Committee appears in the Notes of Meeting of the Tenth (10th) session, held on March 11th, 2005, corresponding to the 66th Regular Session of the Committee.

CJI/doc.177/05

JOINT EFFORT OF THE AMERICAS IN THE STRUGGLE AGAINST CORRUPTION AND IMPUNITY

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. RESOLUTION BY THE INTER-AMERICAN JURIDICAL COMMITTEE CJI/RES.77 (LXV-O/04)

During its 65th regular session (August 2 to 27, 2004), the Inter-American Juridical Committee approved resolution CJI/RES.77 (LXV-O/04) denominated *Joint efforts of the Americas in the struggle against corruption and impunity,* which took into account the *Quito Declaration on social development and democracy, and the impact of corruption* which declares the commitment to *"deny safe haven to corrupt officials… as well as to cooperate in their extradition."*

Considering that through resolution AG/RES 2022 (XXXIV-O/04), *Joint efforts of the Americas in the struggle against corruption and impunity* in its Article 4, the General Assembly asked the Inter-American Juridical Committee to prepare a study on: a) the legal effects of granting safe haven in regional or extra-regional countries to public officials and persons charged with crimes of corruption after having held political power; and b) the cases in which fraud against the law or abuse of the law is considered in relation to the principle of dual nationality.

The Inter-American Juridical Committee, through the resolution, resolved among other issues, to designate Doctor Ana Elizabeth Villalta Vizcarra to present the study requested by the General Assembly in its resolution AG/RES.2022 (XXXIV-O/04), bearing in mind the following elements: a) the Inter-American Convention Against Corruption, especially concerning legal aid and cooperation, and bearing in mind that corruption is an extraditable offense; b) the provisions relating to the United Nations Convention against Corruption, in particular concerning international cooperation; c) the content and scope of the provisions of several resolutions of the General Assembly regarding the existing obligation to deny safe haven to corrupt officials who have held political power, and to cooperate towards placing them at the disposal of the pertinent authorities of the countries where the crimes were committed in order to be tried by their national courts; d) existing international jurisprudence on the matter of "effective nationality or genuine link", especially the rulings of the International Court of Justice in the Nottebohm Case (Liechtenstein v. Guatemala) and sentence of the Permanent Court

of Arbitration in The Hague in the Canevaro Case (Italy v. Peru); e) treatment to be given to requests for asylum in those cases involving individuals accused of crimes of corruption, in order to prevent impunity.

In compliance with this Resolution, the undersigned presents the report during the 66th regular session of the Inter-American Juridical Committee (from February 28th to March 11th of 2005), and organized as follows to approach the theme: A) The Inter-American System; B) The Universal System; C) The Sub-regional System; D) Nationality Conflicts; and E) Conclusions and Recommendations.

- **INTRODUCTION**

- Currently, corruption constitutes one of the new threats or a non-traditional threat in the Americas because corruption is no longer a local matter but has become a transnational phenomenon that affects all societies and economies, creating a need for International Instruments to regulate it in order to prevent, detect, fight and punish it.

- Corruption weakens democracy and undermines the legitimacy of its institutions, it erodes the Constitutional State and jeopardizes government capacity to respond to other security threats; it endangers society, justice and society's moral fiber, as well as the comprehensive development of the peoples.

- Corruption constitutes a new threat, concern and challenge to hemispheric security, among others, which are of a diverse nature and have a multi-dimensional approach and scope, including political, economic, social, health and environmental aspects.

- Corruption constitutes a non-traditional threat to the Inter-American System as well as to the Universal and Sub-regional Systems and for this reason, reference has also been made to International Instruments within the Framework of the United Nations Organization (UN), the Organization of American States (OAS), and the Central American Authority of Integration (SICA).

- **A) The Inter-American System**

- 1) <u>Background</u>

- Resolution AG/RES.1159 (XII-O/92) dated May 22, 1992, by the General Assembly of the Organization of American States (OAS) refers to "Corrupt Practices in International Trade", and establishes that these are a phenomena severely affecting transparent relations between the States and are undermining stable institutional democracy. These corrupt practices can thwart the process of comprehensive development by diverting resources needed to improve the peoples' economic and social conditions, and at the same time have adverse repercussions on International Trade and Investment movements, constituting one of the economic and social challenges for the nineteen nineties decade.

- Resolution AG/RES.1294 (XXIV-O/94) denominated Probity and Public Ethics, refers that the Charter of the Organization of American States recognizes representative democracy as an indispensable condition for the region's stability, peace and development; that corruption is one of the obstacles to the observance of human rights; that the Member States of the Organization should study measures consistent with each country's legal system while improving public administration and promoting transparency and integrity in managing public resources. That the problem of corruption is now an issue of serious concern affecting both industrialized and developing countries throughout the world and the phenomenon is not restricted to our hemisphere.

- Resolution AG/RES.1346 (XXV-O/95) refers to "The Summit of the Americas" held in Miami between December th and 11th, 1994, wherein the Heads of State and Government expressed that all aspects relating to public administration should be transparent and open to public scrutiny in a democracy. That the Organization of American States (OAS) constitutes an appropriate forum to analyze challenges faced by the region's countries and to evaluate the mechanisms for juridical

cooperation in order to prevent and punish any corruption that may affect the Member States, this requiring a hemispheric approach to acts of corruption in both public and private sectors that would include extradition and prosecution of individuals accused of corruption, through negotiations for a new hemispheric agreement or new arrangements within the framework of existing international cooperation agreements. The convenience that a Work Group on Probity and Public Ethics draft a Project for the Inter-American Convention against Corruption with support from the General Secretariat, based on the proposal presented by the Government of Venezuela, and refers the Inter-American Juridical Committee to formulate observations to the Draft for the Inter-American Convention against Corruption.

- Resolution AG/DEC.8 (XXV-O/95) held on June 7, 1995 and titled *Declaration of Montrouis: a new vision of the OAS*, expressed: "Their decision to fight public and private corruption in all its forms. To this end, and taking into account the work under way in the Organization, they support cooperation and the exchange of experiences to promote state modernization, transparency in government administration, and the strengthening of internal mechanisms for investigating and punishing acts of corruption as well as the holding of a specialized conference in Caracas to consider and if appropriate, adopt an Inter-American Convention against corruption."

- On March 29, 1996, the Specialized Conference convened through the OAS General Assembly Resolution AG/RES1346 (XXV-0/95) to adopt the *Inter-American Convention against Corruption*, which constitutes a unique international legal instrument on the subject and gathers the commitment by the States to carry out actions both in the internal and international spheres to fight corruption, also expressing in its preamble, that they are "Convinced that corruption undermines the legitimacy of public institutions, it endangers society, justice and moral order, as well as comprehensive development of the peoples." The *Convention* entered into effect on March 6, 1997.

- Resolution AG/RES.1395 (XXVI-O/96) denominated *Annual Report of the Inter-American Juridical Committee* especially thanked the Committee for major contribution it made to the successful adoption of the *Inter-American Convention against Corruption*. In this sense, as follow-up, it refers the Committee to prepare model legislation regarding illicit enrichment and transnational bribery.

The General Assembly determined that the OAS constitutes an appropriate forum to exchange information on the challenges faced by countries of the region in matters regarding the fight against corruption, as well as to achieve more effective international cooperation to fight it, by adopting the *Inter-American Program for Cooperation in the Fight Against Corruption* through Resolution AG/RES.1477 (XXVII-O/97).

Resolution AG/DEC. 16 (XXVIII-O/98) denominated *Reaffirmation of Caracas*, ratifies the commitment by the Heads of State and Government in the Declaration of Santiago, adopted within the framework of the Second Summit of the Americas, to review the institutional framework of the Inter-American System, particularly the Organization of American States, in order to strengthen its capacity to respond to the challenges of the new century.

- Resolution AG/DEC.35 (XXXII-O/03) denominated *Support for Ecuador in its Fight against Corruption*, approved on June 10, 2003, the General Assembly took into account that the "*Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas*", affirms that "corruption and impunity weaken our public and private institutions, distort our economies, and undermine the social values of our peoples". Likewise, it points out that "cooperation and reciprocal assistance against corruption, in accordance with applicable treaties and law, are fundamental factors in the promotion of democratic governance."

- In this sense, they reaffirmed their support for Ecuador in its fight against corruption and impunity in accordance with the applicable international instruments and national legislation.

- Resolution AG/DEC.33 (XXXIII-O/03) denominated *Support for Peru in its Fight Against Corruption and Impunity*, approved on June 10, 2003, the General Assembly ratified that the fight against corruption is fundamental to the exercise of democracy, institution building, and strengthening of the rule of law. Likewise, it declares its support for the Peruvian State in the effort being made by her people and the State to fight corruption and impunity, in the framework of full respect for human rights, and reiterates the will of the governments of the Member States to extend the widest possible cooperation and assistance to the Government of Peru, in accordance with applicable treaties and law, by processing requests from that country's competent authorities under its domestic law, to investigate and bring to trial cases of corruption and other serious crimes, in order to fight impunity.

- Resolution AG/DEC.36 (XXX/V-O/04) denominated *Declaration of Quito on Social Development and Democracy, and the Impact of Corruption*, approved in a plenary session on June 8, 2004, recalls in said Declaration "that the Inter-American Democratic Charter declares that the peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it and, at the same time, it establishes that transparency in government activities, probity, and responsible public administration on the part of governments are essential components of the exercise of democracy." Throughout the processes for Summits of the Americas, the Heads of State and Government have been concerned with the fight against corruption.

They underscore the *Declaration on Security in the Americas*, through which a multi-dimensional approach recognizes corruption as a new threat to the security of the States that undermines public and private institutions as well as public trust, generates great economic damages, affects stability, distorts the rule of law and harms government capacity to respond to other threats to the security" and that cooperation among Sovereign States plays an important role in supporting national efforts to consolidate democracy, to promote social development and to fight against corruption.

- In that sense, the *Inter-American Convention against Corruption* is the most important legal instrument within the Inter-American scope for fighting corruption, as it establishes essential means of cooperation in the struggle against this scourge and thus promotes international actions to prevent, detect and penalize it.

- In this same sense, they declared: "That development, democracy and the fight against corruption are deeply related and therefore, should be treated in a balanced and comprehensive manner."

- They reaffirmed their commitment in the fight against corruption, which endangers democracy and democratic governance, weakens institutions, jeopardizes economic and social development and the struggle against poverty, undermining public trust and political stability.

- "That within the framework of national legislation and applicable international regulations, they are committed to denying safe haven to corrupt officials, to those that corrupt them, and to assets or goods resulting from corruption, as well as to cooperate in their extradition, recovery and restitution of assets originated by corruption to their legitimate owners, and they commit themselves to perfect the regional mechanisms for mutual juridical assistance in criminal matters."

- "The international community must carry out a far-reaching concerted effort by the Hemispheric States in the fight against corruption and impunity by providing the widest cooperation within the existing framework of treaties and applicable laws, in order to prosecute persons that commit corruption acts against the State through political power, to be judged by their national courts and to respond before them", and that "International Cooperation against corruption should be respectful of the

sovereignty and territorial integrity of the States and the principle of non-intervention in internal affairs."

- That in the exertion of power, governance is the shared responsibility of the government, political parties and civil society in general, and contemplates authorities' obligation to render accounts for optimum transparency.

- It was established that corruption is a phenomenon that threatens the effectiveness of democratic institutions and affects the economic and social development of nations.

- That the fight against corruption is a priority in the Americas because it is the essence of the Inter-American System, preservation and strengthening of democracy, and the *Inter-American Democratic Charter* establishes it by expressing that: the fundamental components in the exertion of democracy are transparency in government activities, probity (integrity), responsibility in public administration by governments, and the freedom of expression and the press; because by fighting corruption we will achieve better social justice as well as better investment and economic growth.

- 2) Summit of the Americas

- The "**First Summit of the Americas**" held in Miami, Florida on December 9th to 11th of 1994 in the Declaration denominated *First Summit and Corruption*, the Heads of State and Government expressed:

- "Effective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions."

- The Heads of State and Government confirmed their commitment presented in the *Declaration of Principles*, in the "Action Plan and Corruption", in its point 5, The Fight against Corruption, expressed:

- "The problem of corruption is an issue of primary interest now a-days, not only for this hemisphere, but also for all the regions of the world. Corruption in public and private sectors weakens democracy and undermines the legitimacy of governments and institutions. The modernization of the State, which includes deregulation, privatization and simplification of governmental procedures, reduces the opportunities for corruption.

- In a democracy, all the aspects relating to public administration must be transparent and open to public scrutiny."

- In this sense, among other actions, they agreed to develop in the Organization of American States with due consideration of Treaties and the pertinent national laws, a hemispheric approach to acts of corruption in the public and private sectors in include extradition and prosecution of individuals accused of corruption, through the negotiation of a new hemispheric agreement or new arrangements within the existing framework for international cooperation.

- In the "Second Summit of the Americas", held in Santiago de Chile, on April 18 and 19 of 1998, in its Declaration denominated "Second Summit and Corruption", the Heads of State and Government expressed:

- "We will lend new impetus to the struggle against corruption, money laundering, terrorism, weapons trafficking, and the drug problem, including illicit use, and work together to ensure that criminals do not find safe haven anywhere in the Hemisphere. We are determined to persevere in this direction."

- The *Action Plan of the Second Summit and Corruption* expressed unfaltering support for the "Inter-American Program to Fight Corruption", implement actions therein, particularly the adoption of a strategy to achieve prompt ratification of the "Inter-American Convention against Corruption" approved in 1996, elaboration of the Codes of Conduct for public officials, in conformity with the respective legal frameworks, study on the problem of goods and product laundering coming from

corruption, and to promote dissemination campaigns on the ethical values that support the democratic system.

- In the "Third Summit of the Americas and Corruption", celebrated in Quebec, Canada on April 20 and 22 of 2001, in its *Declaration Third Summit and Corruption*, the Heads of State and Government expressed: "Recognizing that corruption undermines basic democratic values, it represents a challenge to political stability and to economic growth, and therefore, threatens vital interests of our hemisphere, we will reinforce our struggle against corruption. Likewise, we recognize the need to improve human security conditions in the hemisphere."

- In its *Action Plan Third Summit and Corruption*, in its point "Fight against Corruption", they expressed: "that corruption severely affects public and private democratic political institutions, weakens economic growth and affects the needs and basic interests of the least favored groups in all countries, and that the responsibility of preventing and controlling this problems depends both on governments as well as legislative bodies and judicial powers.

- In this sense, they considered to: sign and ratify or adhere to the Inter-American Convention against Corruption, as soon as possible and as the case may be; promote and ratify its effective application through the Inter-American Cooperation Program to Fight Corruption; to establish a follow-up mechanism for implementation of the *Inter-American Convention against Corruption*, to strengthen the *Inter-American Cooperation Network against Corruption*; to promote whenever pertinent, participation by Civil Society in its struggle against corruption."

- In the "Extraordinary Summit of the Americas": the Heads of State and Government met during the Extraordinary Summit held in the City of Monterrey, Mexico, on January 13th of 2004, and with the purpose of moving forward on the instrumentation of measures to combat poverty, promote social development with a renewed and strengthened vision of cooperation, solidarity and integration, confront the continuous and increasing challenges in the hemisphere, such as new security threats. In that sense, the issued the *Declaration of Nuevo Leon* and in relation to "Democratic Governance", they reaffirmed their decision to coordinate immediate actions whenever democracy is endangered in any of our countries; strengthen and respect the rule of law; defend human rights and fundamental freedoms, economic progress, social justice and well-being, transparency and the rendering of accounts in public affairs, promote diverse forms of citizen participation and generate opportunities for everyone, all of which are essential to promote and consolidate representative democracy.

- They recognized that corruption and impunity weaken public and private institutions, erode social values, undermine the rule of law, and distort economies and the allocation of resources for development. Therefore, they pledged to intensify their efforts to combat corruption and other unethical practices in the public and/or private sectors, strengthening a culture of transparency and ensuring more efficient public management.

- They refer to the "*Inter-American Democratic Charter*", which points out that the peoples of the Americas have the right to democracy and that their governments have the obligation to promote and defend it, and it establishes that transparency in government activities, probity and responsibility in public management are key components of democracy.

- In this sense, in the framework of applicable national and international law, they committed themselves to deny safe haven to corrupt officials, to those who corrupt them, and their assets; and to cooperate in their extradition as well as in the recovery and return of the proceeds of corruption to their legitimate owners. They also committed to enhance regional mechanisms for mutual legal assistance in criminal matters and their implementation. Likewise, they expressed that the "*United Nations Convention against Corruption*" is a valuable instrument to confront this scourge, and therefore we commit to consider signing and promoting its ratification.

- 3) Inter-American Convention against Corruption

- It was subscribed in Caracas, Venezuela on March 29, 1996 and in its preamble establishes that: corruption is often a tool used by organized crime for the accomplishment of its purposes; that, in some cases, corruption has international dimensions, which requires coordinated action by States to fight it effectively; that to combat corruption, the States have the responsibility of eradicating impunity, and to cooperate with one another for their efforts in this area to be effective, reason for which they are convinced of the need for prompt adoption of an international instrument to promote and facilitate international cooperation in fighting corruption and, especially, in taking appropriate action against persons who commit acts of corruption in the performance of public functions, or acts specifically related to such performance, as well as appropriate measures with respect to the proceeds of such acts."

- The main purpose of the Convention is to promote and strengthen development of the necessary mechanisms by each of the State Parties to prevent, detect, sanction and eradicate corruption.

- Said Convention regulates in its Article XIII, matters relating to Extradition by establishing that this Convention may be considered as the legal basis for extradition with respect to any offense to which this article applies, and extradition shall be subject to the conditions provided for by the law of the State Party or by applicable extradition treaties, after verifying that circumstances justify it and are of an urgent nature, and upon request of the Requested State Party, proceed to detain the person requested for extradition in its territory, or adopt other measures to ensure appearance in extradition procedures.

- Article XIV regulates matters referring to Assistance and Cooperation by establishing that the State Parties shall afford one another the widest measure of mutual assistance by processing requests from authorities that, in conformity with their domestic laws, have the power to investigate or prosecute the acts of corruption described in this Convention, to obtain evidence and take other necessary action to facilitate legal proceedings and measures regarding the investigation or prosecution of acts of corruption described in the present Convention, and shall also provide each other with the widest measure of mutual technical cooperation on the most effective ways and means of preventing, detecting, investigating and punishing acts of corruption.

- 4) Inter-American Democratic Charter

- It was subscribed on September 11th, 2001, in Lima, Peru and marked the beginning of a new era in the Inter-American System, having as a starting point, the Declaration that status: "The Peoples of America have the right to democracy and their governments have the obligation of promoting and defending it."

- Among the conditions considered essential for democracy and that nations are committed to defend are: respect for human rights and essential liberties, the possibility for the peoples to elect their governments and Express their will through free and fair elections, transparency and integrity in State institutions and among those appointed as heads of these; recognition and respect for social rights; the existence of public participation spaces and mechanisms so that citizens become directly involved in defining their own destiny; and lastly, strengthening of political parties and organizations as a means for expressing the peoples' will.

- This Charter is based on the principle established in the Charter of the Organization of American Status (OAS), which recognizes that representative democracy is indispensable for stability, peace and development in the region.

- Key components in the exercise of democracy are "transparency in government activities, probity, and responsible public administration by governments, respect for social rights and the freedom of expression and of the press."

- 5) Declaration on Security in the Americas

- This Declaration was adopted on October 8 of 2003, within the framework of the **Special Conference on Security** held in Mexico City on October 27 and 28 of 2003, with the purpose of promoting and strengthening peace and security in the hemisphere, and takes into account the *Santiago Commitment* with democracy and the renovation of the inter-American system of 1991, which decided to begin a joint reflection process on hemispheric security from an updated and comprehensive perspective in light of new world and regional circumstances. In this sense, considering that the *Declaration of Bridgetown* recognizes that threats, concerns and other challenges to Security in the Hemisphere are of a diverse nature and multi-dimensional scope, and that the traditional approach and scope must be widened to encompass new and non-traditional threats that include political, economic, social, health and environmental aspects, reason for which complex characteristics have determined that security has a multi-dimensional character (which includes traditional threats and new threats, concerns and other challenges to the security of the States in the Hemisphere).

- The hemispheric States will have to cooperate in shared values as well as common approaches to face traditional and new threats, concerns and other security challenges.

- These new threats to hemispheric security are of an inter-sector nature that requires responses to multiple aspects on the part of national organizations and in some cases, association between governments, the private sector and civil society, all acting in an appropriate manner in conformity with democratic principles and regulations.

- To face these new threats, it is necessary to have as basis shared values and common approaches well-recognized in the hemisphere, and in this sense, it must be enhanced that: “a) Threats, concerns and other challenges to security in the hemisphere are of a diverse nature and multi-dimensional scope and concept, and that traditional approaches should be widened to encompass new and non-traditional threats that include political, economic, social, health and environmental aspects.”

- “M) Hemispheric State security is affected in many different forms by traditional and new threats, concerns and challenges of a diverse nature: terrorism, transnational organized crime, the global drug problem, corruption, asset laundering, illicit trafficking in weapons and the connections between them…”

- The specialized OAS forums, Inter-American and international, must develop cooperation in order to face these new threats, concerns and other challenges based on applicable instruments and mechanisms.

- In this order, meetings between the Ministers of Justice or General Prosecutors of the Americas (REMJA), and other meetings between authorities on matters of criminal justice are important and efficient forums to promote and strengthen mutual understanding, trust, dialogue and cooperation in the formulation of policies for criminal justice and respond to new threats to security.

- Through this *Declaration on Security in the Americas*, the delegates condemned:

- “Transnational organized crime because it threatens State institutions and has harmful effects on our societies. They renewed the commitment to fight it by strengthening the internal juridical framework, the rule of law and multilateral cooperation with due respect for sovereignty in each State, in particular through the exchange of information, mutual legal assistance and extradition. To fight against transnational organized crime through full implementation of the obligations assumed by the State Parties to the *United Nations Convention against Transnational Organized Crime* and its three Protocols, so that asset laundering, kidnapping, illicit trafficking with people, corruption and other related crimes are typified as crimes in the hemisphere,

and that proceeds from those crimes be identified, sought, frozen or seized, and ultimately, to confiscate and alienate them.

- Likewise, improve coordination and technical cooperation to strengthen national institutions dedicated to preventing and punishing these transnational crimes, and identify and prosecute members of transnational criminal organizations."

- In Numeral 31, they expressed: "We reaffirm our commitment in the fight against passive and active corruption, which constitute a threat to the security of our Status and undermines public and private institutions as well as society's trust, generating great economic damages, affects stability, erodes the rule of law and harms governmental capacity to respond to other security threats. Its effects propagate to different fields of activity in our States, reason for which cooperation, mutual legal assistance, extradition and concerted actions to fight it are a political and moral imperative. We commit ourselves to strengthen follow-up mechanisms to the Inter-American Convention against Corruption and support the United Nations Convention on the subject."

- To deal with this struggle, the Delegates reaffirmed their "commitment to revitalize and strengthen the organs, institutions and mechanisms of the inter-American system related to the multiple aspects of security in the hemisphere, achieve major coordination and cooperation among them within their areas of competence in order to improve the capacity of the American States to face traditional and new threats, concerns and other challenges to security in the hemisphere."

- Within the framework of the "Special Conference on Security", the Third Plenary Session approved a *Declaration on the Central American Model for Democratic Security* on October 28th of 2003, which recognizes the contribution of the 1995 *Framework Treaty on Democratic Security in Central America* to the new vision on hemispheric security and its multi-dimensional approach, was well as great progress attained by the Central American Security Commission in executing the Central American Democratic Security Model.

- Said Declaration enhances substantial contributions by the Central American Integration System to the hemispheric security design, as well as advances in comprehensive development of its democratic security model.

- 6) <u>Fight against Corruption and Impunity</u>

- Resolution AG/RES.2022 (XXXIV-O/04) denominated The "*Joint Effort of the Americas in the Struggle against Corruption and Impunity*", approved on June 8, 2004, considers: That the Charter of the Organization of American Status recognizes that representative democracy is an indispensable condition for the stability, peace, and development of the region and that transparency in government activities, probity, and responsible public administration on the part of the government are essential components of the exercise of democracy, as stated in the *Inter-American Democratic Charter.*

- That the *Inter-American Convention against Corruption* establishes that the fight against corruption strengthens democratic institutions and that the in this struggle it is the responsibility of the States to eradicate impunity; that their action in this area requires cooperation among them in order to be effective.

- It recalls that the *Declaration of Santiago on Democracy and Public Trust: a new commitment to good governance for the Americas*, affirms that cooperation and reciprocal assistance against corruption, in accordance with the applicable treaties and law, are fundamental factors in the promotion of democratic governance, and that the *Declaration on Security in the Americas*, the States reaffirmed that cooperation, mutual legal assistance, extradition and concerted action to combat corruption constitute a political and moral imperative.

- That in the *Declaration of Nuevo Leon*, adopted at the Special Summit of the Americas, the Heads of State and Government pledge, inter alia, to cooperate in the

extradition of corrupt officials and to enhance regional mechanisms for mutual legal assistance in criminal matters and their implementation.

- Likewise, the preamble of the *United Nations Convention against Corruption* emphasizes that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent it and fight it essential.

- That it is necessary, in accordance with the various documents we have adopted in the Hemisphere, to express, in a collective and unified manner, the political will of our peoples to insist that the international community fulfill its commitments to these values and ideals

- In this order of ideas, the General Assembly resolved to: reaffirm that the struggle against corruption and impunity is a fundamental commitment and a mutual duty of the States of the Americas, as a guarantee of the exercise of democracy and the consolidation of its institutions, governance, strengthening of the rule of law, and respect for human rights, because corruption, whether passive or active, is a menace to the security of States, undermines public and private institutions, and encumbers the development of peoples."

- To express, in the context of strengthening democratic governance, their full support for the efforts being carried out by member states so that those who have committed acts of corruption against those states while in public office shall be prosecuted by national courts and answer before them."

- Likewise, they call upon the international community, in accordance with applicable treaties and laws, to refrain, without accepting justifications based on fraud or abuse of the law and legal principles, from granting safe haven; and to provide broad cooperation to the states of the hemisphere for the purpose of guaranteeing that those public officials who have exercised political power and, in that capacity, have committed crimes of corruption, may be made available to the corresponding authorities of the countries in which these crimes were committed for prosecution by their national courts.

- **B) The Universal System**

- In the framework of the United Nations, concerned by the severity of the problems and threats from corruption against the stability and security of all societies by undermining institutions and democratic values, ethics and justice, as well as affecting sustainable development and the rule of law; and at the same time concerned by the links between corruption and other forms of crime, in particular organized crime and economic crime, including Money laundering; that in those cases of corruption that involve vast amounts of assets, which can constitute an important proportion of the resources of the States, and that they threaten political stability and sustainable development in those States.

- That corruption is no longer a local problem and has become a transnational phenomenon that affects all societies and economies, and international cooperation to prevent it and fight is essential, requiring a broad and multi-disciplinary approach to prevent and fight corruption in an effective manner.

- That it is necessary to prevent, detect and dissuade international transferences of assets illicitly acquired in a more efficient manner, and to strengthen international cooperation to recover assets because prevention and eradication of corruption are the responsibility of all the States who must cooperate among each other.

- In this sense, the Member States of the Organization of the United Nations subscribed The United Nations Convention against Corruption known as the Convention of Mérida, on December 10th of 2003 in Mérida, Yucatan, Mexican United States, which constitutes an effective and modern instrument in the struggle against corruption, since it establishes among others, the obligation of the State Parties to

adopt preventive measures and to penalize a broad scope of corruption acts; to lend the widest cooperation for extradition and reciprocal legal assistance, in conformity with national legislation and applicable international regulations.

- The object of this Convention is to: promote and strengthen measures to prevent and fight corruption in a more efficient and effective manner; to promote, facilitate and support international cooperation and technical assistance in the prevention and struggle against corruption, including recovery and repossession of assets; and promote integrity, the obligation to render accounts and due management of public affairs and assets.

- Chapter IV regulates all matters referring to International Cooperation and specifically, extradition; transference of sentenced persons; reciprocal legal assistance, among others. In the same sense, it also regulates international cooperation for recovery of assets.

- Chapter IV establishes that the Parties will have wide-scope cooperation in criminal issues and that whenever appropriate and in accordance with the national legal system, the State Parties will consider the possibility of lending assistance in the investigation and corresponding procedures corresponding to civilian and administrative matters related to corruption.

- With regard to extradition, the most ample cooperation is regulated since it establishes that it will apply to typified crimes according to the present Convention in those cases where the person object of a request for extradition in the territory of the Requesting State Party, as long as the crime for which the extradition is requested is punishable in accordance with the national law of the Requesting State Party and the Requested State Party. Despite the above, if allowed by the legislation of a State Party, it can grant extradition of a person for whatever crimes comprehended in this Convention that is not punishable according to its own national laws.

- That when the national law of a State Party allows it, the Convention may serve as a basis for extradition and will not consider any crimes typified according to the Convention as being of a political nature, and if a State Party subordinates extradition to the existence of a treaty, receives a request for extradition from another State Party with which it has no associated extradition treaty, may consider the Convention as juridical basis for the extradition with respect to the crimes to which this Convention applies.

- That the State Parties that do not subordinate extradition to the existence of a treaty, will recognize the crimes to which the present article applies as cause for extradition among them. That the State Parties, in conformity with their national laws, will speed up extradition procedures and streamline the corresponding probative requirements with respect to any crimes to which the Convention applies. If an alleged criminal is in the territory of a State Party and it does not extradite him with respect to a crime to which this Convention applies due to the fact that he is one of its nationals, previous request from the State Party that requests the extradition, it will be forced to submit the case without unjustified delay to its competent authorities for purposes of prosecution.

- When the national law of a State Party only allows extradition or in some way surrender of one of its nationals under the condition that the person be returned to that State Party to comply with the imposed sentence as result of a judgment or prosecution for which the extradition was requested, and that State Party and the State Party that requested the extradition accept that option; if the request for extradition or handing over with the purpose of complying with the sentence is denied due to the fact that the person sought is a national of the required State Party, if its national law allows it and in conformity with the requirements of said law allow it, previous request from the Requesting State Party, will consider the possibility of imposing compliance of the imposed sentence or de remaining part of the sentence in accordance with the national law of the Requesting State Party. Before denying the extradition, the Requested State Party, when adequate, will consult with the Requesting State Party in order to provide

ample opportunities to present its opinions and provide pertinent information to its allegations. The State Parties will try to celebrate agreements, or bilateral or multi-lateral arrangements to carry out the extradition or increase its efficiency.

- With regard to reciprocal Legal Assistance, the State Parties will lend the most ample reciprocal legal assistance with respect to investigations, prosecutions and legal actions related to crimes included in the present Convention.

- The Convention provides for the establishment of Conference of the State Parties in the Convention with the purpose of improving the capacity of the State Parties and cooperation between them to attain the objectives and promote and examine its application.

- **C) The Sub-Regional System**

- The Central American Authority for Integration (SICA) constitutes the Sub-Regional System in the Central American Region, which updates the Juridical Framework of the Organization of Central American States (ODECA), readapted to the current reality and needs through the Protocol of Tegucigalpa to the Charter of the Organization of Central American States (ODECA) subscribed by the Summit of Central American Heads of State and Government on December 13 of 1991, wherein SICA constitutes the institutional framework of Central American Regional Integration.

- Article 3 in its incise b) of the Protocol of Tegucigalpa, among other regulated purposes, the following: “To establish a new Regional Security Model based on the reasonable balance of forces, strengthening of public power, overcoming extreme poverty, promotion of sustainable development, environmental protection, eradication of violence, corruption, terrorism, drug and weapons trafficking.”

- This Regional Security Model was set forth with the subscription of the Framework Treaty on Democratic Security in Central America, on December 15 of 1995, in the Summit of Central American Presidents held in San Pedro Sula, Honduras.

- This Central American Democratic Security model upholds the supremacy and strengthening of public power, the reasonable balance of forces, citizen security and their properties, overcoming poverty and extreme poverty, promotion of sustainable development, environmental protection, eradication of violence, corruption, impunity, terrorism, drug related activity, and illicit traffic of weapons. The adoption of a framework legal instrument becomes a need to facilitate integral development of all the aspects contained in the New Democratic Security Model, that is, the Framework Treaty on Democratic Security in Central America.

- Public or private corruption constitutes a threat to democracy and citizen security and for the States of the Central American Region within this model, and therefore, the State Parties are committed to carry out all the efforts for eradicating it at all levels and manners.

- In this sense, the Parties carry out all efforts to eradicate impunity by elaborating programs leading to harmonization and modernization of the Central American criminal justice systems.

- The concept of Democratic Security is integral and inseparable and comprehends all the aspects for sustainable development in Central America, in its political, economic, social, cultural and ecological manifestations, constituting a multi-dimensional approach to Democratic Security.

- With the purpose of contributing to the consolidation of Central America as a Region of peace, freedom, democracy and development, one of the objectives consists of: “Establishment or strengthening operational coordination mechanisms of the competent institutions for a more effective struggle against crime and all the threats to democratic security, such as terrorism, illicit traffic of arms, drug activity and organized crime.”

- In this manner, the 1995 Framework Treaty for Democratic Security in Central America has contributed a new vision to Hemispheric Security and its multi-dimensional approach, and Resolution AG/RES.2O53 (XXXIV-O/04) denominated Central American Model for Democratic Security, approved on June 8, 2004 expresses it as such, and it also calls on the Central American States to continue working on the implementation of its initiatives, among others, public security for persons and their properties, overcoming poverty, particularly extreme poverty and corruption.

- **D) Nationality Conflicts**

- Nationality is conceived as the political-legal ties that unite a person with a determined State, which generate reciprocal rights and obligations.

- Nationality conflicts arise due to diverse regulations on the positive rights in this aspect.[1] There are two types of conflicts: negatives and positives. There are negative conflicts when a person lacks nationality, not being a citizen of any State (stateless person), and there is no legislation to apply. There are positive conflicts when a single person has two or more nationalities, reason for which two or more legislations can be applied.

- The same person can have double or multiple nationalities as a consequence of a positive nationality conflict. This conflict may cause fraudulent naturalizations on some occasions when invoked by mala fides.

- When double nationality exists, a claimant cannot be protected against its own State, and The *Hague 1930 Agreement on Codification of International Law* in its Article 4 establishes so by expressing that: “no State can exert diplomatic protection in benefit of one of its nationals, against another State to which it is also a national.”

- **THE HAGUE CONVENTION OF 1930**

- The *Hague Convention* of 1930 codified the vast majority of the general principles in effect on matters of nationality, on issues relating to conflicting laws on nationality, thus Article 1 states: “each State must determine by its own law who are its nationals. This law will be recognized by other States as long as it is compatible with the conventions, common regulations and well-recognized general principles of international law.”

- The same Convention in its Article 4 establishes that: “a State cannot give diplomatic protection to one of its nationals against a State of whom the person is also a national. Likewise, a person that has two or more nationalities cannot use the fact that he is a national of one of those States to begin legal procedures before a commission or international court against the other State of which he is also a national.”

- In relation to “effective or dominant nationality”, Article 5 of the Convention expresses: “a person that has more than one nationality will be treated as if he had a single nationality within a third State.” Without prejudice of the application of the law on matters relating to the personal condition and of any convention in effect, the authorities of the third State will exclusively recognize any one of the nationalities that the person has; the nationality of the country in which he habitually and mainly resides, or the nationality of the country to which he is apparently more intimately connected by circumstances.”

- **EFFECTIVE NATIONALITY**

- The principle of effective nationality has been confirmed by jurisprudence and by development of conventional law, and it is understood as an effective and closer relationship with a determined State. An example of this is the 1912 Sentence by The Hague Permanent Court of Arbitration in the Canevaro Case.

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1 MONROY CABRA, Marco Gerardo. *Tratado de Derecho Internacional Privado,* 5th ed. Temis, 1999.

- Effective nationality takes into account all the factual circumstances of a person that determine his real connections to one State or another. Doctrine on effective nationality is also regulated in Article 3, Paragraph 2 of the *By-Laws of the International Court of Justice* by expressing: "any person to be elected as a member of the Court who could be considered as a national of more than one State, will be considered a national of the State where he ordinarily practices his civil and political rights."[2]

- **The Canevaro Case**

- This is a diplomatic protection case interposed by Italy on behalf of Rafael Canevaro against Peru, which considered whether Rafael Canevaro should be considered an Italian claimant and The Hague Permanent Court of Arbitration ruled against; that in reality, regardless of the condition that Canevaro has in Italy, Peru has the right to consider him a Peruvian citizen and to deny his character as an Italian claimant, since he behaved as a Peruvian when he presented his nomination for the Senate (where only Peruvian citizens can be elected), having carried out his office as Consul General of Peru in The Netherlands and effectively presenting himself as a Peruvian.

- This case established that when double nationality exists since birth (by the combination of the principles of jus soli and jus sanguinis), in case of a conflict between the two, the "effective or dominant nationality" will prevail and it can be determined on the basis of the person's desires, intentions, actions and behavior.

- In matters of double nationality, the international arbitrators have not given prevalence to jus sanguinis over jus soli, but rather to "effective nationality", that is, the extent and place to which an individual was established, and that is the place where Public Authority will be in charge of the individual and will determine his condition, (Sentence by The Hague Permanent Court of Arbitration, Canevaro Affair, May 3, 1912, Italy-Peru), J.P. Niboyet, *Principles of International Private Law*.[3]

- **The Mergé Case**

- The case dealt with a claim due to loss of property and compensation in detriment of a person with double nationality, Mrs. Florence Strunsky Mergé, national from the United States by *jus soli* and national of Italy by marriage. On the basis of facts and the claimant's behavior, the Conciliation Commission determined that the Mergé Family did not have the United States as its habitual residence, that the interests and professional life of the head of the family were not established in the United States, reason for which they did not consider that the claimant, Mrs. Mergé, to have "dominant nationality" of the United States.

- The Conciliation Commission upheld the opinion that the principle of "effective nationality" and the concept of "dominant nationality" were simply two faces of the same coin. In this case, the Commission expressed: "The principle based on the sovereign equality of the States, which excludes diplomatic protection in the case of double nationality, must give precedence to the principle of effective nationality, as long as that nationality is that of the claiming State. But precedence will not be granted when that predominance is not clearly demonstrated, because the first of these two principles is generally recognized and can constitute criteria for practical application to eliminate any possible uncertainty." (Conciliation Commission Italy-United States in the Mergé Affair in 1955).[4]

- **The Nottebohm Case**

- Mr. Friedrich Nottebohm was born on September 26, 1881 in Hamburg, and thus held German nationality. He moved to Guatemala in 1905, where he lived and worked until 1943. However, he maintained family relations in Germany as well as

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2 Idem.
3 NIBOYET, J.P. *Principios de Derecho Internacional Privado*. México, D.F.: Ed. Nacional, 1928.
4 United Nations International Law Commission, 2827th Session, 3 August 2004.

Liechtenstein, where one of his brothers lived as of 1931. In 1939, he requested nationality from the Principality of Liechtenstein, a neutral country during World War II. Liechtenstein granted nationality to Nottebohm that same year, and Nottebohm renounced his nationality of origin in obtaining nationality of the Principality. Nevertheless, Nottebohm continued to live in Guatemala until he was arrested in 1943, detained, expelled and prohibited from returning to Guatemalan territory. His assets (both properties and movables) were confiscated.[5]

- For this reason and as a citizen of Liechtenstein, on December 17, 1951 Nottebohm appealed to the International Court of Justice against Guatemala. The Court examined whether the naturalization conferred under these circumstances granted Liechtenstein the right to provide Nottebohm with diplomatic protection against Guatemala, his country of habitual residence.

- Guatemala filed a preliminary objection of lack of jurisdiction, arguing that the Declaration by which Guatemala accepted the Court's jurisdiction had expired in January 1952. The Court denied this objection in a judgment dated November 18, 1953. Guatemala also requested that the Court declare the claim by Liechtenstein inadmissible, arguing: 1) that Nottebohm had obtained nationality from Liechtenstein in an irregular manner and in contravention of the Principality's legislation; 2) that said naturalization had not been granted pursuant to generally recognized principles with respect nationality; and 3) that Nottebohm had requested nationality from the Principality in a fraudulent manner in order to acquire the condition of citizenship of a neutral country, with no veritable desire to establish a lasting connection with the Principality.

- By a judgment of 11 votes to 3, the International Court of Justice decided that the Principality of Liechtenstein was not entitled to exercise Nottebohm's diplomatic protection against Guatemala, stipulating that: "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties." 6

- The Court determined that the link that united Nottebohm with Guatemala, although it was not a link of nationality, was stronger than that which united him to Liechtenstein. Therefore, Guatemala was not obligated to recognize the nationality conferred under these circumstances. The Court also established that the connections between Nottebohm and Liechtenstein were "extremely tenuous" in comparison with the close connections between Nottebohm and Guatemala over a period of 34 years, leading the Court to affirm that Liechtenstein did not have title to exercise protection in respect to Nottebohm against Guatemala.

- The principle of "genuine connection" emphasizes the real or social connections that an individual has or had during his or her life with a certain country. It is particularly relevant when determining the true motives that lead the individual to seek naturalization in another country.

- Subsequently, in its decision of April 6, 1955, the Court held Liechtenstein's claim to be inadmissible, giving priority to effective nationality based on the following: "According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State[7].

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5 MONROY CABRA, Marco Gerardo, *op. cit. supra*.

6 Decisions of the International Court of Justice at the Hague, 1953 and 1955.

7 Idem.

- The State of effective or dominant nationality may undertake legal actions in respect to a national against another State (Canevaro case, Permanent Court of Arbitration, 1912: jurisprudence that served as a basis for the International Court of Justice in the Nottebohm case.)

- In summary, in the Nottebohm case, the Principality of Liechtenstein intended to exercise diplomatic protection in respect to a German national residing in Guatemala (Nottebohm), alleging that, according to its legislation, said individual had acquired its nationality and therefore should not have been considered a German citizen by Guatemalan authorities, who confiscated his properties in treating him as the national of an enemy State (Germany) during World War II. Without deciding on the internal legitimacy of the granting of nationality by Liechtenstein, the Court affirmed that the Principality's opposition to other States could only be judged by international law and not national law, and international law requires an effective link between the individual and the State. In this case, this condition was not met, and therefore the Court denied the legitimacy of Liechtenstein to exercise diplomatic protection of Nottebohm.

- **THE INTERNATIONAL LAW COMMISSION**

- Since its 48th Session held in 1996, the United Nations International Law Commission has considered that the theme of diplomatic protection is one of the most ideal in terms of codification and progressive development of international law. In the same year, the General Assembly, through Resolution 51/160 dated December 16, 1996, invited the Commission to examine the topic and indicate its scope and contents with respect to the observations presented by the governments. Since that date, the Commission has been developing the topic in such a way that it now has "draft articles on diplomatic protection" approved by the Commission on first reading. In the part corresponding to diplomatic protection and nationality, said "text of draft articles" stipulates the following:8

DIPLOMATIC PROTECTION

Part One

GENERAL PROVISIONS

Article 1

Definition and scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State adopting in its own right the cause of its nationals in respect of an injury to that national arising from an internationally wrongful act of another State.

Article 2

Right to exercise diplomatic protection

A state has the right to exercise diplomatic protection in accordance with the present draft articles.

Part Two

NATIONALITY

Chapter I

GENERAL PRINCIPLES

Article 3

Protection by the State of nationality

1. The State entitled to exercise diplomatic protection is the State of nationality.

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8 UNITED NATIONS INTERNATIONAL LAW COMMISSION *Text of draft articles*, 2827th Meeting. August 3, 2004.

2. Notwithstanding paragraph 1, diplomatic protection may be exercised in respect of a non-national in accordance with draft article 8.

Chapter II

NATURAL PERSONS

Article 4

State of nationality of a natural person

For the purposes of diplomatic protection of natural persons, a State of nationality means a State whose nationality the individual sought to be protected has acquired by birth, descent, succession of States, naturalization or in any other manner, not inconsistent with international law.

Article 5

Continuous nationality

1. A state is entitled to exercise diplomatic protection in respect of a person who was its national at the time of the injury and is a national at the date of the official presentation of the claim.

2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the time of the injury, provided that the person has lost his or her former nationality and has acquired, for a reason unrelated to the bringing of the claim, the nationality of that State in a manner not inconsistent with international law.

3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury incurred when that person was a national of the former State of nationality and not of the present State of nationality.

Article 6

Multiple nationality and claim against a third State

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that individual is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

Article 7

Multiple nationality and claim against a State of nationality

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the time of the injury and at the date of the official presentation of the claim.

Article 8

Stateless persons and refugees

1. A State may exercise diplomatic protection in respect of a stateless person who, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State when that person, at the time of the injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

- The Commission has understood that diplomatic protection is the procedure employed by the State of the nationality of the person injured in order to guarantee the protection of said person and to obtain rectification of the injury caused by the internationally wrongful act. In exercising diplomatic protection, the State adopts as its

own the cause of the national injured by the internationally wrongful act of the other State. This means that there must be an injury caused to a national as the result of the wrongful act of the other State.

- The Commission has also indicated that although it is true that a State has the right to decide who its nationals are, this right is not absolute, in such a way that a State against which a claim has been formulated may challenge the nationality of the person when said person has acquired the nationality against international law, in which case the burden of proof shall fall on the State that challenges the nationality of the injured person.

- In the case of multiple nationality and claim against a State of nationality (article 7 of the draft text), the Commission insists that the claimant State demonstrate that its nationality is predominant, both at the time of injury and on the date of official presentation of the claim. The Commission has also considered that the principle enabling a State of "dominant or effective" nationality to present a claim against another State of nationality reflects the current position in common international law. In this sense, although it is true that the document uses the terms "effective" or "dominant" to describe the necessary link between the claimant State and its national, in situations in which the State of nationality presents a claim against another State of nationality. [sic]

- The Commission has considered using the term "predominant" to describe this link, since this gives an idea of relativity and indicates that the person maintains closer links with one State than with the other. In addition, this was the term used by the "Italy-United States Conciliation Commission" in the Mergé affair, which may be considered the starting point of the development of the current consuetudinary rule.

- In this order of ideas, it is clear that for the United Nations International Law Commission, the following are basic elements for exercising diplomatic protection: that injury has been caused to a national as the result of the wrongful act of another State, and that nationality has not been acquired in a manner inconsistent with international law, that is, fraudulently.

- For the Commission, article 8 corresponds to the progressive development of international law since it enables a State to exercise diplomatic protection in respect of a person who is not its national when this person is stateless or a refugee.

- With respect to refugees, this issue is diplomatic protection by the State of residence since refugees can not or do not want to resort to the State of nationality. The Commission has preferred not to put limits on the term refuge so that any State may grant diplomatic protection to any person deemed to be and treated as a refugee.

- The Commission has also considered that the State of refuge may not exercise diplomatic protection against the State of nationality of the refugee since nationality is the predominant basis for the exercising of diplomatic protection. The exercising of diplomatic protection must absolutely not be interpreted in a sense that affects the nationality of the protected person.

- **FRAUD IN LAW**

- Fraud in Law may occur in cases of "fraudulent naturalization". People often use the faculties they enjoy to change circumstances of connection or points of contact (nationality, domicile, situation, etc.) with the exclusive objective of avoiding legislation that would interfere with or prejudice their goals or interests, placing themselves under another power more favorable to the ends they pursue. This situation constitutes "Fraud in Law" in private international law.

- In this sense, "Fraud in Law" consists of the voluntary and conscious evasion of a determined law and placement under the power of another through the real and effective change of certain circumstances or factors of connection.

- In this respect, nationality may be changed for many reasons, for example: to escape a very severe marriage regime, to deduct the payment of certain taxes, to

evade certain public obligations such as military service, to evade a request for extradition or an order of expulsion, etc. In the same way, domicile may be used to vary applicable law.

- Niboyet defined this aspect as follows: "In private international law, the notion of Fraud in Law is the necessary recourse so that the law conserves its imperative nature and its sanction in cases in which it ceases to be applicable to a juridical relation when those interested have fraudulently resorted to a new law." [9]

- In order for "Fraud in Law" to apply, the presence of the following requisites is necessary: a) the intention to evade or deceive imperative or prohibitive provisions of determined legislation; that is, fraudulent intent, b) the intention to substitute said provisions with those of other legislation; that is, the desire to provoke the application of other legislation; c) the change of certain circumstances of connection or points of contact must be carried out deliberately and with the stipulated purposes; on the contrary, fraud in law would not occur but rather the violation of law; d) said change must be real and effective; and e) the legislation eluded, evaded or deceived must be lex fori (the law of the jurisdiction where the case is pending.)[10]

- Fraud in law basically seeks to make the application of the competent foreign juridical provision ineffectual. In private international law, fraud in law tends to evade the law contained in a provision that prohibits the implementation of a determined act, submitting instead to the power of a more tolerant law.

- Article 6 of the *1981 Inter-American Convention on General Rules of Private International Law* regulates the principle of fraud in law: The law of a State Party shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded. The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties." In this sense, the Convention established fraud in law as an exception to the application of foreign law.

- Fraud in law is based on the adage "***Fraus Omnia Corrumpit***" (fraud corrupts all), which assumes that fraud must be sanctioned not only in internal law but also in private international law.

- When it seeks to divert or distort the reason for being of the rules of private international law or the objective sought by the legislator in dictating said rules, fraud in law resembles, as claimed by Professor Armijón, "abuse of process," since it is based on the abuse of the ability to acquire a foreign nationality, domicile or residence abroad in order to deceive the law of the former nationality, domicile or residence.[11]

- Relying on the above-mentioned aphorism of *Fraus Omnia Corrumpit*, French jurisprudence has declared that any exclusion from a legal precept based on a fraudulent connection with foreign law is ineffective and, therefore, the precept that was sought to be eluded must be applied.[12]

- In this sense, there is an obligation that States abstain from providing safe haven to corrupt functionaries who have exercised political power and from this position have committed crimes of corruption, as well as to cooperate so that said functionaries are made available to the corresponding authorities of the countries in which they committed the crimes, to be judged by their national courts. This obligation implies abstention from providing sanctuary to corrupt functionaries and refusal to accept justifications based on fraud in law or abuse of process, since the granting of sanctuary to these individuals leads to impunity and constitutes an obstacle against the due imparting of justice, thus affecting the broad international cooperation that States must afford in order to combat this scourge. In this sense, "fraud in law" or "abuse of process" with respect to dual nationality can be used as a means to avoid justice and therefore to favor impunity. For this reason, any fraudulent action whose objective is to

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9 NIBOYET, J. P. *op.cit. supra*.
10 DUNNKER BIGGS, Federico. *Derecho Internacional Privado, Parte General*, 39. ed. [Chile]: Jurídica de Chile, 1967.
11 Idem.
12 Idem.

evade or avoid the application of justice for crimes of corruption affects the relative rules of international juridical cooperation.

- Based on the above, impunity is the juridical effect that may occur as a result of the granting of safe haven in regional or extra-regional countries to public functionaries and persons accused of crimes of corruption after having exercised political power. This promotes the evasion of justice and acts as an obstacle against the due administration of justice, affecting at the same time the rules related to the international juridical cooperation that States must provide in order to fight against this scourge, converting these States into veritable paradises or sanctuaries for corruption. This affects international peace and security, since corruption weakens democracy and undermines the legitimacy of its institutions; erodes the rule of law and hampers governmental capacity to respond to other threats against security; and works against society, justice and the moral order and against the integral development of peoples. Thus the needs to prevent, detect, combat and penalize it.

- It is here that extradition plays an important and essential role as an effective mechanism in the fight against corruption. This is the reason that both the "*Inter-American Convention against Corruption*" and the "*United Nations Convention against Corruption*" recognize that crimes of corruption are considered to be included among those crimes that give rise to extradition in all treaties in effect between State Parties and that, in the absence of a Treaty of Extradition, the Convention is considered a sufficient juridical base. For this reason, it is necessary that regional and extra-regional States cooperate more effectively and opportunely in the fight against this problem by celebrating bilateral or multilateral agreements to carry out extradition or to increase its efficiency; by ensuring expeditious, effective and efficient procedures for ongoing requests for extradition; and by ensuring to the extent possible that these requests are not rejected, since this would favor impunity.

- It is advisable that the State Parties whose legislation so allows do not consider to be of a political nature any of the crimes typified as crimes of corruption in the "*Inter-American Convention against Corruption*" and the "*United Nations Convention against Corruption.*" Otherwise, corrupt functionaries could hope to make use of the right to asylum or safe haven in order to avoid the administration of justice. In this sense, before conceding asylum or safe haven State Parties must take into due consideration the importance of fighting corruption and of conferring upon crimes of corruption the character of common rather than political crimes, so as to prevent the promotion of impunity and the creation of sanctuaries or paradises for corrupt public functionaries and individuals.

- In this sense, Article XVII (Nature of the act) *the Inter-American Convention against Corruption* literally states: "For the purposes of articles XIII, XIV, XV and XVI of this Convention, the fact that the property obtained or derived from an act of corruption was intended for political purposes, or that it is alleged that an act of corruption was committed for political motives or purposes, shall not suffice in and of itself to qualify the act as a political offense or as a common offense related to a political offense."

- The Convention does not consider an act of corruption as a political offense or as a common offense related to a political offense precisely so that the figure of extradition can be exercised, since acts of corruption become extraditable crimes and the Convention itself a juridical basis for extradition.

- In addition, because the "act of corruption" does not constitute a political offense or a common offense related to a political offense, the elements of asylum and safe haven cannot take shape, since both are based on political persecution and in the case of corruption we would be dealing with common offenses. Consequently, the treatment that should be awarded to requests for asylum in cases involving individuals accused of corruption, in order to prevent impunity, is to qualify them as inadmissible because acts of corruption do not qualify as political offenses or common offenses related to political offenses, and in order to proceed with asylum the juridical nature of the offense must be of a political character. In this sense, those who request asylum

must be pursued for political offenses or motives; in the case of common offenses, the person does not have the right to asylum. As acts of corruption are not political in nature, the element of asylum does not proceed and, therefore, these acts can not remain unpunished. In a similar manner, the granting of safe haven for acts of corruption would not proceed.

- **E) CONCLUSIONS AND RECOMMENDATIONS**

- In the global arena as well as at the hemispheric and sub-regional levels, corruption is one of the new threats against security, a threat that must be fought through international cooperation, mutual judicial assistance in criminal matters, extradition and concerted action by the international community.

- The phenomenon of corruption is not only seen at local and national levels but also on a transnational scale. Therefore, the fight against it now involves international instruments. Corruption itself, along with related offenses, is regulated in these instruments, including the 1995 Framework Treaty on Democratic Security in Central America, the 1996 Inter-American Convention against Corruption and the 2003 United Nations Convention against Corruption.

- All of these instruments emphasize the need for expeditious, effective and efficient international judicial cooperation: This is one of the reasons that the Inter-American Convention on Mutual Assistance in Criminal Matters has been established within the inter-American arena, and the Treaty of Mutual Legal Assistance in Criminal Matters has been created Central American level. In the same way, agile procedures have been adopted for extradition in order to fight corruption, with the Conventions serving in many cases as the legal basis for extradition. In this way, the fight against impunity advances and States are prevented from becoming sanctuaries for corrupt officials.

- The fight against corruption must be effective. As we have seen in this report, corruption is an assault against democracy and its institutions, against the rule of law and against democratic governance. It harms society, justice and the moral order, and it prevents the integral development of peoples.

- Therefore, the public and private fight against corruption must be a task not only for States and their governments but also for civil society, so that efforts in this struggle become effective and thus counteract one of the new threats facing today's international security.

- In this sense, it is helpful to remember that the "*Inter-American Convention against Corruption*" is currently in effect between Member States of the Organization of American States (OAS). It has been ratified by 33 Member States, for which its fulfillment is obligatory.

- There is a need to urge States within the international community to sign and ratify the "*United Nations Convention against Corruption*," so that this instrument enters into effect as soon as possible, as well as to demand its fulfillment.

- That States ensure that the rules of international judicial cooperation come into effect so that extradition and mutual judicial assistance become expeditious, effective and efficient through the completion of multilateral and bilateral treaties on extradition and mutual judicial assistance; or, in the event that such treaties do not exist, that the "*Inter-American Convention against Corruption*" and the "United Nations Convention against Corruption" become the legal basis for said cooperation; or, as a last resort, that requests for extradition and judicial assistance proceed based on reciprocity and international judicial cooperation, so that corrupt functionaries who have exercised political power in their respective States can be brought before corresponding authorities in the countries in which they committed said offenses of corruption and thus be judged by their national courts, thereby strengthening the rule of law and the administration of justice and fighting not only corruption but also impunity. Such a fight against this new scourge will help to preserve international peace and

security, since both corruption and impunity are among the new threats against these conditions.

- It is necessary for all States of the international community to ensure the practical application of these rules, so as not to become sanctuaries or paradises for those accused of crimes of corruption after having exercised political power.

BIBLIOGRAPHY

ARELLANO GARCÍA, Carlos. *Derecho Internacional Privado.* México: Porrúa, 1974.

CONVENCIÓN DE LA HAYA DE 1930 SOBRE CUESTIONES RELATIVAS AL CONFLICTO DE LEYES DE NACIONALIDAD.

CONVENCIÓN DE LAS NACIONES UNIDAS CONTRA LA CORRUPCIÓN. *Convención de Mérida.*10 de diciembre de 2003, Mérida, Yucatán, Estados Unidos Mexicanos.

CONVENCIÓN INTERAMERICANA CONTRA LA CORRUPCIÓN. 29 de marzo de 1996, Caracas, Venezuela.

CONVENCIÓN INTERAMERICANA SOBRE NORMAS GENERALES DE DERECHO INTERNACIONAL PRIVADO, DE 1981.

CUMBRE EXTRAORDINARIA DE LAS AMÉRICAS. *Declaración de Nuevo León*, 2004.

CUMBRES DE LAS AMÉRICAS. *Cumbre de las Américas* y sus respectivas *Declaraciones* de 1994, 1998 y 2001.

DECLARACIÓN SOBRE SEGURIDAD EN LAS AMÉRICAS. 28 de octubre de 2003, México.

DUNCKER BIGGS, Federico. *Derecho Internacional Privado: parte general*. 3 ed. [Chile]: Jurídica de Chile, 1967.

FELDSTEIN DE CÁRDENAS, Sara Lidia. *Derecho Internacional Privado: parte espinal.* Buenos Aires: Ed. Universidad, 2000.

GAMBOA SERAZZI, Fernando. *Derecho Internacional Público.* Ed. de Talca, 1998.

HALAJCZUK, Bonhdan T., MOYA DOMÍNGUEZ, María Teresa del R. *Derecho Internacional Público*. 3 ed. actual. Ed. Comercial Industrial y Financiera, 1999.

JIMÉNEZ DE ARÉCHAGA, Eduardo. *Curso de Derecho Internacional Público*, t. I. Montevideo, 1959.

LA HAYA. Sentencia del Tribunal Permanente de La Haya, 3 de mayo de 1912 (Italia *versus* Perú).

LA HAYA. Sentencias de la Corte Internacional de Justicia de 1953 y 1955. (Liechtenstein *versus* Guatemala). Asunto Nottebohm.

MIAJA DE LA MUELA, Adolfo. *Derecho Internacional Privado.* Madrid, 1964.

MONROY CABRA, Marco Gerardo. *Derecho Internacional Público*. 4. ed., Ed. Temis, 1998.

_____. *Tratado de Derecho Internacional Privado.* 5. ed. Ed. Temis, 1999.

NACIONES UNIDAS. Comisión de Derecho Internacional de Naciones Unidas. *Protección Diplomática: proyecto de artículos*, Sesión 2827ª, 3 de agosto de 2004.

NIBOYET, J. P. *Principios de Derecho Internacional Privado.* Traducción por Andrés Rodríguez Ramón. México, D.F.: Ed. Nacional, 1928.

ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. Asamblea General de la Organización de los Estados Americanos. *Resoluciones relativas a la corrupción e impunidad.*

ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. *Carta Democrática Interamericana.* 11 de septiembre de 2001, Lima, Perú.

PEREZNIETO CASTRO, Leonel. *Derecho Internacional Privado.* 4. ed. México, D.F.: Ed. Karla, 1989.

SEARA VÁSQUEZ, Modesto. *Derecho Internacional Público.* México, D.F.: Porrúa, México, 1994.

TRATADO MARCO DE SEGURIDAD DEMOCRÁTICA EN CENTROAMÉRICA.15 de diciembre de 1995, San Pedro Sula, Honduras.

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2. Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions

Resolutions

CJI/RES.89 (LXVI-O/05) *Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional*

CJI/RES.96 (LXVII-O/05) *Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional*

Document

CJI/doc.199/05 rev.1 *Report on the topic "Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions"*
(presented by the coordinator, Dr. Luis Herrera Marcano)

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During the 66th regular session of the Inter-American Juridical Committee (Managua, Febuary 28–March 11, 2005), Dr. Luis Herrera Marcano, coordinator for the topic, reported on the responses that to date the legal advisors had given the questionnaire made by the Committee, summarizing those responses. In addition, he requested that a new coordinator for the topic be elected, since his term expires at the end of 2005.

Dr. Jean-Paul Hubert suggested that, since a large number of responses had still not been received, the question needed to be raised whether it was appropriate to continue pursuing this topic, bearing in mind that even those countries that had responded had not done completely.

Dr. Antonio Pérez continued Dr. Hubert's line of reasoning, and inquirid about the purpose of this study. The topic of compliance with international decisions varies according to the body or organ issuing them, he said. He suggested that the next step with respect to this topic should be a report on the direction it should take within the Committee.

Dr. Mauricio Herdocia stated that this study had generated interest on the part of the States Parties; although a large number of responses had not been elicited, the number of received responses was significant. In his opinion, alternatively, the different integration mechanisms could be used directly, and he requested the coordinator of the topic to work closely with the Secretariat to obtain clarifications from the countries whose responses were incomplete or still have gaps to fill. Finally, he proposed that the coordinator for the topic be requested to present a progress report in the August session in which he should indicate the orientation this topic can take in the future. He also requested the Secretariat to directly contact international organizations and obtain information on the judgments and decisions they have issued, in order to complete the information received by the legal advisors.

The coordinator for the topic stated that he shared some of the doubts expressed by Dr. Hubert, but that it should be borne in mind that the purpose of the topic was to identify problems countries could face in the execution of judgments rendered by international organizations. This constituted the most difficult stage of the study, in contrast with the data collection stage that was underway, albeit slowly. He proposed that the suggestion made by Dr. Herdocia be accepted, to prepare a progress report in August with the responses available to date.

The Inter-American Juridical Comittee approved resolution CJI/RES.89 (LXVI-O/05), "*Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions*" to request that the General Secretary re-send the questionnaire, contained in document CJI/doc.146/04 rev.2, to the

legal advisors of the Ministries of Foreign Relations of the member States of the OAS that have not yet responded. It also decided to request the legal advisors who have sent their responses those clarifications or additions that might be necessary. The deadline set to receive both was June 30, 2005. The Committee, in addition, requested Dr. Luis Herrera Marcano, the coordinator of the topic, to jointly explore with the General Secretariat the posibility of requesting information directly from those international and regional organizations and entities that can offer useful information for the study of the topic, and, based on all responses received, to present during the 67th regular session of the Juridical Committee, a report on the situation to date and to propose the future direction work on this topic should take.

In March of 2005, the Chairman of the Juridical Committee wrote to the General Counsellor of CARICOM, enclosing the questionnaire on the topic. That month, the General Secretariat sent reminders to the legal advisors of the Ministries of Foreign Relations. By June 13, 2005, the following responses had been received: Belice, Canada, Colombia, Costa Rica, Dominica, El Salvador, Guatemala, Haiti, Jamaica, Mexico, Nicaragua, Panama, Peru, United States, Uruguay and Venezuela.

During its 35th regular session (Fort Lauderdale, June 2005), by resolution AG/RES.2069 (XXXV-O/05) *"Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee*," the General Assembly took note of the progress made by this organ in the study of the topic and requested a final study on it, to be included in its next annual report of 2005.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2005), the coordinator of the theme, Dr. Luis Herrera Marcano, presented an oral report in which he indicated that to date 18 member States had responded to the questionnaire prepared by the Inter-American Juridical Committee and contained in document CJI/doc.146/04 rev.2. He pointed out that all the answers had been complete and that the criteria of answers had not been the same, but that nevertheless they form a suitable basis to extract some preliminary conclusions. Of the answers received so far, he suggested that the Chancelleries seemed not to find juridical problems of an internal nature in complying with international sentences. Dr. Herrera also pointed out that Peru, Canada and the United States had already adopted certain legislative measures to enable compliance with international sentences, primordially in the criminal area. He also informed that in respect to the Inter-American Court of Human Rights and some arbitral decisions concerning investments, which establish pecuniary compensation, there exists the principle that these should complied directly in the domestic system. But in practice, obstacles can be found in the internal provisions that limit the compliance of sentences against States. This, he suggested, could be the object of deeper research by the Committee. One aspect that should be investigated more closely, indicated Dr. Herrera, concerns the possible juridical obstacles to the full application of the *Statutes of the International Criminal Court* and the modalities to resolve these. This analysis could throw some light on similar cases where special courts have been installed. Another of the themes that the coordinator emphasized was non-compliance with international sentences by States of a federal structure, which deserves a fresh investigation.

Dr. Galo Leoro Franco expressed his doubts as to the finality of this study. He asked the other members if the aim was to lead the Committee for Juridical and Political Affairs of the Permanent Council towards a resolution that adopts principles on the matter. In turn, Dr. João Grandino Rodas proposed insisting on waiting to the next regular session of the Committee to obtain a greater number of answers to the above-mentioned questionnaire. He suggested trying to delineate, as the main objective of this theme, basic principles that could cast some light on the progressive development of this matter.

Dr. Stephen C. Vasciannie suggested that the Juridical Committee propose to member States, through the most appropriate channels, to adopt internal legislation to facilitate the application of international sentences. He also expressed his concern that many countries of the Caribbean had not yet answered the questionnaire. He also pointed out that in respect to some international courts, the Caribbean felt that many of their decisions did not take into account the expectations that these countries had when they accepted their jurisdiction, which made them skeptical about the theme. Thus, in relation to the work of the Inter-American Commission on Human Rights, the Caribbean countries considered that there is no problem of implementation with regard to their recommendations, since these are not of a binding nature.

In turn, Dr. Antonio Fidel Pérez underlined the content of the mandate of the Juridical Committee. He indicated that in his opinion it was not a matter of examining the political reasons for non-compliance with certain international decision but rather the juridical impediments for the countries to fulfill their obligations regarding these international decisions. He suggested that the report to be prepared in this regular session should request support and guidelines from the political sectors of the OAS. Dr. Ana Elizabeth Villalta Vizcarra agreed with this idea and emphasized the need for some States to have guidelines for fulfilling international sentences.

After this first exchange of ideas, Dr. Luis Herrera made an exposé on document CJI/doc.199/05, *Report on the topic legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions*. The first part of the report concerned the development of the theme within the Committee, passing then to an examination of the state of the answers to the questionnaire prepared by the Committee, and finally a set of conclusions.

Dr. Jean-Paul Hubert suggested that the report be included in the Juridical Committee's Annual Report and that one should wait for a new mandate or fresh orientation on the part the General Assembly. Dr. Antonio Fidel Pérez supported Dr. Hubert's idea in the sense that it would be better to include the coordinator's report in the Annual Report and wait for the reaction of the political bodies to the direction to be taken from now on with regard to the theme, despite the academic interest that the theme might represent to the members of the Juridical Committee. He also expressed his desire not to overload the other member States with an additional questionnaire on the matter. Then Dr. Ana Elizabeth Villalta Vizcarra expressed the opinion that it was time to conclude the study of this theme. Dr. Luis Marchand Stens also supported the idea that the Juridical Committee should conclude the consideration of the theme in this regular session because the proper conditions are absent to proceed with the theme and the appropriate details have not been provided.

Dr. Luis Herrera Marcano also recalled that the Juridical Committee began its study of the theme with the assumption that the matter contained a juridical problem, but the Committee, after its investigation, should now conclude that this problem does not exist. Although there are exceptions, that is, although some problems have been identified as regards the constitutionality of the International Criminal Court, this theme was already part of a specific point in the agenda of the Juridical Committee, he reckoned. Following this line of thought, he suggested taking the report presented as the final report solicited by the General Assembly and adopting a resolution in this sense.

Accordingly, the Inter-American Juridical Committee adopted resolution CJI/RES.96 (LXVII-O/05), by which it thanked Dr. Luis Herrera Marcano for his presentation of the Report on the topic Legal aspects of compliance within the States with decisions of international courts or tribunals or other international bodies with jurisdictional functions, document CJI/doc.199/05 rev.1, adding as an annex to this resolution said document to complement resolution AG/RES.2069 (XXXV-O/05) of the General Assembly. The Inter-American Juridical Committee also decided to eliminate the theme from its agenda.

Following is the text of the resolutions approved by the Inter-American Juridical Committee during 2005 and the final report of the coordinator.

CJI/RES.89 (LXVI-O/05)

LEGAL ASPECTS OF COMPLIANCE WITHIN THE STATES WITH DECISIONS OF INTERNATIONAL COURTS OR TRIBUNALS OR OTHER INTERNATIONAL ORGANS WITH JURISDICTIONAL

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING NOTE of the verbal report *Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional* presented by Dr. Luis Herrera Marcano during the current regular session, in which the current state of information received in reply to the re-sent questionnaire on the matter was referred to;

CONSIDERING the exchange of views that took place within the Juridical Committee on the issue;

BEARING IN MIND the need to conclude the stage of receiving information and to be able to draw up a report on the basis of the responses during the next regular session of the Committee,

RESOLVES:

1. To request that the Secretary General sends out the questionnaire that is included in the document CJI/doc.146/04 rev.2 once again to the legal advisors to the Foreign Ministers of the member States of the OAS that have still not responded. Likewise, and in coordination with Dr Luis Herrera Marcano, to request clarifications or elaborations from the legal advisors that have already sent their responses, insofar as these may be pertinent. In either case the 30th June 2005 is set as the deadline for their receipt.

2. To request that the coordinator of this issue, Dr. Luis Herrera Marcano, in coordination with the Secretary General, explore the possibility of requesting information directly from regional and international bodies and entities who might be able to provide useful data on the issue.

3. To request that the coordinator of the issue, Dr. Luis Herrera Marcano, present a report to the 67th regular session of the Juridical Committee that covers the situation to date and proposes a future workplan on the issue, based on the responses received.

The resolution was approved unanimously in regular session held on March 10, 2005, by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

CJI/RES.96 (LXVII-O/05)

LEGAL ASPECTS OF COMPLIANCE WITHIN THE STATES WITH DECISIONS OF INTERNATIONAL COURTS OR TRIBUNALS OR OTHER INTERNATIONAL ORGANS WITH JURISDICTIONAL FUNCTIONS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that during its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee adopted resolution CJI/RES.67 (LXIII-O/03), *Legal aspects concerning States complying internally with sentences passed by international courts or other international organizations with jurisdictional functions*, by which it decided to include this theme in its agenda;

BEARING IN MIND resolution AG/RES.2042 (XXXIV-O/04) adopted by the General Assembly during its 34th regular session (Quito, June 2004), by means of which it noted the inclusion of this item in the agenda of the Inter-American Juridical Committee and requested that a study of the progress made in this direction be included in its *Annual report* for 2004;

ALSO BEARING IN MIND that in response to said mandate, during its 65th regular session (Rio de Janeiro, August 2004), the Inter-American Juridical Committee adopted resolution CJI/RES.82 (LXV-O/04) adding the report on the progress made presented by the coordinator of the topic, Dr. Luis Herrera Marcano, contained in document CJI/doc.167/04 rev.2, based on the responses of the Legal Advisors of the Ministries of Foreign Affairs of the member States of the OAS to the questionnaire on the topic drawn up by the Inter-American Juridical Committee, contained in document CJI/doc.146/04 rev.2;

CONSIDERING that during its 66th regular session (Managua, March 2005), the Inter-American Juridical Committee asked the coordinator of the topic to present at the next regular session a report based on all the responses obtained proposing the future orientation of work on the theme;

ALSO BEARING IN MIND resolution AG/RES.2069 (XXXV-O/05) adopted by the General Assembly during its XXXV regular session (Fort Lauderdale, June 2005), by means of which note was taken of the progress made by the Inter-American Juridical Committee in the study of this theme and a request was made to include a final study on the matter in the next *Annual report* for 2005;

TAKING NOTE OF document CJI/doc.199/05 rev.1 presented by Dr. Luis Herrera Marcano, as coordinator at the present regular session of the Inter-American Juridical Committee, containing a final report on the topic in accordance with the mandate of the General Assembly,

RESOLVES:

1. To express its thanks to the coordinator Dr. Luis Herrera Marcano, for presenting the *Report on the topic of "Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions"*, CJI/doc.199/05 rev.1.

2. To attach to this resolution document CJI/doc.199/05 rev.1 in accordance with the mandate contained in the resolution AG/RES.2069 (XXXV-O/05).

This resolution was adopted unanimously in a regular session held on August 16, 2005 by the following members: Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

CJI/doc.199/05 rev.1

REPORT ON THE TOPIC

"LEGAL ASPECTS OF COMPLIANCE WITHIN THE STATES WITH DECISIONS OF INTERNATIONAL COURTS OR TRIBUNALS OR OTHER INTERNATIONAL ORGANS WITH JURISDICTIONAL FUNCTIONS"

(presented by Coordinator Dr. Luis Herrera Marcano)

In light of the exchange of opinions within the 5th Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS member States on Monday 25 and Wednesday 26 August 2003, at the Inter-American Juridical Committee headquarters and its 63rd regular session (Rio de Janeiro, August 2003), the Committee adopted resolution CJI/RES.67 (LXIII-O/03), *Legal aspects of internal compliance of the States with rulings of international courts or other international bodies with jurisdictional functions*. It therefore resolved to include the topic in its agenda and entrusted each of its members to present a report, to be considered at the next regular session, on the legal status in their own countries on this matter. Dr. Luis Herrera Marcano was also entrusted to coordinate this work. The Coordinator agreed to send a first report to the members of the Juridical Committee before the next regular session for their comments on defining the topic.

On 15 January 2004, the Department of International Law sent the members of the Juridical Committee a document prepared by the Coordinator, pursuant to resolution CJI/RES.67 (LXIII-O/03), *Legal aspects of complying within the States with decisions of international courts and other international bodies with legal functions*, CJI/doc.146/04.

During the 64th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2004), the Committee examined the aforementioned document and various members of the Juridical Committee submitted their reports.

The Inter-American Juridical Committee also decided during this regular session to streamline the title of the topic in both Spanish and English as follows:

> *Aspectos jurídicos del cumplimiento en el ámbito interno de los Estados de las decisiones de tribunales o cortes internacionales u otros órganos internacionales con funciones jurisdiccionales*
>
> Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions

After the regular session, the Inter-American Juridical Committee examined document CJI/doc.146/04 rev.1, *Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions*, presented by the Coordinator, which contains a revised questionnaire on the topic to be sent to the legal advisors of the Ministries of Foreign Affairs of the OAS member States.

It was finally decided that the Coordinator would include all proposals expressed and send the General Secretariat a revised questionnaire and draft letter for the latter to send to the other Juridical Committee members for their revision. It will then be sent to the legal advisors who attended the 5th Joint Meeting and other legal advisors, explaining that it entailed informal answers whose source would not be mentioned and whose purpose will be merely to help the Juridical Committee's work on this matter.

In turn, the General Assembly, during its 34th regular session (Quito, June 2004), under resolution AG/RES.2042 (XXXIV-O/04), noted that this topic was included in the Inter-American Juridical Committee agenda and requested that a progress report on it be included in its next annual report for 2004.

During the 65th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2004), the Coordinator pointed out that to date, and in response to the

distributed questionnaire on the matter, six answers had been received from members of the Juridical Committee with regard to: Canada, El Salvador, Nicaragua, Peru, Uruguay and Venezuela. He also said that the following countries had also replied: Belize, Canada, Guatemala, Panama, Paraguay, Peru, Uruguay and United States.

He then listed the reports submitted by each country and jurisdictional international body, explaining how a progress report on the matter could be made.

With the contributions from the other Juridical Committee members, the Coordinator drafted the document CJI/doc.167/04, *Report on the current status of the topic "legal aspects of the compliance within the States with the decisions of the international courts or tribunals or other international bodies with jurisdictional functions"*. Some Juridical Committee members made comments and suggested some modifications.

The *revised 2* progress report submitted by the Coordinator was adopted by the Inter-American Juridical Committee, which also adopted resolution CJI/RES.82 (LXV-O/04).

On 21 September 2004, the General Secretariat sent the progress report CJI/doc.167/04 rev.2, and resolution CJI/RES.82 (LXV-O/04) to the Legal Advisors of the Ministries of Foreign Affairs. On 8 December 2004, the Secretariat repeated the request made to the Legal Advisors on 21 September.

During the 66th regular session of the Inter-American Juridical Committee (Managua, 28 February–11 March 2005), the Coordinator reported on the answers from the Legal Advisors to the questionnaire drafted by the Committee and summarized them. He also requested that a new Coordinator of the topic be elected since his term of office would finish at the end of 2005.

The Inter-American Juridical Committee adopted resolution CJI/RES.89 (LXVI-O/05), *Legal aspects of the compliance within the States with the decisions of international courts or tribunals or other international bodies with jurisdictional functions,* by which it resolved to ask the General Secretariat to re-send the questionnaire in document CJI/doc.146/04 rev.2 to the legal advisors of the Ministries of Foreign Affairs of the OAS member States that had not yet answered. It also resolved to ask the legal advisors who had already sent in their answers for explanations or further details that may be necessary. In both cases, it set 30 June 2005 as the final date for receiving them. The Committee also asked the Coordinator, on the basis of all answers received, to submit a report during the 67th regular session of the Juridical Committee giving the status to date and proposing the future direction of the work on the topic.

In March 2005, the Chairman of the Juridical Committee wrote a letter to the Secretary-General of CARICOM including the questionnaire on the topic. That month, the General Secretariat sent the letters to the Legal Advisors of the Ministries of Foreign Affairs.

The General Assembly, during its 35th regular session (Fort Lauderdale, June 2005), under resolution AG/RES.2069 (XXXV-O/05), *Comments and recommendations to the Annual Report of the Inter-American Juridical Committee*, resolved to take note of the progress achieved by this body the study in question to include in its next annual report for 2005 a final study on this matter.

To date answers have been received from 19 countries: Belize, Brazil, Canada, Colombia, Costa Rica, Dominica, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, United States and Venezuela.

Fifteen countries have still to reply: Antigua and Barbados, Argentina, Bahamas, Barbados, Bolivia, Chile, Dominican Republic, Ecuador, Granada, Guyana, Saint Lucia, St. Kitts and Nevis, St. Vincent and Grenadines, Surinam, Trinidad & Tobago.

Not every reply fully answers the questionnaire and they do not all use the same criteria in response. For this reason it is difficult and sometimes maybe inaccurate to compare or tabulate them. It is worth bearing this in mind when reading the following summary.

The results of the questionnaire so far can be summed up as follows:

INTERNATIONAL COURT OF JUSTICE

All OAS member States are members of the United Nations and, therefore, party to the *Statutes of the International Court of Justice*.

Eight of the States that answered accepted the mandatory jurisdiction of the Court, four with declarations. Eight had not accepted or having done so had later withdrawn their acceptance. There was no information about three.

Eight States accepted the mandatory jurisdiction of the Court through the Inter-American Treaty of Peaceful Settlements (*Bogota Pact*), two with restrictive statements. There was no information about two States.

Nine States were the subject of the Court rulings. Ten had not been. None mentioned the existence of legal barriers for compliance.

INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA

Fourteen of the States that answered are party to the UN *Convention on the Law of the Sea.*

Two of these States had reservations about the jurisdiction of the Tribunal

Only one State was the subject of a ruling by the Tribunal. None mentioned the existence of legal barriers for compliance.

INTER-AMERICAN COURT OF HUMAN RIGHTS

Sixteen of the States that answered are party to the *American Convention of Human Rights* and three are not. Thirteen accepted the mandatory jurisdiction of the Court, four with statements.

Seven were the subject of Court decisions, six were not and there was no information about three of them.

INTERNATIONAL CRIMINAL COURT

None of the States Parties offered its territory for compliance with court rulings, although two expressed their intention to do so.

The Court has given no rulings so far.

ANDEAN COURT OF JUSTICE

Three of the five members of the Andean Community responded.

The three States were subject of numerous rulings of the Court for failure to comply with regulations of the community legal system.

The Court rulings do not have executive force within the States Parties. When a State fails to comply with a ruling, the Court can authorize the other affected States to apply compensatory measures. This has occurred on several occasions involving two of the three States.

The Court rulings only have executive force as a basis in actions for damages filed by individuals against the defaulting State. No information is available whether actions of this kind have been successful.

There is no mention of legal barriers against complying with the Court rulings. On the contrary, adopting the community system is preferable within the States Parties (primacy or supra-nationality).

CENTRAL AMERICAN COURT OF JUSTICE

It should be noted that this Court has two kinds of jurisdiction: one with regard to the Central American Economic Community and the other relating to the disputes between public authorities within the States Parties.

Answers were received from all Central American States. Three of them ratified the treaty that the Court created.

Two States were subject of Court rulings.

It should be noted that there was a Court of Central American Justice between 1909 and 1919, and it issued at least one ruling for two member States. Questions about this Court were not included in the questionnaire.

CARIBBEAN COURT OF JUSTICE

It should be mentioned that this Court has two kinds of jurisdiction: as a court of the Caribbean Community (CARICOM), and as an ultimate court of appeals of the member countries on civil and criminal matters.

Three of the States about which information was obtained ratified the treaty created by this Court. Two of them adopted and the third is in the process of adopting legislation in order to comply with the Court rulings.

The Court, however, has ruled no case.

CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND CRIMINAL TRIBUNAL FOR RWANDA

Two countries about which information was received adopted specific legislative measures in order to comply with the rulings of these tribunals. Both received requests for legal aid from these tribunals.

Neither country has been the subject of an order from these courts.

ARBITRATIONS OF PUBLIC INTERNATIONAL LAW (Permanent Court of Arbitration, *ad hoc* court rulings, individual rulings, arbitration commissions)

A number of answers received do not answer this question or are incomplete.

Fourteen of the States about which information was obtained are party to the treaties created by the Court and three are not.

Three States were the subject of reports in the Permanent Court of Arbitration. Nine were the subject of reports in ad hoc tribunals or arbitration commissions.

ARBITRATIONS BETWEEN A STATE AND FOREIGN INVESTOR (ICSID, International Chamber of Commerce, UNCITRAL rules).

Some replies to the questionnaire omit this section or give an incomplete answer. The information received is as follows:

Thirteen States signed treaties providing for this kind of arbitration, and three did not.

Twelve States signed the treaty that created ICSID, and five did not.

Thirteen States agreed to appeal to ICSID in treaties, thirteen agreed to appeal to the UNCITRAL rules and three would appeal to the International Chamber of Commerce.

Four States were the subject of reports of this kind.

TRADE TREATY PANELS (WTO, NAFTA, G-3, others)

Every country on which information has been received are members of the World Trade Organization. Eleven of them are also party to one or more free trade treaties that provide for settlement of disputes through panels.

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Some comments on specific bodies follow:

International Criminal Court. In two States, El Salvador and Nicaragua, it is discussed whether there is incompatibility between some provisions in the *Rome Statute* and their own Constitutions. Canada made modifications to its internal legislation for

possible compliance with the provisions of the Statute. The English-speaking States of the Caribbean adopted or are in the process of adopting legislation so that it is possible for the Statute to prevail within the States.

The topic must be studied in greater detail by the Juridical Committee since in its current regular session a topic has been included in its agenda, by mandate of the General Assembly, on the measures necessary to facilitate ratification of the Statute of Rome.

Criminal Tribunal for the Former Yugoslavia and Criminal Tribunal for Rwanda: Both Canada and the USA adopted legislative measures to make it possible to comply with orders or requests from said tribunals.

The results of the study on the measures to facilitate ratification of the aforementioned *Statute of Rome*, will probably also throw light on the problems that have arisen or may arise regarding the rulings of these international criminal tribunals created for special cases.

Inter-American Court of Human Rights: Part of the Court rulings that provides for pecuniary damages is directly enforceable within the State in question.

Compliance with other provisions (punishment for the guilty, modification or adoption of legislative provisions, etc.) is a State obligation.

Rulings between a State and investor: As in the case of the Inter-American Court of Human Rights, the provisions of these arbitration tribunals (constituted under ICSID, the International Chamber of Commerce or the Arbitration Rules of UNCITRAL) stating compensation must, in principle, be directly enforceable within the State in question. In practice, this may come up against difficulties arising from the procedural privileges of the State, or from provisions or reservations in the treaties on compliance with arbitration rulings abroad that exclude its application to rulings that are not private law.

Andean Court of Justice, and panels of the World Trade Organization panels or of free trade treaties:

The rulings of these bodies are not enforceable within the States. It is up to the States to comply with them. Should they fail to comply, taking compensatory measures is authorized by the other affected States.

In the case of the Andean Court of Justice, the only enforcing effect is when the ruling that declares that a State is in default may act as a basis for private persons to proceed to claim in their own courts from the State in question to obtain damages that had caused them such non-compliance.

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It is now time for the Committee to decide on what course it would like this topic to take.

The Committee might consider the difficulties that exist in order to draft a document that brings together in further detail the results of the questionnaire for each organ under consideration.

As mentioned above, since many of the answers are incomplete and not everyone has adopted the same criteria for the different items in the questionnaire, a prior work will be necessary to complete and harmonize this information, and possibly further effort to obtain the information relating to countries that have not yet answered. Some of these, such as Argentina and Chile, have had valuable experience in such a matter. Although nine of the English-speaking Caribbean countries failed to answer the questionnaire it may be assumed that their answers would have been substantially similar to those of the countries that have already answered, given the close similarity of their legal systems and their historical experiences.

Be that as it may, it should not be forgotten that the Committee has assured the legal advisors that their replies to the questionnaire will be considered informal and that they will not be published word for word or be attributed to them.

It is worth mentioning that the questionnaire does not include the Mercosur Permanent Review Court, which did not exist at the time when it was first drafted, nor the Central-American Court of Justice, the first international judicial tribunal in history, dating from the early twentieth century.

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When assessing the results of the questionnaire and considering possible lines of action in the future, it is worthwhile recalling that the focus of this study is to determine the drawbacks of a strictly legal nature that some member States may have perceived in their own legal systems in order to comply with the rulings of international legal bodies, and investigate whether other States successfully solved similar problems, with the end purpose that this information can be of general utility.

Cases where failure to comply with a ruling of this kind results in political, economic or any other kind of case not strictly legal are specifically and expressly excluded from this study.

The answers received to date do not seem to indicate that, at least at the level of the legal advisors of the Ministries of Foreign Affairs, the general compliance with the rulings of international jurisdictional bodies is a serious legal problem.

The generality of the States who answered does not provide terms in their internal legislation referring specifically to the execution of this kind of international ruling. It is worth considering that, in the States with a British legal tradition that keep the dualist system, international treaties do not have legal effect internally unless they have been included by law. That is why presumably any legal drawback perceived in complying with the rulings of a jurisdictional body would be against drawing up such legislation.

In any case, it could be of interest to inform the member States about constitutional or legislative provisions adopted or proposed by some member States to enable or facilitate the rulings of international courts and other similar bodies.

The following countries should be mentioned:

- Honduras, whose Constitution expressly states compliance with international rulings

- Haiti, which considers that the provision in its Constitution accepting the prevalence of international law has effectively given international rulings an executive force within the State.

- Peru, which adopted a law on the matter

- Mexico, whose Congress considers a Constitutional amendment to facilitate the execution of the rulings of the kind considered herein.

It may also be of interest to know the specific legal measures taken by some member States to facilitate their cooperation with international criminal courts.

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3. Legal aspects of the interdependence between democracy and economic and social development

Resolution

CJI/RES.95 (LXVII-O/05)	*Legal aspects of the interdependence between democracy and economic and social development*

Document

CJI/doc.190/05 rev. 1	*Legal aspects of the interdependence between democracy and economic and social development (presented by the Dr. Jean-Paul Hubert)*

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At its XXXIV regular session (Quito, June 2004) the General Assembly, through resolution AG/RES.2042 (XXXIV-O/04), requested the Inter-American Juridical Committee to analyze, in light of the provisions in Chapter III of the Inter-American Democratic Charter, the legal aspects of interdependence between democracy and economic and social development, bearing in mind, for example, *Recommendations of the High Level Meeting on Poverty, Equality and Social Inclusion in the Declaration of Margarita, Monterrey Consensus*, declarations of action plans issued by Summits of the Americas, and the objectives in the *United Nations Millennium Declaration*.

The Inter-American Juridical Committee examined the General Assembly resolution AG/RES.2042 (XXXIV-O/04) at its 65th regular session (Rio de Janeiro, August 2004).

The Inter-American Juridical Committee decided to add another topic to the Committee agenda with the title Legal aspects of interdependence between democracy and economic and social development for consideration with Dr. Jean-Paul Hubert as rapporteur. The topic on implementation of the Inter-American Democratic Charter continues with Dr. Eduardo Vío Grossi as rapporteur. The Juridical Committee approved this decision by adopting resolution CJI/RES.80 (LXV-O/04).

At its 66th regular session (Managua, February 28–March 11, 2005), the Inter-American Juridical Committee examined document CJI/doc.176/05 "*Legal aspects of the interdependence between democracy and economic and social development: A Preliminary Report*" presented by the rapporteur for the topic, Dr. Jean-Paul Hubert.

The rapporteur remarked that it was a very preliminary report on the subject matter and that it required considerable analysis and discussion. He requested that the other members' comments in order to gain further insight on how to continue with the work.

The rapporteur also noted that none of the reference documents included in the mandate are binding. However, although they are not mentioned in the mandate, he deemed it important to analyze, in addition, what is said on the subject by the United Nations Charter, the *Charter of the OAS*, the *Santiago Declaration on Democracy and Citizen Confidence*, *resolution 1080 on Representative Democracy*, the *Declaration on Security in the Americas* and the *Declaration of Nueva León*. He also mentioned the *Quito Declaration* and other resolutions related to social and economic development adopted by the last General Assembly.

It was the rapporteur's opinion that a key element of the mandate lies in the word "interdependence" along with the legal aspects that stem from said "interdependence." He indicated that the mandate presupposes that said interdependence exists and is undeniable. How and in what manner this assumed interdependence is described in the aforementioned documents is the issue towards which the Committee must direct its attention. One of the problems that need to be addressed is the abundant bibliography that exists on this topic, and in which it is held that development is a condition for democracy and viceversa, *i.e*., that

democracy is a prerequisite for development. This debate, however – he remarked – is of a political nature. There is no definitive answer for the problem, and the most intelligent way to approach it is to do it from a dual perspective.

The rapporteur commented that some may argue that democracy is already a part of human rights, but he pointed out that this was not an easy conclusion to arrive at. Another item for discussion is whether there exists a human right to development. He noted, as a first observation, that the word "democracy" cannot be found anywhere in the *United Nations Charter,* although it now can be held that it lies within the Charter, throughout many concepts, and that it relates to social and economic aspects. He also made reference to article 2.b of the *Charter of the OAS* as well as to article 3, which mentions the concept of "representative democracy." In the same article 2 there is mention of the promotion of economic, social and cultural development. Article 45 of the Charter obviously contains a kind of Social Charter, and full democracy is presented as a consequence of development. Although a right to democracy or to development is not provided for by the *Charter of the OAS,* the latter does, the rapporteur pointed out, present both as an objective to be accomplished. He also said that both in the declarations and the plans of action of the Summits, it is understood that democracy is strengthened by the fight against poverty. It is not stated that poverty necessarily entails the loss of democracy, but it is undoubtably the case that the fight against poverty strengthens democracy. The text of the *Declaration of Quebec* in particular, he added, is clear in establishing that democracy and social and economic development are interdependent and mutually reinforcing.

Dr. Hubert also made reference to the *Millennium Declaration* as a document that addresses the topic of development in depth. This Declaration states that the best way to achieve development is through democracy, although it does not affirm that development can be achieved only through democracy. For its part, the *Inter-American Democratic Charter* provides that there is a right to democracy, that this right belongs to the peoples, and that governments have an obligation to promote and defend it.

The rapporteur concluded with an analysis of these concepts in the Monterrey Consensus, the Declaration of Margarita, and the Declaration on Security in the Americas.

Dr. Luis Herrera Marcano said that although the concept of economic development is clear, what is included by the concept of social development is not (discrimination, extreme poverty, labor rights, education, and so on). It would have to be determined whether both concepts are divisible or indivisible. Interdependence could be studied from different points of view, *e.g.*, the historical one. However, he went on to say, if the Committee limits itself to applying the *Democratic Charter*, which is what seems to stem from the mandate, the question then becomes whether social and economic development is an essential condition for democracy. Several documents indicate that said development contributes to the strengthening of democracy, but they do not say that it is essential for its existence. He also pointed out that other documents, while they state that these are interdependent and mutually reinforcing concepts, they do not mean to say that they are the same thing. He concluded by remarking that, this being so, if there is a government that acts in a way leading to the deterioration of the social or economic situation of a country, this does not mean that the *Inter-American Democratic Charter*'s mechanisms can be triggered into action.

Dr. Galo Leoro recalled that the *Charter of the OAS* speaks of integral development and remarked that both economic and social development should be viewed in that light. It can be deduced from article 45 of the *OAS Charter* that human rights are part of integral development. In his opinion, democracy should not be cut short in connection with these definitions. He inquired about the possibility of deriving legal obligations from non-binding instruments. In his opinion, it would be advisable that the Juridical Committee make recommendations, *i.e.*, of encouraging the States to adopt legislation compatible with the conclusions reached by the Committee's study.

Dr. Ana Elizabeth Villalta underscored the complexity of the topic, especially because it has many political aspects to it. She recalled that the *Protocol of San Salvador* is one of the human rights instruments with few ratifications and that, due to the difficulties that some States have had with this topic, a number of declarations or non-binding instruments had been turned to, in order to deal with this subject matter.

Dr. Stephen Vasciannie recommended that an upcoming report should include more than a compilation of norms, *i.e*., a distinction between the political and legal components that may be found throughout the study. He also suggested that the Committee define its notion of democracy, be it through its constitutive elements or by means of a general definition; that it determine whether there exists a legal right to democracy, as well as its content, and if there is a right to development. It should also determine the relationship among the Inter-American instruments (special law) with other international instruments and their relevance; whether democracy is a fundamental responsibility of the States and what consequences would derive from this responsibility. It should determine whether there is a hierarchy of rights and, finally, what are the implications of carrying the concept of democracy to the international sphere, which would require, for example, the analysis of veto power in the UN Security Council.

Dr. Mauricio Herdocia coincided with the rapporteur on several points, particularly the fundamental importance which should be attached to the *Charter of the OAS*. He inquired if there was an obligation on the part of the States to promote development according to a principle of gradual action based on the means and resources available, or whether there was a greater obligation. He also pointed out the importance of analyzing the relationship between democracy and human rights, and recalled that the *Inter-American Democratic Charter* provides, at least, an interpretation of the *Charter of the OAS*. He further recalled that human rights constitute an indivisible and interdependent whole and that, therefore, it is important to consider the topic of economic, social and cultural rights as essential components of democracy. It is this concept that provides, in his view, a legal bond between democracy and economic and social development, which in turn is closely related to integral development. Dr. Herdocia also stressed the importance of not confusing the concepts of democracy, human rights, and development, despite their interdependence. Democracy conceived as a right cannot be subsumed in the field of human rights, although they mutually reinforce each other. A question which should eventually be asked is whether a reading of the Charter of the OAS and the *Inter-American Democratic Charter* brings forth that legal connection. Dr. Herdocia maintained that it does. The account provided by the rapporteur as well as the observations made in the current session were an important point of departure that should be conveyed to the political organs of the OAS, along with the recommendation that the study of the existing legal bonds should continue to move forward. He also thought it would be important to examine the possible contributions to the progressive development of law in this subject matter.

Dr. Antonio Fidel Pérez expressed that the report was quite comprehensive although, given the complexity of the topic; he suggested that other dimensions, not yet considered, should be. He also pointed out that frequently it was easier to establish the non-existence of a relationship between two concepts (negative sense) than to establish its existence (positive sense), and that as a working method an exploration of the relationship, in the negative sense, between democracy and economic and social development could be made.

Dr. Luis Marchand then spoke, addressing integrating forces (such as the integration mechanisms) and disintegrating forces (such as terrorism, poverty, and so on), for democracy and development. These aspects, he suggested, should be borne in mind in developing the topic.

Dr. Jean-Paul Hubert again stressed that in discharging their mandate given by the General Assembly, the Committee should limit itself to the legal aspects of the relationship

between the concepts of democracy and economic and social development. He also noted that the Social Charter proposed within the OAS framework would be discussed at some point and eventually would be adopted; this was a reality that should be borne in mind and upon which the Juridical Committee's report would exert considerable influence.

Taking into consideration all the opinions offered, the Juridical Committee resolved to request for its next session a report from the rapporteur collecting the comments made by the Committee members during this session, and to then discuss possible options in the light of a contribution that this Organ might be able to offer on the subject matter.

During its 35th regular session (Fort Lauderdale, June 2005), in its resolution AG/RES.2069 (XXXV-O/05) "*Observations and Recommendations on the Annual report of the Inter-American Juridical Committee*," the General Assembly noted with satisfaction the inclusion on its agenda of the topic and requested it to include a report thereon, based on the guidelines set forth in resolution AG/RES. 2022 (XXXIV-O/04), in its next *Annual Report*.

During its 67th regular session (Rio de Janeiro, August, 2005), the Inter-American Juridical Committee examined document CJI/doc.190/05, *Legal aspects of the interdependence between democracy and economic and social development: an interim report*, sent by the rapporteur of the theme, Dr. Jean-Paul Hubert, to the other members of the Committee. The rapporteur indicated that this was a preliminary report and that although it developed in greater depth the first oral report presented last year, it should not yet be considered a final report. One of the preliminary conclusions reached by the rapporteur is that the Inter-American Juridical Committee should examine how the interdependence between democracy and economic and social development, which no-one seemed to question, was expressed. He also conveyed his doubts as to whether one should define the concepts of economic and social development. He also stated that the mandate of the General Assembly was in part political in nature, but suggested that the Juridical Committee keep a distance from political considerations and concentrate on the legal aspects of the theme.

Dr. Hubert proceeded immediately to describe the structure and methodology of his report. Among other points, he said that the Juridical Committee should approach certain problems concerning the framework of the theme, namely, whether democracy was a right besides being a human right, or whether there existed a right to development. He indicated that the documents of the United Nations were clear in establishing the right to development, but not those of the OAS. In order to examine the interdependence between democracy and development, the Juridical Committee should determine whether both were rights in nature.

He also expressed that he had reflected a great deal on the reason why the mandate of the General Assembly spoke of economic and social development rather than integral development. This latter concept was developed in the *Charter of the OAS* in a very broad and comprehensive manner, he said. He also pointed out that it was important to determine whether the concept of integral development included that of democratic development. This could prove an interesting element in the question that the Juridical Committee aimed to investigate. He also referred to the importance attributed by many to drawing up a Social Charter, although he also pointed out that others found no need for it, seeing that Chapter VII of the *Charter of the OAS* dealt with the matter. This, in his opinion, was a point to be debated.

The rapporteur of the theme closed his presentation pointing out that his intention was to present a final report for the regular session of the Inter-American Juridical Committee corresponding to the month of March.

Dr. Mauricio Herdocia referred to the obligatory nature of exercising representative democracy. He claimed that today this is part of international law in the Americas, and that in respect to international law this is a judicially binding obligation. He pointed out that it was important to stress that democracy had certain elements whose development remains at the

criterion of each State, but that there are certain elements in representative democracy that cannot be compromised, such as the separation of powers or respect for fundamental rights (article 3 of the *Inter-American Democratic Charter*). He manifested his conviction that democracy and economic and social development were interdependent concepts that reciprocally reinforce one another, but that they had their own peculiar contents and regime. He stated that in his mind there was a legal bind between economic, social and cultural rights (as part of the indivisible set of human rights), and democracy. From this point of view, democracy had the duty to promote human rights and in this way incentivize economic and social development. He ended by saying that the right to development as a human right proclaimed in the *Charter of the United Nations* had a legal bind expressed in the duty of democracy to foster human rights.

Dr. Eduardo Vio Grossi claimed that the sense of the mandate of the General Assembly was not very clear and that the problem that the Juridical Committee had to solve was not very clear either. He stated that the *Democratic Charter* points out that democracy and economic and social development are two different realities, because if they were the same they would not mutually reinforce one another, as said instrument claims. Economic and social development consolidates but does not condition democracy, he claimed. He emphasized that the mandate affirms that such interdependence exists. This being so, he stated that the legal aspects of this interdependence are translated into rights and duties and that their content is what the Juridical Committee should establish, instead of discussing whether democracy was a right or not. This had been established previously by the Juridical Committee, even before the *Inter-American Democratic Charter* was approved, he recalled. The Committee should therefore assume that democracy is a right and also an obligation of results. He further expressed that although the States should cooperate towards development (an obligation of means or comportment), development is the responsibility of each and every one.

Dr. Antonio Fidel Pérez recommended to the rapporteur some United Nations sources and documents that might help to draw up the final document. He also indicated that the comments of Dr. Eduardo Vio Grossi established coherently what he himself felt about the development of the theme.

Dr. Ana Elizabeth Villalta Vizcarra expressed the idea that democracy is strengthened by development, but that it could not necessarily be concluded that democracy could not exist without development.

Dr. Luis Herrera also expressed the opinion that the lack of social development did not justify suppressing democracy and that on the other hand the existence of social development did not justify suppressing democracy. He also pointed out that a regime that systematically violates human rights cannot be considered democratic.

Dr. Galo Leoro Franco said that concepts such as the preservation of democracy and the principle of non-intervention might appear antithetical and that the States have not managed to lend a specific content to these concepts. It would seem that the principle of non-intervention is somehow influenced by the *Inter-American Democratic Charter*, he claimed.

Dr. Stephen C. Vasciannie suggested that the final wording of the report should consider a series of questions arisen in the discussions in the Juridical Committee, as a point independent from the central theme assigned by the General Assembly.

Dr. Jean-Paul Hubert finally indicated that the main problem in this theme is that although some States can be sanctioned for not being democratic or for not fulfilling their obligation to foster democracy, there are no ways to sanction a State for not cooperating to promote development in their region. He pointed out that he thought he saw in this problem the reason why the mandate was given to the Inter-American Juridical Committee. Although the concepts of democracy, human rights and development are independent, the way they

have been treated throughout the last few years has been confused with regard to their inter-relation. He likewise expressed that the principle of non-intervention had not become more flexible or lost its original force. The rapporteur indicated that what had changed across time was what was understood as "intervenable" or "non-intervenable" in the world of today. He also requested the other members of the Juridical Committee to point ideas on the final structure of the report.

The Inter-American Juridical Committee emphasized the importance of having a final report on the theme from the rapporteur for the next regular session.

Finally, the Inter-American Juridical Committee adopted resolution CJI/RES.95 (LXVII-O/05), *Legal aspects of the interdependence between democracy and economic and social development*, by means of which it expressed its thanks to the rapporteur, Dr. Jean-Paul Hubert, for presenting the progress report on the theme and asked him to present at the 68th regular session a final report containing the debates held by the Committee, on formulating his recommendations and conclusions.

Following is the resolution mentioned before. The follow-up report submitted by the rapporteur during the 67th regular session of the Inter-American Juridical Committee (CJI/doc.190/05 rev.1) can be found as an annex of the present *Report*.

CJI/RES.95 (LXVII-O/05)

LEGAL ASPECTS OF THE INTERDEPENDENCE BETWEEN DEMOCRACY AND ECONOMIC AND SOCIAL DEVELOPMENT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the OAS General Assembly, during its 34th regular session in Quito, Ecuador, under Resolution AG/RES.2042 (XXXIV-O/04), requested the Juridical Committee to "analyze, in the light of the terms in chapter III of the Inter-American Democratic Charter, the legal aspects of interdependence between democracy and socioeconomic development, including, for example, the recommendations of the high-level meeting on poverty, equity and social inclusion in the Margarita Declaration, Monterrey Consensus, declarations and action plans from the Summits of the Americas, and objectives in the United Nations Millennium Declaration";

CONSIDERING, moreover, that the General Assembly, during its 35th regular session, was pleased to note the inclusion on the Juridical Committee agenda of the topic *Legal aspects of the interdependence between democracy and socioeconomic development,* and asked to include a section in its next annual report, based on the *OAS Charter* and the guidelines stated in resolution AG/RES.2042 (XXXIV-O/04);

HAVING read and discussed document CJI/doc.190/05 rev.1 containing the *Progress report* submitted by the rapporteur of the topic on *Legal aspects of interdependence between democracy and socioeconomic development,*

RESOLVES:

1. To acknowledge rapporteur Dr. Jean-Paul Hubert's presentation of the *Progress report on legal aspects of interdependence between democracy and socioeconomic development*, which is adopted as a valuable basis for the exchange of opinions and comments in the course of the Committee's current regular session.

2. To request the rapporteur to consider the Committee's discussions when drawing up the relevant recommendations and conclusions for the report to be presented during the 68th regular session of the Inter-American Juridical Committee.

This resolution was unanimously adopted at the session on 12 August 2005,

attended by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Herrera Marcano, Antonio Fidel Pérez, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

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4. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII

Resolutions

CJI/RES.91 (LXVI-O/05)	*Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII*
CJI/RES.100 (LXVII-O/05)	*Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII*

Annexes:

CJI/doc.196/05 rev.1	*Comments on CIDIP-VII agenda* (presented by Drs. Antonio Fidel Pérez, João Grandino Rodas y Ana Elizabeth Villalta Vizcarra)
CJI/doc.193/05	*The Inter-American Juridical Committee on the codification of private international law and preparation of the Seventh Inter-American Specialized Conference on Private International Law* (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.192/05	*Note for the Inter-American Juridical Committee on CIDIP-VII* (presented by Dr. Antonio Fidel Pérez)
CJI/doc.74/01 rev.1	*CIDIP-VII and beyond* (presented by Drs. Carlos Manuel Vázquez and João Grandino Rodas)

At its 66th regular session of the Inter-American Juridical Committee (Managua, February 28 – March 11, 2005), the Director of the Department of Legal Affairs and Services reported that the Committee on Political and Juridical Affairs was discussing a draft resolution to approve the following agenda for the upcoming CIDIP-VII: Consumer protection: applicable law, jurisdiction and monetary restitution (conventions and model laws), and secured transactions: electronic registries for the implementation of the Model Inter-American Law on Secured Transactions.

In addition, at this session, the Juridical Committee adopted resolution CJI/RES.91 (LXVI-O/05), by which it resolved to forward once more to the Permanent Council of the OAS resolution CJI/RES.59 (LXIII-O/03), "The Applicable Law and Competency of International Jurisdiction with Respect to Extracontractual Civil Liability," along with the request that the Permanent Council bear in mind the conclusions arrived at by the Committee as well as consider the advisability of including the topics therein when it prepared the agenda of the upcoming Inter-American Specialized Conference on Private International Law, CIDIP-VII.

On May 13, 2005, the General Secretariat conveyed a verbal note to the Permant Missions at the OAS, to which the resolution of the Inter-American Juridical Committee was attached, and in which it informs that all the documentation referred to in same can be found on the OAS website.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly adopted resolution AG/RES.2065 (XXXV-O/05), "*Seventh Inter-American Specialized Conference on Private International Law*," with the following agenda for CIDIP-VII:

a. Consumer protection: applicable law, jurisdiction and monetary restitution (conventions and model laws);
b. Secured transactions: electronic registries for the implementation of the Model Inter-American Law on Secured Transactions.

In said resolution the Permanent Council is instructed to establish a methodology for the preparation of the Inter-American instruments to be considered by CIDIP-VII; to set a date and place; and that, when it considers future topics for upcoming CIDIPs, it include, among

others, the topic of an inter-American convention on international jurisdiction. It also requests the Inter-American Juridical Committee to present its comments and observations on the topics for the final agenda of CIDIP-VII. In addition, by AG/RES.2069 (XXXV-O/05) "*Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee*," the General Assembly requests the Committee to collaborate in preparations for the next CIDIP-VII.

During its 67th regular session (Rio de Janeiro, August, 2005), the Inter-American Juridical Committee examined document CJI/doc.192/05, *Note for the Inter-American Juridical Committee on the CIDIP-VII*, presented by Dr. Antonio Fidel Pérez.

Dr. Pérez indicated that the General Assembly has requested the Inter-American Juridical Committee for its opinion on the agenda of the next CIDIP-VII, that is, consumer protection and secured transactions. He also suggested that the Juridical Committee could make a statement on the feasibility and implementation of any norms to be adopted in different types of legal instruments. In this sense the rapporteur develops his written report on the methods to harmonize private law (treaties, model laws, conventions or framework directives, and economic integration agreements), analyzing the advantages and disadvantages of such proposed methods. He pointed out that the Juridical Committee should now look at the future of the CIDIPs rather than their past.

Next, the Director of the Department of International Legal Affairs, Dr. Jean-Michel Arrighi, presented the latest developments of the topic within the OAS, after which the Juridical Committee decided to dwell on the treatment of the topic of consumer protection, about which there already exists a draft convention. The Juridical Committee could offer its comments with regard to this draft convention, said the Chairman.

Dr. Eduardo Vio Grossi then stated that of the two themes on the agenda of the CIDIP-VII, consumer protection and secured transactions, the former could be better handled by the Juridical Committee as far as the general considerations that had been requested were concerned. He expressed the idea that this was a fine opportunity for the Juridical Committee to return to the process of the CIDIPs through its comments on this matter. He further expressed the notion that it would be important to stress in the rapporteurs´ report that the use of model laws was indispensable for harmonizing and preventing any conflict of laws, and suggested an analysis of the role played by autonomy of will on this theme, which was not used in the past. Many conflicts of laws are now settled because the parties sign a contract of competent jurisdiction and applicable law, leaving aside the applicability of the norms on conflict of laws, he claimed.

The Chairman suggested that the rapporteurs of the topic should meet in a working group to analyze the draft convention on consumer protection and then present a report. He also considered that it was important for the rapporteurs to attend the Meetings of Experts in preparation for the next CIDIP-VII.

In view of these guidelines, during this regular session the Inter-American Juridical Committee examined document CJI/doc.196/05, *Comments on the CIDIP-VII agenda*, presented by Drs. Antonio Fidel Pérez, João Grandino Rodas and Ana Elizabeth Villalta Vizcarra.

Dr. Antonio Pérez, on presenting the document, indicated that it was of no use to start now to analyze the contents of the projects presented concerning the themes of the CIDIP-VII agenda, but rather comment on the harmonization process in general. He also stressed the importance of the process of receiving comments from civil society over the Internet and any other means made available by the Department of International Legal Affairs.

Dr. João Grandino Rodas emphasized the relation of this theme with that of re-examining the Inter-American conventions on international private law. Dr. Grandino Rodas

supported the idea of not yet starting to analyze the content of the proposals offered on the themes of the CIDIP-VII agenda, since these proposals are not yet completely mature projects within the Organization. The Juridical Committee would play a more useful role if it analyzed the general guidelines that these projects or others to be presented should follow in order to arrive at a positive result. He also expressed the willingness of the rapporteurs to participate in the Meetings of Experts on the theme of consumer protection and to prepare new documents during the recess of the Inter-American Juridical Committee.

The Inter-American Juridical Committee finally adopted resolution CJI/RES.100 (LXVII-O/05), *Seventh Inter-American Specialized Conference on International Private Law*, through which it requested the rapporteurs of the theme to participate in a coordinated manner in the consultation mechanisms that come to be established for the purpose of developing the themes proposed for the CIDIP-VII, and principally at the meeting of experts convoked for that purpose. It was also requested that the rapporteurs keep the Inter-American Juridical Committee informed of progress in the discussion of the themes, as well as a report on the matter to be presented during the 68th regular session of the Juridical Committee or before that date if the themes are appropriately developed.

Following are the texts of the resolutions and documents approved on this subject by the Inter-American Juridical Committee during 2005.

CJI/RES.91 (LXVI-0/05)

SEVENTH SPECIALIZED INTER-AMERICAN CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VII)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING NOTE of the verbal report on the "Seventh Inter-American Specialized Conference on Private International Law" presented by Dr. Ana Elizabeth Villalta Vizcarra, co-rapporteur on the topic, during the current regular session;

CONSIDERING the work that has been done in preparation for the upcoming CIDIP-VII;

BEARING IN MIND that the resolution CJI/RES.59 (LXIII-O/03) "Applicable law and jurisdictional competence in relation to extra-contractual civil responsibility" approved during the 63rd regular session together with six other reports presented to date by the rapporteurs on this topic, Drs. Ana Elizabeth Villalta Vizcarra and Carlos Manuel Vázquez, was duly forwarded to the Permanent Council by the Inter-American Juridical Committee,

RESOLVES:

1. To again forward the resolution CJI/RES.59 (LXIII-O/03) "Applicable law and competence of international jurisdiction on non-contractual civil liability" to the Permanent Council of the Organization requesting that it takes into account the conclusions made by the Juridical Committee in that resolution, and considers the possibility of their inclusion in drawing up the agenda for the next Inter-American Specialized Conference on Private International Law, CIDIP-VII.

The resolution was approved unanimously in regular session held on the 11th of March 2005, by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

CJI/RES.100 (LXVII-O/05)

SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS that the General Assembly of the Organization of the American States, in resolution AG/RES.2069 (XXXV-O/05), *Observations and recommendations on the annual report of the Inter-American Juridical Committee*, dated June 7, 2005, requested the Inter-American Juridical Committee to proceed in its review of the situation of private international law in the Americas and to collaborate in the preparations for the next Inter-American Specialized Conference on Private International Law (CIDIP-VII);

WHEREAS the General Assembly also adopted resolution AG/RES.2065 (XXXV-O/05), *Seventh Inter-American Specialized Conference on Private International Law,* in which it requested the Inter-American Juridical Committee to present its comments and observations on the topics on the final agenda of the CIDIP-VII;

CONSIDERING the pioneer role of the Inter-American Juridical Committee in identifying the themes of consumer protection and electronic protection as matters that deserve to be dealt with in the CIDIP-VII,

RESOLVES:

1. To express thanks to the rapporteurs, Drs. João Grandino Rodas, Ana Elizabeth Villalta Vizcarra and Antonio Fidel Pérez, for their presentation of document CJI/doc.196/05 rev.1, *Comments on the agenda of the CIDIP-VII*, which are attached with this resolution and with the other documents mentioned in same.

2. To request the rapporteurs of the topic to participate in coordinated fashion in the mechanisms of consultation that come to be set up for the purpose of developing the themes proposed for the CIDIP-VII, and especially at the meeting of experts to be convoked for that purpose.

3. To thank the rapporteurs for their initial comments and observations with regard to the topics adopted by the CIDIP-VII and to ask the rapporteurs to keep the Inter-American Juridical Committee informed, via the Chairman, on the progress made in the discussion of the topics.

4. To request the rapporteurs to draw up a report on the matter to be presented during the 68th regular session of the Committee, or before the session if that is deemed necessary.

This resolution was adopted unanimously at the session held on August 18, 2005 in the presence of the following members: Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

Attachments: CJI/doc.196/05 rev.1; CJI/doc.193/05; CJI/doc.192/05; CJI/doc.74/01 rev.1

CJI/doc.196/05 rev. 1

COMMENTS ON CIDIP-VII AGENDA

(presented by Drs. Antonio Fidel Pérez, João Grandino Rodas and

Ana Elizabeth Villalta Vizcarra**)**

The Inter-American Juridical Committee welcomes the Permanent Council's approval of an agenda for CIDIP-VII and appreciates the opportunity afforded to it by the General Assembly to comment on that agenda by paragraph 4 of General Assembly Resolution AG/RES.2065 (XXXV-O/05) of June 7, 2005.

Based on the different forms of comprehensive consultation to experts adopted at the CIDIP-VI and which are very probably the same as approved for preparing this new CIDIP, this body understands that the CIDIP-VII negotiating process will attempt to explore the opportunities made available by electronic communications to facilitate the participation of States and civil society concerning the proposed texts in relation to the matters set forth in the agenda. The Inter-American Juridical Committee further understands that this process will supplement the traditional CIDIP process involving a meeting of experts but is intended not to unduly accelerate the CIDIP negotiating process nor reduce but rather enhance the quality of the instruments.

The Inter-American Juridical Committee therefore welcomes the opportunity afforded it by the General Assembly to include the Juridical Committee's comments in the agenda shared with the participants in the electronic process. Accordingly, the Inter-American Juridical Committee will express its comments on the agenda in order to fulfill the mandate of the General Assembly. The Inter-American Juridical Committee therefore takes this opportunity to make preliminary and general comments on the agreed agenda and the specific item concerning consumer protection. However, the Committee expects to make further comments now permissible by the CIDIP process in progress, when the discussion of each agenda item matures and when these comments are appropriate and useful in the Committee's understanding of the development of the negotiations on each item on the agenda.

The Inter-American Juridical Committee recommends that CIDIP-VII should also offer civil society an opportunity to participate in this electronic process for a certain reasonably long period of time with sufficient public notice of this event. The Committee considers that this possibility would greatly enhance the quality of the CIDIP process and provide a broader support for any instrument that CIDIP-VII ultimately produces. The Inter-American Juridical Committee welcomes this advance in the CIDIP process and the willingness of member States to find new ways and means to accelerate the harmonization process of private international law in the hemisphere.

As a general matter, in addition to welcoming and endorsing the item concerning secured transactions, the Juridical Committee welcomes the General Assembly's decision to include the item on consumer protection in the agenda, so that it permits the development of texts on the same subject matter in different ways. The Inter-American Juridical Committee is aware of the possibility that this approach will enable States to implement the principles and rules agreed under this agenda item so that the States find it more compatible with their internal procedures and legal requirements. The Juridical Committee understands that several States have already submitted proposals under this agenda item for treaties and/or model laws. Without entering into a discussion on the content of the various proposals, the Committee would like to urge the member States to ensure that the multiple instruments produced in CIDIP-VII are fully consistent in their coverage and substantive content so that the form of implementation chosen by the States does not undermine the goals of legal harmonization. On this matter, the Inter-American Juridical Committee emphasizes that a fundamental choice may need to be made in the CIDIP process on whether to focus on electronic commerce and in that context to address the rights of consumer or to focus on consumer rights and in that context address the needs for electronic commerce, and that inconsistency between any treaty and model law on the same subject might give rise to competition between the two instruments; and, although in some cases competition in the presentation of different legal instruments may be useful for States, the Juridical Committee believes that the overall process of regional legal harmonization hopefully to be advanced by CIDIP could be ill-served by such inconsistency. Accordingly, both treaties and model laws should clearly and affirmatively define their effects and include a clear statement of their object and purpose. On the other hand, while it appears that a treaty on the subject matter specified in the agenda may be better suited to the situation of a subject matter that already is regulated by a substantial number of States, the very nature of a model law would be to encourage regulation of matters not previously addressed under the internal law of many States. It therefore may be the case that a treaty on consumer protection would be better suited to the adoption of model laws. In short, progress on legal

harmonization should not await a treaty if it can be achieved more rapidly through model laws.

Finally, the Inter-American Juridical Committee wishes to report that it is in the process of preparing a report on the status of the existing private international conventions and model laws previously produced in the CIDIP process, in order to develop a set of questions for discussion by the States. The Juridical Committee reiterates the suggestion it made in the context of CIDIP-VI that it may be time for a broader review of the CIDIP process, particularly with regard to the relationship between CIDIP instruments –such as treaties and model laws– and the regional free trade agreements of the hemisphere, as well as the possible hemisphere-wide free trade agreement currently under negotiation. The Juridical Committee would hope that the CIDIP-VII process will produce recommendations to the General Assembly as to how best such a review might be conducted, in order to bear in mind the need to coordinate the development of private international law in the hemisphere with the opportunities created by ongoing negotiations on relaxing restrictions on trade. In this connection the Juridical Committee transmits the reports submitted by its rapporteurs on the CIDIP process, Dr. Ana Elizabeth Villalta Vizcarra (CJI/doc.193/05 of July 29, 2005) and Antonio Fidel Pérez (CJI/doc.192/05 of July 22, 2005), while re-transmitting the report prepared by its rapporteurs for CIDIP-VI, Drs. Carlos Manuel Vázquez and João Grandino Rodas (CJI/doc.74/01 rev.1 of August 14, 2001).

CJI/doc.193/05

THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE CODIFICATION OF PRIVATE INTERNATIONAL LAW AND PREPARATION OF THE SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

Pursuant to resolutions [AG/RES.2060 (XXXV-O/05)] and [AG/RES.2065 (XXXV-O/05)] the Inter-American Juridical Committee was asked to continue its examination of the status of private international law in the Americas and contribute toward the preparations of the next Inter-American Specialized Conference on Private International Law (CIDIP-VII). It was also asked to submit its comments and observations about the themes in the Final Agenda for the CIDIP-VII, bearing in mind aforementioned resolution s, and to draft the following report for the appreciation of the Inter-American Juridical Committee during its 67thregular session.

1. Background

The first attempt at codification in America was made by the Congress of Panama convened by Simón Bolívar in 1824.

Later, the Lima Conferences were held in 1847, 1861, 1867 and 1878 to codify private international law, but it failed to reach any practical result, even though it did good technical and investigation work.

In 1877 a Congress of Jurists was held in Lima, Peru, to set uniform rules of private international law, this meeting culminating in the “Lima Congress (1877-1878)”, attended by specialist delegates from Argentina, Bolivia, Chile, Cuba, Ecuador and Peru. Also at this meeting a treaty on private international law was drawn up that comprised matters relating to the status and capacity of persons, marriage, succession, jurisdiction in criminal matters, juridical acts, execution of foreign judgments and legalization.

This treaty was called the “Lima Treaty” which could not be enforced because it was ratified solely by Peru.

In 1889 in Montevideo, Uruguay, a new Congress was held to sign a treaty that governed the regulations of private international law, attended by representatives from Argentina, Bolivia, Chile, Paraguay, Peru and Uruguay, this Congress culminating in the “1889-1990 Montevideo Treaties”, since at this event several treaties were signed

relating to the: a) Treaty on International Civil Law; b) Treaty on International Commercial Law; c) Treaty on International Criminal Law; d) Treaty on International Procedural Law; e) Treaty on Literary and Artistic Copyright; f) Treaty on Trademarks, and e) Treaty on Practice of Liberal Professions.

These 1889 Montevideo Treaties had repercussion in Central America, resulting in meetings of the Central American Juridical Congress in 1897 and 1901, when Conventions on civil, mercantile, criminal, procedural law, extradition and literary and artistic copyright were signed.

These treaties had a decisive influence on continental law, since they contractually regulated the institution of asylum in embassies or legations and warships and the system of domicile was adopted to settle the conflict of laws.

In 1889, the First International American Conference, held in Washington D.C., United States of America, adopted a resolution in which it urged States that had not done so to sign the “1889 Montevideo Treaties”, and recommended the signing of a general arbitration treaty of a mandatory nature.

At the Second International American Conference in Mexico in (1901-1902), a convention was signed by the representatives present, the purpose of which was to draft the codes of public and private international law for which committees were created.

At the Third International American Conference in Rio de Janeiro, Brazil in 1906, the “International Commission of American Jurists” was created to draft the codes, one for public international law and the other for private international law. The Commission met in 1912 and adopted the drafts on extradition and on foreign judgments and six sub-committees were created, the fifth entrusted with the study of private international law.

At the Fourth International American Conference in Buenos Aires, Argentina, in 1910, treaties on private international law on trade marks, invention patents and industrial drawings and models.

In 1911, Bolivia, Ecuador, Colombia, Peru and Venezuela met at the “Bolivarian Congress” and adopted five private international law agreements on: literary and artistic property, academic degrees, extradition, patents and privileges of invention, and judicial acts of aliens.

In 1912, the “American Institute of International Law” was created, which contributed considerably to ongoing development and codification of international law and in which Cuban jurist Dr. Antonio Sánchez de Bustamante prepared the Draft Code of Private International Law.

The Fifth International American Conference, held in Santiago, Chile, in 1923, which was strongly in favor of codification, a convention was adopted for the protection of commercial, industrial and agricultural trade marks and commercial names, and recommended the adoption of a code for private international law and convening a meeting of the International Commission of American Jurists for this purpose.

At this Conference it was also agreed on what should be understood by American International Law, to which Chilean jurist Dr. Alejandro Álvarez gave a valuable contribution. At that time the Rio Panel of Jurists was organized and it was agreed that the system to be adopted for codification of both private and public international law would be gradual and progressive.

This meeting was held in Rio de Janeiro in 1927 and in terms of private international law adopted the draft code prepared by Prof. Antonio Sánchez de Bustamante, who took as reference the Montevideo Treaties, the drafts prepared by the Fifth and Sixth Committee and the draft code of Brazilian jurist Lafayette Rodrigues Pereira.

The Sixth International American Conference in Havana, Cuba, in 1928, adopted the draft code of private international law, prepared by Antonio Sánchez de Bustamante and for that reason was called the “Bustamante Code”, consisting of 437 articles and

containing subjects relating to general rules, international civil law, international mercantile law, international criminal law and international procedural law. This code was signed by twenty countries: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

This Conference also adopted agreements on the protection of trademarks, a uniform law on bills of exchange, restatement of the mandatory commercial arbitration and the uniformity of legislation concerning public corporations, and added new codification methods, for which another three committees were created, one in Rio de Janeiro for work on public international law; another in Montevideo for work on private international law, and the third in Havana for comparative legislation and unification of laws.

This Conference was extremely productive and contributed considerably to the international system and international law in general.

At the Seventh International American Conference in Montevideo, Uruguay in 1933, recommendations were made to hold a conference on international commercial arbitration; to unify laws on simplifying and standardizing powers of attorney; to adopt The Hague regulations on unifying the law on exchange, and regulations made on the nationality of women, and the civil and political rights of women.

In 1938 the Eighth International American Conference was held in Lima, Peru, when a Permanent Committee of Jurists was created to prepare unification of civil and commercial laws of the Americas.

In 1939, a Congress in Montevideo, Uruguay, was called to sign the “1889 Montevideo Treaties”, when it was decided to update them based on fifty years of experience of their application. Accordingly, the “**1939-1940 Montevideo Treaties**” were signed as follows: 1939 Treaty on asylum and political refuge; 1939 Treaty on intellectual property; 1939 Convention on the practice of liberal professions; 1940 Treaty on the law of international commercial navigation; Treaty on international commercial terrestrial law; Treaty on international civil law; Treaty on international procedural law; Treaty on international criminal law; and an Additional Protocol.

In 1940 the Convention was also signed concerning the legal uniformity of powers of attorney.

In 1939, the “International Commission of American Jurists” takes the name “Inter-American Committee of Neutrality” and in 1942, at the Third Consultation Meeting of Ministers of Foreign Affairs in Rio de Janeiro under resolution XXVI its name changes again to “Inter-American Juridical Committee”, attributing one of its functions to “develop and coordinate the codification work of international law, without detriment to the competence of the existing organizations”.

In 1945 at the “Chapultepec Conferences on War and Peace”, the Inter-American Juridical Committee submitted a report on the codification of international law, whose conclusions were adopted by that Conference.

In 1948, at the Ninth International American Conference in Bogota, Colombia, the Charter of the Organization of American States (OAS) was adopted and came to be known as the “Bogota Charter”. The “Inter-American Council of Jurists” was created to act as an advisory body on juridical matters, to promote the development and codification of private and public international law and by which the “Inter-American Juridical Committee” became a Permanent Committee.

The work of the Inter-American Juridical Committee was productive in the field of codifying international law, for which it formulated a plan to codify private international law.

In 1950 “Inter-American Juridical Committee” was entrusted with the study and analysis of the possibility of reviewing as far as possible the “Bustamante Code”, the outcome of the 1928 Sixth International American Conference, in the light of the 1889-

1889 and 1939-1940 “Montevideo Treaties” of the “Restatement of the Law of Conflict of Laws”, prepared by the American Law Institute, United States of America, in order to unify these three codifications and analyze the systematic and technical differences existing between them and also analyze the reservations with the “Bustamante Code” made by the States.

In 1951, the Inter-American Juridical Committee wrote a first report on the method of codification. In a second report, the Inter-American Juridical Committee reckoned that the “Code could be reviewed for improvement at several points, in order to be closer to the uniformity of the regulations of private international law of the different American countries, especially the law applicable to civil status and personal capacity”.

The Committee also prepared a comparative study on the provisions in the Bustamante Code, Montevideo Treaties and regulations in the Restatement of the Law of Conflict of Laws, and submitted it for consideration by governments for their comments. It only received comments from the USA and Ecuador.

On this matter, the USA considered that it was not possible to harmonize the Restatement with the Montevideo Treaties and Bustamante Code and that it, stating as follows: “The Bustamante Code refers to matters that are the internal competence of the various States of the Organization and in which there are regulations on conflict of laws that are not the same or reconcilable”. It also said: “That it is unfeasible to harmonize the Restatement with the other codifying instruments and that even when the preparation of a single code is reached, its ratification is very difficult if not impossible by the United States of America, due to the federal structure of its government”. [1]

Ecuador, on the other hand, stated: “we believe that we should not for the time being insist on including in the codification work the North American Restatement and that the task should be restricted to reviewing the Bustamante Code, in the light of the “1889 and 1940 Montevideo Treaties”.[2]

Earlier the Inter-American Juridical Committee recommended: “a) restricting the unification work to the Bustamante Code and Montevideo Treaties”; b) suggest an efficient method to be clearly established with regard to the different juridical relations, status of the non-ratifying countries or those ratifying with reservations, and c) recommend the governments to examine the frequently mentioned Comparative Study and all or some questions contained therein”.

In 1959, a new resolution was adopted wherein the Inter-American Juridical Committee was urged to continue its review work to obtain the unification of the regulations of private international law of the American States, further reducing the reservations concerning the Code.

In 1965 at the Fifth Meeting of the Inter-American Council of Jurists, held in San Salvador, El Salvador, it recommended that in 1967 a “**Specialized Conference on Private International Law**” be convened to review certain parts of the Bustamante Code, such as general regulations, international civil law and international commercial law.

In this sense, Colombian delegate Dr. José Joaquín Caicedo Castilla prepared a new draft code of private international law that substituted the Bustamante Code, and which also contained the comments on reforms indicated by the latter. On this matter the Inter-American Juridical Committee recommended that it would be useful to inform the governments and the Specialized Conference on Private International Law about this draft.

In 1967 with the “Buenos Aires Protocol” that amends the OAS Charter, the “Inter-American Council of Jurists” was extinguished and the “Inter-American Juridical Committee” was promoted to principal organ of the Organization of American States,

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1 MONROY CABRA, Marco Gerardo. *Tratado de derecho internacional privado*, 1999.
2 Idem.

including in its functions "promoting the development and codification of public international law and private international law". [3]

2. Inter-American Specialized Conferences On Private International Law

In the light of the above, under resolution [AG/RES.48 (I-0/71)] adopted on April 23rd, 1971, the General Assembly of the Organization of American States called the "**First Specialized Conference on Private International Law"** and entrusted the Permanent Council to prepare the draft agendas and regulations of the Conference, and the Inter-American Juridical Committee to "prepare the studies, reports and draft conventions required for use of the aforementioned Specialized Conference".

Accordingly, the Permanent Council of the Organization, under resolution [CP/RES.109 (120/74)] dated March 20th, 1974, chose the city of Panama to host the First Specialized Conference on Private International Law, and earlier, pursuant to resolution [CP/RES.83 (89/72)] dated December 20th, 1972, adopted the following draft agenda:

1) Multinational commercial companies, 2) commercial companies; 3) international procurement of goods; 4) bills of exchange, checks and international promissory notes; 5) international commercial arbitration; 6) international waterborne transportation with special reference to bills of lading; 7) processing letters rogatory; 8) acknowledgment and execution of foreign legal sentences; 9) taking of overseas evidence on civil and commercial matters; 10) legal system of the powers of attorney to be adopted abroad, and 11) action to be taken to develop the other themes in private international law.

The Inter-American Juridical Committee in turn, and at its session from July 26th to August 27th 1973, prepared draft conventions and other documents on the eleven points of the draft agenda adopted by the Permanent Council.

The importance of this Specialized Conference of Panama is that it was the start of the process of harmonizing the regulations about conflicts of laws in America, with the approval of six inter-American conventions, as follows: a) Inter-American convention on letters rogatory; b) Inter-American convention on conflict of laws concerning bills of exchange, promissory notes and invoices; c) Inter-American convention on conflict of laws concerning checks; d) Inter-American convention on the taking of evidence abroad; e) Inter-American c onvention on the legal regime of powers of attorney to be used abroad; and f) Inter-American convention on international commercial arbitration.

All those conventions were signed by the delegates of the Organization's member States on January 30th, 1975, based on the relevant draft conventions prepared by the Inter-American Juridical Committee.

This Conference asked the General Assembly of the Organization of American States (OAS) to convene, at its Fifth regular session in April 1975, the Second Specialized Conference on Private International Law, to continue studying and examining the topics that, at the discretion of the OAS member States, it considers worthy of further attention and importance.

The Conference also adopted a resolution requesting the Permanent Council of the Organization to entrust the Inter-American Juridical Committee with the study and preparation of drafts on conflict of laws concerning international checks and a uniform law on the same subject.

Pursuant to resolution [AG/RES.187 (V-O/75)], adopted by the General Assembly of the Organization of American States on May 19th, 1975, the "**Second Inter-American Specialized Conference on Private International Law (CIDIP-II)**, was called to be held in Montevideo, Uruguay, from April 23rd to May 8th, 1979.

The General Assembly of the Organization entrusted the Permanent Council and the Inter-American Juridical Committee to prepare draft agendas, conference regulations and studies and reports on the matters under discussion. Accordingly, the Permanent

[3] 1967 Buenos Aires Protocol.

Council adopted on May 24th, 1978, the draft regulations of CIDIP-II, and the Inter-American Juridical Committee, in turn, prepared the draft conventions on the topics in the agenda of the Conference, while the Legal Advisors of the Organization prepared the technical documents to facilitate the work of the Conference.

This Second Specialized Conference on Private International Law (CIDIP-II) adopted the following conventions: 1) Inter-American convention on conflict of laws concerning checks; 2) Inter-American convention on conflict of laws concerning commercial companies; 3) Inter-American convention on extraterritorial validity of foreign judgments and arbitral awards; 4) Inter-American convention on execution of preventive measures; 5) Inter-American convention on proof of and information on foreign law; 6) Inter-American convention on domicile of natural persons in private international law; 7) Inter-American convention on general rules of private international law, and 8) Additional protocol to the inter-American convention on letters rogatory.

These Conventions were based on the draft conventions prepared by the Inter-American Juridical Committee.

This Second Specialized Conference asked the General Assembly of the Organization to convene the Third Specialized Conference on Private International Law (CIDIP-III) and to consider the convenience of institutionalizing the "Inter-American Specialized Conference on Private International Law (CIDIP)", which should meet every three years; and to suggest that the OAS General Secretariat continue to prepare technical and informative documents on the points in the agenda in order to facilitate the work of the Third Conference, as well as provide secretarial services.

The "**Third Inter-American Specialized Conference on Private International Law (CIDIP-III)**" was convened pursuant to resolution [AG/RES.505 (X-O/80)], adopted by the OAS General Assembly on November 27th, 1980.

In this resolution, the General Assembly entrusted the Inter-American Juridical Committee to prepare the reports, draft conventions and statement of reasons required for the Conference, suggested that the Permanent Council of the Organization prepare the draft agendas and regulations for CIDIP-III, and asked the General Secretariat to prepare the technical and informative documents on the points in the agenda and to provide secretarial services.

Accordingly, the Permanent Council, under resolution [CP/RES. 376 (510/82)] dated November 10th, 1982, adopted the draft agenda for the Conference and under resolution [CP/RES.379 (515/83)] dated February 2nd, 1983, adopted the Draft Rules of Procedure.

The agenda of said Conference was the following: 1) International waterborne transportation; 2) International land transportation of goods and passengers; 3) Personality and capacity of natural and juridical persons; 4) Adoption of minors; 5) Draft Additional Protocol to the Inter-American Convention on taking proof abroad; 6) Draft Inter-American Convention on international competency for extraterritorial validity of foreign judgments and arbitral awards.

In turn, the Inter-American Juridical Committee prepared the draft Conventions in the agenda and other documents on the same subject at its 1981, 1982, 1983 and 1984 regular sessions.

The Permanent Council of the Organization chose the city of La Paz, Bolivia, to host the CIDIP-III in 1984.

The Third Specialized Conference on Private International Law began on May 15th, 1984, attended by delegates from 18 OAS member States.

At this Conference the following Conventions were adopted: 1) Inter-American convention on conflict of law concerning the adoption of minors; 2) Inter-American convention on personality and capacity of juridical persons in private international law; 3) Inter-American convention on jurisdiction in the international sphere for the extraterritorial

validity of foreign judgments and arbitral awards; 4) Additional Protocol to the Inter-American convention on the taking of evidence abroad.

This Conference also adopted various resolution s, such as, for example, the request to the OAS General Assembly to call the Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV).

Under resolution [AG/RES.771 (XV-O/85)] dated December 9th, 1985, the General Assembly of the Organization of American States agreed to hold the "**Fourth Inter-American Specialized Conference on Private International Law"**.

In this resolution, the OAS General Assembly entrusted the Inter-American Juridical Committee to prepare the draft conventions and relevant statements of motives necessary for the Conference; the Permanent Council of the Organization was entrusted to draw up the draft agenda and regulations of CIDIP IV, and the OAS General Secretariat to prepare technical and informative documents on the agenda and provide secretarial services.

Under resolution [CP/RES.496 (731/88)], the Permanent Council chose the city of Montevideo, Uruguay, to host the CIDIP-IV in 1989.

On October 23rd, 1987, pursuant to resolution [CP/RES. 486 (717/87)], the Permanent Council adopted the following draft agenda: 1) Abduction and return of minors; 2) Land transportation; 3) International contracting and 4) Support obligations (alimony).

The Fourth Specialized Conference on Private International Law was held from July 9th to 15th, 1989, in Montevideo, Uruguay, in the presence of delegates from 17 member States of the Organization.

The Fourth Conference adopted three conventions, as follows: 1) Inter-American convention on international return of children; 2) Inter-American convention on support obligations, and 3) Inter-American convention on contracts for the international carriage of goods by road.

Pursuant to resolution [AG/RES.1024 (XIX-O/89)] the General Assembly of the Organization of American States convened the "**Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V)**, entrusting the Permanent Council of the Organization to prepare the draft agenda, and the Inter-American Juridical Committee to prepare a draft inter-American convention on a "law applicable to international contracts" and a study on "preparing rules for the regulation of international businesses that so require and of international contracts" and "general outlines relating to a draft inter-American convention for the repression of international trafficking of minors"; it also entrusted the General Secretariat to prepare the relevant documents as well as convene a meeting of experts on international contracts.

The Permanent Council of the Organization, under resolution [CP/RES.588 (911/92)], adopted the following agenda for CIDIP-V: 1) Law applicable to international contracts; 2) Civil and criminal aspects of trafficking of minors, and 3) Juridical aspects and private international law concerning technology transfer agreements, and 4) other business.

At the Fifth Inter-International American Conference two meetings of experts were held, one in **Oaxetepec, Morelos, Mexico,** from October 13th to 26th, 1993, on trafficking children, which prepared a draft inter-American convention on international trafficking of minors, and the other in **Tucson, Arizona**, from November 11th to 14th, 1993, on international contracts.

On May 20th, 1993, Mexico City was chosen to host CIDIP-V on March 14th, 1994.

The conventions adopted at the Fifth Specialized Conference were as follows: 1) Inter-American convention on a law applicable to international contracts, and 2) Inter-American convention on international traffick of minors.

This Conference suggested that the General Assembly of the Organization convene the Sixth Inter-American Specialized Conference on Private International Law and suggested that its agenda should include the following topics: 1) Power of attorney and commercial representation; 2) Conflict of laws concerning non-contractual liability; 3) Uniform mercantile documentation for free trade; 4) International bankruptcies; 5) Problem of private international law of international loan contracts of a private nature; 6) Civil liability for the transportation agreement: Aspects of private international law, and 7) International protection of the minor in the sphere of private international law: Patria Potestas Guardianship and Visiting Rights.

Under resolution [AG/RES.1339 (XXIX-O/96)] of the OAS General Assembly, the **Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)** was held in Washington, D. C. from February 4th to 8th, 2002, the preparatory documents being the introduction and report of the Inter-American Juridical Committee "CIDIP-VII and beyond" (CJI/doc.74/01 rev.1); CIDIP-VI/doc.10/02 document; the report by the Secretariat for Legal Affairs of the General Secretariat of OAS called "The history of the CIDIP process" (CIDIP-VI/doc.11/02); as well as the product of the meetings of the expert delegations to CIDIP-VI.

Pursuant to resolution [AG/RES.1472 (XXVII-O/97)] the OAS General Assembly instructed the Permanent Council to continue its study on the topics of CIDIP-VI.

Under resolution [CP/RES. 744 (1185/99)] the Permanent Council adopted the draft agenda, later ratified by the General Assembly, as follows:

i. Uniform mercantile documentation for international transportation, with particular reference to the 1989 "Inter-American convention on hiring international road haulage", and the possible inclusion of an Additional Protocol on bills of lading.

ii. International loan contracts of a private nature and, in particular, uniformity and harmonization of the international commercial and financial guaranty systems.

iii. Conflict of laws concerning non-contractual liability with emphasis on the subject of competency of jurisdiction and the laws applicable to international civil liability for transborder pollution…."

CIDIP-VI adopted the following international instruments:

- Model inter-American law on secured transactions;
- The inter-American negotiable uniform through bill of lading for international carriage of good by road, and
- The inter-American non-negotiable uniform through bill of lading for international carriage of good by road.

In relation to point III of the adopted agenda, the Conference did not reach an agreement on any instrument and instead adopted a resolution requesting further studies by the Inter-American Juridical Committee on the topic of non-contractual liability in cases of transborder pollution, including the examination of documents and precedents, the drafting of a report and, if adopted, preparation of a draft international instrument to be submitted to a group of experts and afterwards to be examined at the 2003 General Assembly.

The Inter-American Juridical Committee appointed as rapporteurs for this report Drs. Carlos Manuel Vázquez and Ana Elizabeth Villalta Vizcarra, who submitted their

reports at the 61st, 62nd and 63rdregular sessions of the IAJC, including their final report at the 63rdregular session.[4]

The **Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII).**

The OAS General Assembly, pursuant to resolution [AG/RES.1923 (XXXIII-O/03)] under the name of "Preparations for the Seventh Inter-American Specialized Conference on Private International Law" adopted on June 10th, 2003, resolved, among other things: to convene the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) and instruct the Permanent Council, with the assistance of the General Secretariat, to conduct preliminary consultations concerning the dates and possible venues for CIDIP-VII, and to establish mechanisms to facilitate member State consultations on the proposed draft agenda and draft rules of procedure for CIDIP-VII; and asked the Inter-American Juridical Committee to continue providing its comments and observations concerning the draft agenda for CIDIP-VII.

On this matter, in document CJI/doc.89/02 of the Inter-American Juridical Committee called "Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)" submitted by Drs. Carlos Manuel Vázquez and João Grandino Rodas, three topics that had been mentioned in the IACJ report were discussed, referring to the topics of CIDIP-VII as follows: electronic mail, transnational insolvency, and migration and free movement of persons.

Under resolution [AG/RES.2033 (XXXIV-O/04)] called "Inter-American Specialized Conferences on Private International Law", adopted on June 8th, 2004, the OAS General Assembly resolved, among other issues: "1. To urge the member States that have not already done so to submit proposals and comments on the possible CIDIP-VII agenda; 2. To request the Permanent Council, in conjunction with the General Secretariat, to study the topics proposed by the member States and their feasibility and inclusion in the CIDIP-VII agenda; 3. To entrust the Permanent Council to continue its inquiries about a possible date and venue for the Seventh Specialized Conference on Private International Law; to ask the Inter-American Juridical Committee to contribute with preparatory work for the CIDIP-VII once the Permanent Council approves its agenda…"

The following Member States presented the topics:

- Peru
- El Salvador
- Brazil
- Mexico
- Canada
- Uruguay
- United States
- Chile

Pursuant to the OAS General Assembly resolutions [AG/RES.1923 (XXXIII-O/03)] and [AG/RES.2033 (XXXIV-O/04)], the Inter-American Juridical Committee was instructed to continue presenting its comments and observations with regard to the proposed CIDIP-VII agenda and contribute with the preparatory work for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), once the Permanent Council adopted its agenda.

During the 35th regular session of the OAS General Assembly from June 5th to 7th, 2005, in Fort Lauderdale, Florida, USA, resolution [AG/RES.2065 (XXXV-O/05)] on the "**Seventh Inter-American Specialized Conference on Private International Law**", it resolved:

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4 VILLALTA VIZCARRA, Ana Elizabeth. *Applicable Law and competence of international jurisdiction concerning non-contractual civil liability* (CJI/doc.130/03, July 29, 2003).
VÁZQUEZ, Carlos Manuel. Jurisdiction and choice of law for non-contractual obligations – Part II: specific types of non-contractul liability potentially suitable for treatment in an inter-American private international law instrument (CJI/doc.133/03), August 4, 2003).

1. To take note of the report of the Permanent Council concerning the Seventh Inter-American Specialized Conference on Private International Law, which set the following agenda:

a. Consumer protection: Applicable Law, Jurisdiction and Monetary Redress (Conventions and Model laws);

b. Secured transactions: Electronic Registries for Implementation of the Model the Inter-American Law on secured transactions.

2. To instruct the Permanent Council to establish a methodology for the preparatory work necessary to draft the inter-American instruments to be considered by the Seventh Inter-American Specialized Conference on Private International Law.

3. To instruct the Permanent Council to set the date and place for the Seventh Inter-American Specialized Conference on Private International Law.

4. To request the Inter-American Juridical Committee to present its comments and observations concerning the topics of the final agenda of the CIDIP-VII.

5. To instruct the Permanent Council that when, through its Committee on Juridical and Political Affairs, it considers future topics for upcoming Inter-American Specialized Conferences on Private International Law, it include, among others, the topic of an Inter-American Convention on International Jurisdiction.

6. To entrust the Permanent Council to follow up on this resolution, which will be implemented within the resources allocated in the program-budget of the Organization and other resources, and to present a report on its implementation to the General Assembly at 36th regular session.

In this codification work the Organization of American States (OAS) and the Inter-American Juridical Committee (IAJC) have contributed greatly to adopting regulations on disputes and uniform regulations that hope to bring the civil law closer to the common law systems and unify private international law.

Since 1975 the inter-American institutional framework of private international law was the **Inter-American Specialized Conferences on Private International Law**, which are convened by the Organization of American States (OAS) every four to six years and are known as **CIDIP** (*Conferencias Especializadas Interamericanas sobre Derecho Internacional Privado*), which to date has produced 26 international instruments, such as, for example, conventions, protocols, uniform instruments and model laws that have contributed substantially to the codification and unification of the private international law regulations in America.

The Organization of American States (OAS) in conjunction with the Inter-American Juridical Committee (IAJC) convened six Inter-American Specialized Conferences on Private International Law, known as CIDIP, held in Panama (1975), Montevideo (1979), La Paz (1984), Montevideo (1989), Mexico (1994) and Washington D.C. (2002), and is currently making all necessary preparations to convene the Seventh Specialized Conference on Private International Law.

BIBLIOGRAPHY

COMITÉ JURÍDICO INTERAMERICANO. *Informe sobre el Plan para el Desarrollo y Codificación del Derecho Internacional Público y del Derecho Internacional Privado*, 1949. *In*: Recomendaciones e informes del Comité Jurídico Interamericano: documentos oficiales – 1949-1953, p. 65-90.

MONROY CABRA, Marco Gerardo. *Tratado de Derecho Internacional Privado*, 1999.

ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. *Historia del Proceso de las CIDIPs. Oficina de Derecho y Programas Interamericanas. Departamento de Asuntos Jurídicos y Servicios Jurídicos de la Organización de los Estados* Americanos (OEA).

ORGANIZACIÓN DE LOS ESTADOS AMERICANOS. *Resoluciones de la Asamblea General, del Consejo Permanente y del Comité Jurídico Interamericano de la Organización de los Estados Americanos (OEA).*

Protocolo de Buenos Aires de 1967.

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CJI/doc.192/05

NOTE FOR THE INTER-AMERICAN JURIDICAL COMMITTEE ON CIDIP-VII

(presented by Dr. Antonio Fidel Pérez)

The General Assembly of the OAS has asked the Inter-American Juridical Committee to provide its views on the agenda that it has adopted for CIDIP-VII. The agenda sets forth two main topics: 1) Consumer Protection: Applicable Law, Jurisdiction, and Monetary Redress (Conventions and Model Laws); and 2) Secured Transactions: Electronic Registries Implementation of Model Inter-American Law on Secured Transactions. See AG/RES. 2065 (XXXV-O/05). Because no date or preparatory procedures have been set for CIDIP-VII, it may be premature for the Committee to offer its views in any detail on the specific proposals before the CIDIP. Nonetheless, in light of the request's reference to the possibility of different kinds of legal instruments and the issue of implementation, it may be useful for the Committee to begin to consider the kind of reply it should give to this request. This Note will analyze the circumstances of private law harmonization efforts in the western hemisphere. It will consider the different kinds of instruments that have been, are now, and in the future could be employed –namely, traditional treaties; model laws; framework agreements requiring domestic implementation; and regional economic integration agreements– to contribute to the goals of the inter-American community through the CIDIP process. It will describe the advantages and disadvantages of each of the possible mechanisms for harmonization. This Note will argue that the Committee should consider the possibility of advising the CIDIP not only on the specific features of the proposed agenda but also with respect to the possibility of encouraging the CIDIP to develop documents that will be in a form that can be implemented in various ways. This would be based on uncertainty, as discussed below, as to which method of legal harmonization ultimately should be employed as economic (and possibly political) integration continues to develop in the Americas.

This Note is only a preliminary exploration of systemic issues for the consideration of the Committee, whose discussion will inform the direction of future research and analysis for the preparation of a report that could serve as useful guidance for CIDIP-VII and beyond.

I. BACKGROUND: METHODS FOR PRIVATE LAW HARMONIZATION

A. Treaty Method

The traditional approach of CIDIP, which was created after the failed effort of the Inter-American Juridical Committee nearly half a century ago to facilitate amendment of the Bustamante Code for implementation in the hemisphere, tracks that of the Hague Conference on Private International Law. Like the Hague Conference, CIDIP focuses on identifying narrow issue-areas for the preparation of treaty instruments that will then be implemented in States, either as self-executing treaties or through virtually identical implementing legislation, depending on the internal constitutional order of the individual State. In short, the effort reflects a desire to produce narrowly tailored, incremental progress in private law harmonization. As is widely known, the process finds its roots in the First Congress on Private International Law held in Montevideo in 1888-89. It was convened by Argentina and Uruguay, largely in the belief that prospects for private law harmonization would be greater in the South American region –because of the economic, political and cultural similarities among the States of the region– than in a global process involving Europe and the United States. These visionaries also hoped that private law harmonization would yield immeasurable benefits, not only with respect to conflict resolution between persons of different States (and accordingly between the States

themselves) but also with respect to economic development of the region and its stature in the world. Given the relatively low adherence to many of the conventions submitted by the various CIDIPs, it is an open question whether detailed treaties that make little room for accommodating diverse local interests have proven, or will prove, the most effective vehicle for obtaining the commercial benefits of private law harmonization.

B. Model Laws

CIDIP-VI broke new ground in the private law harmonization process in the Americas by employing the method of proposing a model law governing an issue area, which would not be the subject of a duty for States to implement under international law but would instead serve as the basis for the enactment of comparable domestic legislation. Thus, the model law method presupposes that States will have an opportunity to take account of local differences, albeit at the cost of achieving the unifying effects of a single, unvarying set of commitment employed for the most part in the treaty process. The technique produced model laws, but there is no substantial evidence yet that the model law method has resulted in greater acceptance of the substantive legal norms developed at the CIDIP.

The method draws on the experience of federal States, which –for constitutional reasons analogous to limitations suggested by the desire of nation-States to preserve their internal sovereignty over certain matters– reserved certain areas of legislative jurisdiction to their States. For example, in the United States, the momentous Supreme Court decision of Erie Railroad v. Tompkins, 304 U.S. 64 (1938), ended the power of federal courts to make a general federal law common-law in cases that did involve federal statutory or constitutional law. Previously, the Supreme Court had authorized the creation of a federal common law, largely in commercial law, to govern dispute between citizens of different States adjudicated in federal courts. Thereafter, in the absence of statutory authorization, this federal judicial law-making power was limited to areas of special federal concern, such as maritime law, thereby leaving questions of commercial law to the States. Consequently, the American Law Institute (ALI) and National Conference of Commissions for Uniform State Laws (NCCUSL), both private organizations established for the purpose of seeking private law harmonization among the several States of the United States, prepared a series of model laws for State adoption in areas affecting interstate commerce. The most important example of this method was the creation of a model Uniform Commercial Code (UCC), covering sales, leases, negotiable instruments, and security interests, among other things. The method has not been used to create a model law for non-contractual obligations, such as torts, strict liability, or restitution, although Restatements that do not have the force of law but do operate as recommendations to the courts have been adopted by the ALI in these and other areas.

Recent efforts to amend the UCC suggest that the effectiveness of the model law process in the United States may have run its course. Some have suggested that the willingness of State legislatures to enact model laws, without significant amendments reflecting local interests, has diminished over time. They argue that private interest groups (including not only consumer and producer organizations but also other special interest groups, such as those committed to environmental protection and conservation, or human rights) have engaged more effectively in political participation at the State and local levels of government, as well as in private legislatures such as the ALI, NCCUSL. This appears to be increasingly true –even though, as political theory suggests, the *per capita* costs of such participation increase as one goes lower down the scale and size of government. One possible explanation is that the organization costs of interest groups is falling significantly, because of the communications revolution of the last two decades, so as to facilitate political involvement at lower levels of governance. (Indeed, predictions for increased special interest group participation in private and public processes that legal harmonization would appear to operate at all levels of government, including international conference such as at The Hague Conference and CIDIP.)

Whatever theory may predict, the NCCUSL's proposed amendments to Article 2 and 2A of the UCC –which, among other things, take into account electronic commerce

issues involving so-called shrink-wrap license agreements associated with computer software– have yet to be adopted by any State and has been proposed for enactment in only two States. See Legislative Fact Sheet (available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp). On the other hand, the proposed Uniform Electronic Transactions Act –which provides for the validity of digital signatures– has been widely adopted. See UETA: Legislative Fact Sheet (available at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp). Thus, some argue that the achievement of uniformity in the U.S. with respect to some of the substantive issues raised by electronic commerce, particularly with respect to software, may well require federal legislation. However, the jurisdictional requirement for federal legislation –namely, that it substantially affect inter-State commerce– suggests that harmonization through federal legislation will be difficult to satisfy for purely intra-State commerce. Nonetheless, given the constitutional grant of authority to the federal legislature to regulate foreign commerce, the harmonization of inter-State and international commerce would clearly be within the federal jurisdiction of the United States.

That said, in some cases, harmonization can also be achieved without resorting to national legislation or, in the case of federal States, even with State legislation to implement model laws. Rather, private-sector standard-setting organizations may be able to develop informal codes that facilitate international legal harmonization and thereby facilitate international trade. Governments could serve as facilitators for the development of such private standards without agreeing to adopt treaties, laws or regulations.

The next two methods both draw from regional economic integration programs, but they vary in terms of whether member States are given discretion in the means of implementation and precise content of the harmonization instruments (like model laws) or whether they must treat the harmonization instrument as fit for direct implementation under domestic law (like self-executing treaties).

C. Framework Conventions or Directives

The European Union (EU), by contrast, has more recently employed an alternative process –one combining the features permitting local variation and international obligation. (This Note will refer to the EU for purposes of simplification, although the precise institutional allocations of competence may actually involve other, subsidiary bodies.) The EU has directed its member States to implement certain supra-national policies. These Directives provide roadmaps for implementation and provide clear guidance on the substantive principles required to govern national implementing legislation. In a sense, therefore, they create a framework for implementation. They do not, therefore, always prescribe a precise set of rules; and, even when they do supply a set of rules, they do not require point-by-point uniformity. In short, Directives combine the international obligation component of treaties with the national discretion component of model laws. Their effectiveness, of course, depends on the existence of supervisory EU political institutions to police the process of implementation and, where necessary, intervention of the European Court of Justice to mandate compliance with the EU harmonization project. In short, the Directives succeed in combining an international legal obligation to implement broadly written instruments with reasonable accommodation of the need for local variation because the EU's institutional structure socializes and enforces an ethic of compliance.

D. Economic Integration Agreements

More recently, however, the EU has chosen to implement its harmonization agenda through EU Regulations, which function as supra-constitutional statutes capable of direct implementation under national law. An important example is the decision to implement the Brussels-Lugano Convention regime for the exercise of judicial jurisdiction and the recognition and enforcement of judgments in civil and commercial matters through an EU Regulation. Such Regulations are secondary law, subordinate to primary EU law found in the constitutive instruments of the EU, but they are superior to national law. Like a federal statute in the United States, then, Regulations provide a mechanism for direct private law

harmonization, and like federal statutes are superior to member State constitutions. Of course, it is still too early to say whether EU constitutive instruments will be more conducive to legal harmonization than the U.S. federal constitution has been thus far. However, the constitutional principle under EU law governing the allocation of authority between the EU and the member States –subsidiarity– does appear to seek the maximization of economic efficiency, perhaps making it even more conducive than U.S. federalism has been to centralization and legal harmonization.

There are other relevant precedents to legal harmonization through regional economic integration. For example, one could look to the U.S. Constitution –whose drafters, seeing the Constitution in part as a regional free trade agreement, included a clause requiring each State to give "full faith and credit" to the judicial judgments of the courts of other States. The WTO also has moved to harmonize certain areas of legal regulations, such as the regulatory principles contained in the so-called "reference paper" in the Fourth (Telecommunications Services) Protocol to the General Agreement on Trade in Services. See TELECOMMUNICATIONS SERVICES: REFERENCE PAPER, 24 April 1996 (Negotiating group on basic telecommunications) (available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.).

These efforts suggest that legal harmonization may well be as important in public law domains as they are in private law, as commerce increases in sectors that are subject to extensive governmental regulation. It is now argued by some that an extensive practice of private contracting, as well as other interactions giving rise to non-contractual obligations, now occurs in the shadow of pubic regulations. These developments call into question the distinction between public and private law, since so much private exchange is now occurring in a public context. Indeed, for many common law and civil law lawyers, it is shocking to discover the degree to which the two different systems vary in the treatment of even contractual rights as entirely private matters *versus* transactions clothed with public interests and reflecting public values. The erosion of the distinction may well provide an opportunity for legal convergence. In the immediate future, however, the convergence of public and private law will severely test the traditional limitation of the international law harmonization process to the domain of private law.

It may be useful, therefore, to review the constitutive instruments and practice of the various hemispheric regional free trade organizations to explore the degree to which instruments that were previously considered to fall within the category of private international law could be implemented within their frameworks.

II. ADVANTAGES AND DISADVANTAGES

It seems clear that, ordered in terms of the flexibility they give member States in implementing an inter- or supra-national or federal harmonization project, that model laws are preferable to directives; directives, and similar framework instruments, are preferable to regulations and other regional economic integration agreements; and regulations are preferable to treaties.

By parity of reasoning, ordered in terms of the degree of harmonization achieved through the precise and effective implementation of the substantive rules in a harmonization project, treaties (if widely-adopted) are superior to regulations and other regional economic integration agreements; regulations are superior to directives; and directives are superior to model laws.

On the other hand, it could be argued that there may well be situations in which greater and more precise harmonization will be achieved through model laws, because the process of adoption of model laws will entail States following the first State or group of States to adopt the proposed model in identical or virtually identical form. This might occur because the benefits of following the leader or group of first-movers, in such circumstances, will exceed the costs of satisfying local preferences. This might occur because the now certain benefits of harmonization in furthering cooperation would be measured against the uncertain benefits of varying from the proposed model. In short, adoption of model laws could be analogous to the development of international custom.

Of course, each of these general tendencies will be subject to issue-specific

variation. Increased precision and harmonization may well be extremely beneficial in contracting contexts with few effects on third parties, because legal clarity will dramatically reduce transaction costs for bargaining, contacting, and enforcement without any significant external costs. On the other hand, lost opportunities of increased precision may be lower in an area in which the gains from precision are small, making increased flexibility desirable in the context of maximizing the social benefits from avoiding excessive legal harmonization that reduces the ability of member States to meet their local needs.

There may be costs from flexibility in legal harmonization, however, that flow from the incentives it provides to States and interest groups to act strategically. Viewed from the domestic standpoint, if internal legislative processes are less transparent than the negotiating context that resulted in the harmonization agreement, flexibility in implementation may well provide an opportunity for interest groups to exert undue pressure in the implementation process, possibly reducing the value of the instrument to the nation as a whole. Furthermore, viewed from the standpoint of the international bargain resulting in the harmonization instrument, it is conceivable that claims that benefits would flow from flexibility would be asserted in bad faith; flexibility might serve, rather, as an opportunity to obtain the benefits from international legal cooperation without genuine commitment to bear the corresponding costs. As students of strategic behavior might be aware, the ability of States to re-negotiate the terms of implementation after the initial international bargain undercuts the willingness of States to bargain in the future, thereby reducing the utility of the negotiating forum. In other words, excessive flexibility resulting in opportunistic behavior undermines not only issue-specific cooperation but also the cooperative process as a whole. Thus, there are both issue-specific and systemic costs to excessive flexibility. Increased institutionalization, as suggested above in the context of the EU, may well be the only mechanism to control these systemic costs. In the absence of such institutions, it may well be that an effort to seek harmonization in issues for which the risk of such opportunistic behavior is great may well be counterproductive and should be developed in forms that will be implemented at the appropriate time only as part of larger efforts toward regional institutionalization of trade integration.

III. EVALUATION OF AGENDA – SYSTEMIC CONSIDERATIONS

One would imagine, therefore, that there is some optimal tradeoff between flexibility and precision in the harmonization process. It may be that the optimal tradeoff with respect to a single issue or set of issues, however, will be different when all the costs and benefits are taken into account from the standpoint of the process as a whole. Thus, the Inter-American Juridical Committee may wish to urge the CIDIP –at this critical moment when treaties, model laws, and other vehicles are all available models– to consider the system-wide implications of the kinds of instruments it chooses to propose to States as the fruit of CIDIP VII.

Attention to these issues might bring into focus questions of procedure in the drafting and implementation of CIDIP instruments that are relevant to avoiding harmful strategic behavior or incomplete information in bargaining and implementation. For example, it might be useful to encourage CIDIP to facilitate better coordination with institutions critical to implementation, such as national legislatures, State legislatures in federal States, civil society interest groups whose support may well be required for implementation, and secretariats of regional free trade organizations. One could imagine a number of ways in which this could be achieved, taking advantage of modern information management technology, such as internet WebPages and video-conferencing, in addition to the traditional mechanisms of experts' meetings, and the like, well in advance of a final diplomatic conference. Such mechanisms might well provide better vehicles for monitoring implementation and, at their most developed stage, convert the private law unification process in the Americas, which is now divided into temporal phases as determined by the political organs of the OAS, into a more continuous and self-reinforcing process.

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CIDIP-VII AND BEYOND

(presented by Drs. Carlos Manuel Vázquez and João Grandino Rodas)

At the 31st Regular Session of the General Assembly held in Costa Rica in June 2001, the General Assembly requested the Inter-American Juridical Committee "to initiate studies for the design of the agenda and topics of the next Inter-American Specialized Conferences on Private International Law (CIDIP) in order to promote the development of private international law in the inter-American system and to present its proposal during the next Specialized Conference (CIDIP-VI) to be held in Guatemala City in November 2001." (The venue and dates of CIDIP VI have since been changed. It will be held in Washington, D.C. in February of 2002.)

To that end, the Juridical Committee, with the assistance of the Secretariat for Legal Affairs, drafted and distributed a questionnaire soliciting the views of broad spectrum of parties interested in the CIDIP process, including member States, academics, members of the private bar, and officials of other organizations specializing in private international law. The questionnaire posed questions of both a specific and a general nature. The specific questions related to the topics that should be addressed in CIDIP and the process for both choosing topics and for working on the topics after they have been selected. The general questions sought the respondents' views concerning the approach to private international law harmonization and/or codification best suited to the American region in the 21st century. The questionnaire was sent to a large number of recipients in member States, with a request that it be forwarded to other parties who might be interested. The Committee requested responses by the end of July 2001. Despite the short period of time given to the recipients – a little more than a month – a large volume of responses was received. The responses are attached hereto as Appendix I.

This report describes some of the general themes that emerge from the questionnaire responses as well as some of the specific suggestions found in those responses. We also offer some thoughts regarding the topics suggested most often by the respondents as possible subjects of CIDIP-VII.

I. GENERAL THEMES

The responses expressed a wide range of views about the current state of the CIDIP process and the shape it should take in the future. Some respondents expressed the view that CIDIP is in a state of crisis.[5] Not all respondents shared this pessimism. Others expressed the view that CIDIP is basically on the right track, and that no major changes were necessary except an increased commitment by the OAS of the resources necessary for the effective execution of its tasks.[6] Nevertheless, for a variety of reasons, we believe that the time is ripe for a thorough, in-depth study of the future of CIDIP and private international law codification or harmonization in this hemisphere. The Inter-American Juridical Committee has, in accordance with the General Assembly's request, "initiated" such a study. For the reasons explained below, we propose that serious consideration should be given to the continuation and deepening of this project through the convening of a group of experts charged with conducting a wide-ranging study of The Role of CIDIP in the Twenty-First Century. We shall first enumerate the reasons why this is a propitious time to embark upon an in-depth study of the CIDIP process, and then we shall offer a few general suggestions about who should conduct the study and how.

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5 Response to OAS IJC CIDIP Questionnaire by Eduardo Vescovi of Uruguay, at 1. All responses to the CIDIP Questionnaire shall be hereinafter cited as "Response of . . . ".

6 Response of Harold S. Burman, U.S. Department of State.

A. Why Now?

1. Declining Level of Ratifications

The primary concern that has been expressed about the current state of CIDIP relates to the comparatively low level of ratifications of recent CIDIP instruments.[7] Early CIDIP conventions received a significant number of ratifications. For example, two of the early conventions received 17 ratifications, which is impressive by any standard. By contrast, some of the recent conventions have received less than two ratifications.[8] We recognize that the low level of ratifications of recent CIDIP instruments does not necessarily reflect a lack of influence. Some States that have failed to ratify CIDIP instruments have nevertheless used those instruments as models for domestic legislation on the pertinent subject.[9] Nevertheless, the significant drop in ratifications is one sign that the time may be right for a thorough study of the CIDIP process.

2. CIDIP-VI's Shift to Model Laws

The problem of decreasing ratifications may well already have been addressed through a change implemented in CIDIP-VI. In contrast to previous CIDIPs, which have elaborated draft conventions on traditional subjects of private international law, such as jurisdiction, choice of law, and enforcement of judgments, CIDIP-VI has focused on producing model laws on substantive topics of private (commercial) law. CIDIP-VI will consider for adoption a model law on secured financing as well as a model law on draft bill of lading for the carriage of goods by road. Some respondents praised this recent focus on model laws, while other respondents lamented it. Most respondents, however, observed that it was too soon to tell whether this was a positive development. One of the principal challenges to CIDIP is to decide whether it should remain focused on treaties addressing conflict of laws, or whether it should deal in greater depth with particular substantive topics through the elaboration of model laws. A thorough study of CIDIP after the conclusion of CIDIP-VI will permit a preliminary assessment of this question.

3. Duplication of Efforts

Concern has also been expressed regarding the duplication of effort that currently characterizes the field of private international law.10 At the global level, CIDIP competes with the work of organizations such as UNCITRAL, UNIDROIT, and the Hague Conference. Some respondents lamented the fact that the nations of Latin America tend not to participate in the work of the global organizations, preferring instead to devote their efforts to the CIDIP process.[11] Because resources are limited, many States in the region are understandably selective in their participation in harmonization efforts. One respondent expressed a preference for discontinuing the CIDIP process, thus making it more likely that Latin American States would participate in the global processes. Alternatively, respondents proposed that the CIDIP process devote its efforts to promoting the ratification by American States of the instruments adopted in the global

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7 *See, e.g.,* Response of Professor Juan Fernando Gamboa Bernante of Colombia and Response of Professors Martha Szeimblum, Eduardo Tellechea Bergman and Cecilia Fresnedo of Uruguay.

8 *The OAS web site (www.oas.org) shows the following data for ratification of CIDIP conventions: CIDIP-I – 1975 – Panama: Convention B-33 (14 ratifications), B-34 (9 ratifications), B-35 (17 ratifications), B-36 (17 ratifications), B-37 (15 ratifications), B-37 (15 ratifications), B-38 (16 ratifications); CIDIP II – 1979 – Uruguay: B-39 (8 ratifications); B-40 (8 ratifications), B-41 (10 ratifications), B-42 (7 ratifications), B-43 (12 ratifications), B-44 (6 ratifications), B-45 (10 ratifications), B-46 (13 ratifications); CIDIP III – 1984 – Bolivia: B-48 (4 ratifications), B-49 (3 ratifications), B-50 (1 ratification), B-51 (4 ratifications); CIDIP IV – Uruguay – 1989: B-53 (7 ratifications), B-54 (9 ratifications), B-55 (0 ratification); CIDIP V – Mexico – 1994: B-56 (2 ratifications*), B-57 (7 ratifications).

9 *See* Response of Professor Diego P. Fernández Arroyo of Spain, at 5 (citing the 1998 Venezuelan legislation on private international law as an example of the influence of CIDIP on domestic laws in Latin American nations).

10 *See, e.g.,* Response of Professor Alejandro M. Garro of the U.S. and Response of Szeimblum et al.

11 *See, e.g.,* Response of Professor Carlos Eduardo Boucault of France, at 4 (asserting that "there is a distancing between countries which adhere to CIDIP and organizations such as UNCITRAL and UNIDROIT.") (in translation).

fora, or to coordinating the American position for joint presentation at these global *fora*.[12]

4. Regionalism vs. Globalism

Duplication of effort is of course something to be avoided.[13] However, the preference of American States to participate in the CIDIP process may reflect their view that this process is more directly responsive to their needs than the global processes, or that they have more of a voice in the regional process.[14] Moreover, as noted by some respondents, regional attention to private international law questions that have already been addressed at the global level is not necessarily "duplication." Because there are fewer legal systems at the regional level than at the global level, and because the legal systems within any given region are less diverse, it may be possible to tackle a problem in greater depth at the regional level than at the global level. One respondent cites as an example of this phenomenon the work on secured financing being done in the course of CIDIP-VI. According to this respondent, while similar projects undertaken by UNCITRAL and UNIDROIT are "forward-looking and reflect modern trends in commercial finance, both are at the same time more narrow than the draft Inter-American model law which will be considered for . . . adoption at CIDIP-VI."[15]

The possibility of achieving a more useful, more far-reaching product at the regional level has encouraged the Europeans to address regionally many of the same matters that have already been addressed globally. It has been suggested that we in the Americas should not be hesitant to do the same.[16] We think that the appropriate relation between CIDIP and the work being done by other regional and global organizations working in the field of private international law is a subject worthy of more systematic study.

5. Increased Economic Integration in the Region

The regional effort to harmonize private international law in Europe has no doubt been spurred by the increasing economic integration of that continent. Numerous commentators have noted that increased economic integration brings with it an increased need for harmonization of private law or other mechanisms for addressing conflicts in regulation.[17] If so, then CIDIP may be more important now than ever. Numerous

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12 *See* Response of Garro, at 3 (stating that there should be Inter-American "representation" before the global bodies).

13 Some respondents indicated that duplication of effort is not a problem because competition between regional and global entities engaged in the same activity is more likely to produce a better end product. *See, e.g.,* Response of Gamboa Bernante, at 8. While this may be true in other contexts, however, in the field of harmonization of laws, the production of multiple products is counterproductive. *See, e.g.,* Response of Nathalie Sutter of UNIDROIT, at 1 (stating that "[d]uplication of work should certainly be avoided."); *see also* Diego P. Fernández Arroyo, *Derecho Internacional Privado Inter-Americano: Evolución y Perspectivas*, as published in CURSO DE DERECHO INTERNACIONAL DE LA OEA, August 1999, 189, 204 (hereinafter "DIPR") (citing Mexican and United States reluctance to consider civil liability for cross-border contamination as a CIDIP topic because this subject is already covered by a Hague Conference).

14 *See, e.g.,* Response of Arroyo, at 4; *see also* DIPR, at 215 (stating that "Latin American member States tend to view the CIDIP as more 'theirs' than any other form of private international law unification . . . All member States in the OAS have voice and vote, while the participation of Latin American countries in other fora, such as The Hague Conference, UNIDROIT and UNCITRAL, is more limited.") (in translation); Response of Boucault, at 4 (asserting that "there is a distancing between countries which adhere to CIDIP and organizations such as UNCITRAL and UNIDROIT.") (in translation); Response of Vivian Matteo of Uruguay, at 2 (asserting that "the OAS is in much better position than UNIDROIT to represent the interests of the states, because representatives of member States attend CIDIP conventions.") (in translation).

15 Response of Burman, at 4.

16 *See* Response of Arroyo, at 4 (indicating that participants in CIDIP seem to have a "complex" about addressing regionally matters that have been addressed globally). *Cf.* Response of Carmen I. Claramount, Foreign Affairs Ministry of Costa Rica, at 3 (calling for CIDIPs to "reinforce and modify" existing global instruments).

17 *See, e.g.,* Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, in ASIL NEWSLETTER (1996); Matthew W. Barrier, *Regionalization: the Choice of a New Millenium*, 9 CURRENTS INT'L TRADE L. J. 25 (2000) (stating that "harmonization and approximation of laws is a natural by-product of regional integration."); *see also* Responses of Professor Adriana Dreyzin of Argentina, Professor Claudia

subregional free trade areas have been established in this hemisphere, including the North America Free Trade Area (NAFTA), Mercosur, the Andean Pact, the Central American Common Market (CACM), the Caribbean Community (Caricom), and the Group of Three. More importantly, the continent has embarked in an ambitious effort to create a hemispheric free trade area, the Free Trade Area of the Americas (FTAA), by the year 2005.

Some respondents expressed the view that the FTAA would make a continuation and even an intensification of the CIDIP process indispensable.[18] At the same time, however, the advent of economic integration in the hemisphere increases the need for a reexamination of the existing approach to the codification and harmonization of private international law. The approach to private international law codification and/or private law harmonization that is most appropriate in the context of a hemispheric free trade area may well be very different from the approach that has prevailed until now.

6. The Need to Formalize CIDIP's Procedures

A number of respondents saw a need for formalization of CIDIP's procedures, beginning with the preparation of preliminary studies and the choice of topics and culminating in the CIDIP conferences themselves. Many respondents proposed that the Inter-American Juridical Committee should play a central role in a more formalized CIDIP process. Others suggested the establishment of a permanent CIDIP secretariat. Numerous respondents expressed the view that the CIDIP process requires a greater commitment of resources. A detailed proposal for formalizing and perhaps institutionalizing the CIDIP process should be a central part of the in-depth study of the future of CIDIP.

For all of the foregoing reasons, we conclude that this is a propitious time for a thorough study of "The Role of CIDIP in the Twenty-First Century." We propose that the conduct of this study be a priority item for CIDIP-VII.

B. Who Should Conduct the Study and How

The proposed study should be carried out by a small group of experts, ideally consisting of no more than three persons. The members of the working group should be selected by the Inter-American Juridical Committee, and should include jurists broadly representative of the legal traditions of the Americas. This group should perform the study in close collaboration with the Inter-American Juridical Committee. The study, when completed, should be submitted to the Inter-American Juridical Committee, which should in turn review it and transmit it, with suitable comments and recommendations, to the Permanent Council.

The IAJC is the appropriate organ to supervise the conduct of this study because it is the organ charged by the *Charter* with the responsibility "to promote the progressive development and the codification of international law; and to study juridical problems relating to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation."[19] A substantial majority of those who responded to the questionnaire expressed the view that the Inter-American Juridical Committee should play the central role in determining the topics to be addressed in the CIDIP process, and a large number of respondents believed that the Committee should also play a central role in directing the work on the topics once selected.[20] As numerous respondents noted, however, the Committee will need the assistance of outside exerts to conduct this study. The field of private international law codification and private law harmonization has become increasingly specialized in recent years, and the increasing links to economic integration have already

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Lima Marques of Brazil, Hermes Navarro del Valle of Costa Rica, Horacio Bernardes Neto of Brazil, Professor Mirta Consuelo García of Argentina, Victor Alvarez de la Torre of Mexico, Arroyo, and Szeimblum et al.

18 *See, e.g.,* Responses of Dreyzin, Arroyo, and Szumblum et al.

19 OAS *Charter*, art. 99.

20 *See, e.g.,* Responses of Analia Consolo of Argentina and Mauricio Herdocia Sacasa of the United Nations International Law Commission (UNILC).

been noted. Traditional "specialists" in private international law tend to be generalists. For this reason, it is essential to convene a group of outside experts that unites the breadth and depth of expertise necessary to perform the study.

Designing the study will of course be the first item on the agenda of the group of experts. This is not the place to explore the details of how the project should be carried out. We do recommend, however, that serious consideration be given to the suggestion of one respondent that a series of subregional meetings (*jornadas*) be organized, dedicated to broad-based discussions of the future of CIDIP. [21] It is essential that the study take into account the views of a broad *spectrum* of interested parties. Subregional *jornadas* would provide an appropriate mechanism for a thorough, hemisphere-wide airing and discussion of the question of CIDIP's future.

II. Possible Topics for CIDIP-VII

Recipients of the questionnaire were asked their views on which topics they regarded as the most pressing and appropriate for treatment in CIDIP-VII. A large number of topics were proposed. Attached as Appendix II is a list of the topics suggested by respondents to the questionnaire, ranked according to the frequency with which they were cited. The most frequently cited topic was electronic commerce. Other topics frequently cited in the responses include: (a) migration and free flow of persons; (b) arbitration and dispute resolution; (c) consumer protection; and (d) the protection of minors. [Another proposed topic that we think deserves consideration for possible treatment in CIDIP-VII is that of transnational insolvency.] We recommend that topics mentioned above be given priority consideration in CIDIP-VI as possible topics for CIDIP-VII.

With few exceptions, the respondents did not explain their reasons for believing that the topics they proposed were appropriate for treatment through the CIDIP process at this time. This forbearance on the part of the respondents is due, no doubt, to their recognition that the selection of topics for CIDIP-VII will at all events require substantial preparatory work by the Secretariat for Legal Affairs and/or outside experts on the topics being considered, including a collection of data concerning the internal laws of the member States on the various topics and the preparation of analyses of prior efforts to address the issue internationally and of the feasibility of successfully addressing the topic in this region. It will also require a determination of the political interest of the member States in addressing the topic through CIDIP. For these reasons, it is impossible to do more at this stage than put forward a number of general topics that seem worthy of further consideration as possible subjects to be addressed in CIDIP-VII. These topics should be discussed at CIDIP-VI, and those that seem most pressing and most appropriate for treatment at a regional level should then be the subject of further preparatory work before being approved definitively as the topics to be treated in CIDIP-VII.

For the purpose of facilitating discussion, we offer a few thoughts on each of the topics listed above:

Electronic commerce. E-commerce is of course a very recent phenomenon, made possible by the recent and rapid development of the internet. The novelty of the subject means that few States have developed regulations specifically for this type of commerce. Most States today regulate e-commerce through regulations developed for more conventional forms of commerce. The first question to be considered is whether e-commerce is a sufficiently different form of commerce that it deserves distinct regulatory treatment. Our respondents' proposal of e-commerce as a topic for CIDIP-VII that they believe this subject does deserve distinct treatment. In the light of the substantial work that has already been done on this topic at both the global and regional levels, we are inclined to agree.

The next question is whether the subject deserves to be treated at the regional level. As noted, few member States have developed regulations dealing specifically with

[21] Response of Arroyo, at 1.

e-commerce. It may well be preferable to allow the member States to experiment with domestic regulation, and to address the subject regionally only after the states have acquired a bit of experience with domestic regulation. On the other hand, because e-commerce is very likely to cross national borders, it seems likely that regional treatment will be desirable sooner or later. It may thus be preferable to address this novel topic internationally before a wide variety of approaches to the subject emerges at the national level. Once States begin to develop their own approaches to the subject, it may become more difficult to reach agreement on a uniform regional approach.

An important related question is whether it will be possible to reach agreement on how to regulate this topic. There are those who take the position that e-commerce should be left unregulated to the extent possible -- that regulation will hinder innovation in this still emerging area. On the other hand, some regulation is unavoidable: fraud and other deceptive practices, for example, cannot be left unregulated. The form and extent of appropriate regulation in this area is of course the key question that would be addressed in the course of the CIDIP process. But if there exists too wide a range of views on appropriate approaches to regulating e-commerce, this may suggest that it is too soon to begin an effort to establish a uniform regional approach to this issue. Even if this were the case, however, it may be possible to agree to prohibit certain approaches to the topic, thus limiting permissible regulation to a narrower range. It may also be possible and desirable to pursue the more modest goal of agreeing on the applicable law and approaches to jurisdiction with respect to disputes involving e-commerce.

Aspects of e-commerce have been addressed at both the global and regional levels. UNCITRAL has a Working Group on E-Commerce, which so far has produced a Model Law on Electronic Commerce (1996)[22] and a Model Law on Electronic Signatures (2001).[23] Legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted in Australia, Bermuda, Colombia, France, Hong Kong Special Administrative Region of China, Ireland, Philippines**,** Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) and, within the United States of America, Illinois. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and in the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted as law by a number of jurisdictions in those countries. The UNCITRAL Working Group has also produced a "preliminary draft convention on [international] contracts concluded or evidenced by data messages,"[24] and its agenda includes as well (a) the identification and elimination of barriers to e-commerce present in existing treaties, (b) dematerialization of documents of title, (c) and electronic dispute resolution.

At the regional level, the European Union has issued Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the international market, as well as Directive 1999/93/EC of December 13, 1999 on Electronic Signatures.

In the view of the Juridical Committee, this is clearly a topic that deserves priority consideration for treatment at a future CIDIP. We recommend that this topic be the subject of further preparatory work to determine if now if the time to treat it at the inter-American level.

Consumer Protection. The topic of consumer protection overlaps significantly with that of e-commerce, but it is in some respects narrower and in some respects broader. It is narrower because not all e-commerce involves consumers. It is broader because there is a need for consumer protection with respect to non-electronic as well as electronic commerce. The need for transnational consumer protection is particularly acute with respect to electronic commerce, however, because "the online environment provides

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22 Available at www.uncitral.org/english/texts/electom/ml-elecsig-e.pdf.

23 Available at www.uncitral.org/english/texts/electcom/ml-elecomm.htm.

24 Available at http://www.uncitral.org/en-index.htm.

unprecedented opportunities for fraudulent, dishonest or unfair businesses to target consumers from a different jurisdiction and evade enforcement authorities."[25] Since e-commerce has been suggested as a separate topic, one issue to be considered is whether consumer protection in the field of e-commerce should be addressed as part of the e-commerce topic or the consumer protection topic.

Harmonization of consumer protection rules can be expected to increase transnational commerce in consumer goods. Wide discrepancies in national consumer protection laws can be expected to produce a lack of consumer confidence to participate in cross-border transactions, which in turn deters small and medium-sized businesses from offering their products abroad. It is for this reason that the European Union has given priority to this topic. Even though there exist numerous directives of the European Parliament and Commission relating to various aspects of consumer protection, the Commission has perceived a need for more comprehensive and systematic treatment of the subject. It has accordingly undertaken several studies of the subject, and it has issued a Green Paper on European Union Consumer Protection. The Green Paper is a consultation document that outlines possible options for consumer protection in the EU and seeks comments from interested parties as to the desirability of pursuing the subject and the possible directions for pursuing it. The Green Paper requests that comments be submitted by January 15, 2002.

In the Western Hemisphere, a model law on consumer protection has been drafted by Consumers International's Regional Office for Latin America.[26] The first version of the model law was issued in 1987, and an updated version in 1994. The model law was drafted "in a consultation process with experts convoked under the CI umbrella – and not by governments."[27] According to Consumers International, the model law "has been used for drawing up national legislation in 14 Latin American countries (including Brazil, Argentina, Ecuador, Peru, Mexico, Nicaragua, Costa Rica, and Chile)."[28] Nevertheless, Consumers International believes that additional work is necessary because "these national laws do not necessarily include all the provisions of the model law," and "[o]ther countries, such as Bolivia, Uruguay and Guatemala, still lack specific consumer protection legislation."[29] This view accords with that of some of our respondents, who observed that most Latin American countries lack laws protecting consumers in the areas of accidents caused by defective products, injuries suffered by tourists, and marketing fraud.[30]

At the subregional level, there have been attempts to address consumer protection within Mercosur. Consumer Defence Regulations were developed over four years by a technical commission of Mercosur. They were to be signed in December 1997, but they were opposed by consumer groups in Brazil, who believed that the regulations would have weakened consumer protection in that country, and the regulations were not adopted when the Brazilian delegation refused to sign them. The technical commission then abandoned the idea of developing a comprehensive text and instead pursued the harmonization of specific aspects of consumer protection.

Migration and Free Flow of Persons. This is a topic that appears to extend well beyond the scope of private international law and into the realm of public international law. Determining who can enter a country's territory and under what circumstances has traditionally been considered among the most basic attributes of sovereignty. On the other hand, reducing restrictions on immigration and free flow of persons often goes hand in hand with increasing economic integration. The increasing economic integration of the hemisphere may thus warrant a focus on this topic. However, because of the link to the

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25 Commission of the European Communities, GREEN PAPER on European Union Consumer Protection (2.10.2001).

26 Consumers International, "Roads to Consumer Protection," available at http://www.consumersinternational.org/rights99/section1.html

27 Id.

28 Id.

29 Id.

30 Response of Lima Marques, at 1.

ongoing FTAA negotiations, and because this topic extends well beyond the realm of private international law as traditionally understood, we recommend that the advisability of addressing this topic through CIDIP be considered as part of the broader study of the future of CIDIP proposed in Part I of this report.

Arbitration and Dispute Resolution. This topic has of course been addressed at the global level through the New York Convention.[31] In addition UNCITRAL has done much work in this field. The UNCITRAL Arbitration Rules are widely used. UNCITRAL's Model Law on Commercial Arbitration has been has been incorporated into the domestic law of numerous states. The UNCITRAL Working Group on Arbitration is studying adherence to the model law. Other priority items listed on its September 20, 2001 agenda include drafting uniform rules on the issues of (1) conciliation, (2) requirement of a written form for the arbitration agreement, (3) enforceability of interim measures of protection, and (4) enforcement of an award that has been set aside in the State of origin.

At the regional level, aspects of this topic have been addressed through Inter-American Convention on International Commercial Arbitration[32] adopted at CIDIP-I now having 17 ratifications, as well as the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards[33] adopted at CIDIP-II having 10 ratifications.

The respondents who explained their interest in this topic appeared interested primarily in dispute settlement related to free trade agreements and/or the resolution of investment disputes between private companies and the state. [34] While further discussion may reveal the need to address this topic now, it may be preferable to defer this topic until the FTAA negotiations are further along.

Protection of Minors. At the global level, aspects of this topic have been addressed in the Hague Convention Concerning International Child Abduction,[35] Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Minors,[36] the 1993 Hague Intercountry Adoption Convention, the Hague Maintenance Obligations Conventions and the New York Convention of 10 June 1956 on the Recovery Abroad of Maintenance.

In the Americas, aspects of the topic have been addressed in the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors[37] adopted at CIDIP-III and now having 4 ratifications; the Inter-American Convention on the International Return of Children[38] adopted at CIDIP-IV and now having 7 ratifications; the Inter-American Convention on Support Obligations[39] adopted at CIDIP-IV and now having 10 ratifications; and the Inter-American Convention on International Traffic in Minors[40] adopted at CIDIP-V and now having 9 ratifications. Respondents who proposed this topic identified family relations, patrimony, custody, and visitation as issues that could be addressed.[41]

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31 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

32 Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (1975).

33 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 18 I.L.M.1224 (1979).

34 *See, e.g.,* Response of Professor Francisco Orrego Vicuña of Chile.

35 Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (1980).

36 Oct. 19, 1996, 35 I.L.M. 1391 (1996).

37 Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, 24 I.L.M. 460 (1984).

38 Inter-American Convention on the International Return of Children, Jul. 15, 1989, 29 I.L.M. 63 (1990).

39 Inter-American Convention on Support Obligations, Jul. 15, 1989, 29 I.L.M. 73 (1990).

40 Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, 33 I.L.M. 721 (1994).

41 Response of Tatiana B. de Maekelt of Venezuela.

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5. Consideration on the codification and standarization of international law in the Americas

Resolution

CJI/RES.83 (LXVI-O/05)	*Reexamining the inter-American conventions on Private international law*

Documents

CJI/doc.178/05 corr.1	*Re-examining the inter-American conventions on Private international law and the CIDIP-VII* (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.193/05	*The Inter-American Juridical Committee on the codification of private international law and preparation of the Seventh Inter-American Specialized Conference on Private International Law* (presented by Dr. Ana Elizabeth Villalta Vizcarra)

The Inter-American Juridical Committee decided in August 2004 to include in its agenda the topic on re-examining the inter-American conventions on private international law, in addition to the topic on the CIDIP-VII. It also requested the rapporteurs Drs. Ana Elizabeth Villalta and João Grandino Rodas to present some progress report on such a re-examination at the next regular session. On December 6, 2004, the General Secretariat sent to the two rapporteurs a bibliography and a list of the reports done by the Inter-American Juridical Committee from 1948 until now on the reform of the Bustamante Code to serve as a basis for their respective reports.

At its 66th session of the Inter-American Juridical Committe (Managua, February 28–March 11, 2005), Dr. Galo Leoro stated that the re-examination of inter-American conventions on private international law posed some problems, because said re-examination could only be made by the Parties. The Committee could be initiating work that would eventually come to naught without the proper political backing. Dr. Ana Elizabeth Villalta explained that the objective of this topic was not to rewrite the conventions, but to examine the reasons why the States have not yet ratified most of the legal instruments related to private international law, as well as to examine the viability of model laws as an alternative. Dr. Galo Leoro concurred with these reasons and proposed to vary the title of the topic so that it may reflect the nature of the study to be undertaken by the Committee.

At this session, the Inter-American Juridical Committee examined the document CJI/doc.178/05 corr. 1, “Re-Examining the Inter-American Conventions on Private International Law”, presented by the rapporteur of the topic, Dr. Ana Elizabeth Villalta. The rapporteur stated that the report had yet been discussed with the other co-rapporteur, Dr. João Grandino Rodas. She added that the purpose of the report was to identify the role that the Juridical Committee had assumed in the several Specialized Conferences on the subject.

In her report, the rapporteur notes that the legal framework for private international law in the inter-American system is composed of conventions, protocols, model laws, legislative guidelines, uniform documents, as well as documents and instruments that regulate relations between individuals within an international context. It also reviews the results of the different Specialized Conferences on the subject. The rapporteur also made reference to the preparations for CIDIP-VII and to the topic proposals made by several countries. She stressed that since CIDIP-IV the number of ratifications by member States has diminished and the number of States participating in these Conferences has also been reduced. For this reason she proposed to continue strengthening the process of CIDIPs as the appropriate venue for the codification and progressive development of the international law of the

Americas, promoting both the traditional and the modern approach, which includes the harmonization of substantive laws. She also suggested that, in the preparatory work for CIDIP-VII, the constitution of a commission to analyze the reasons for the decreasing number of ratifications and for the absence of the application of model laws should be planned.

Dr. Luis Marchand remarked that the fact that, out of 24 inter-American conventions on private international law, 23 are in force does not necessarily mean that these 23 conventions are generally applied, because many of them come into force with only two ratifications. He also noted the fact that some of these conventions largely coincide in substance with universal conventions, which raises a question about a possible duplication of effort. He further noted that it would be advisable to analyze the degree to which said inter-American conventions replicate the universal ones. Regarding model laws, he said that these can be useful tools, such as in the topics related to corruption, which derive from a specific treaty; although in other cases they do not necessarily tend towards uniformity.

Dr. Galo Leoro Franco addressed the reasons why the States do not ratify some of the conventions on private international law, and suggested that the Committee establish communication with them to obtain information on their reasons. This could constitute a process of self-reflection for them. He also indicated that the fact that there are so many conventions in the inter-American sphere makes the situation more problematic, especially due to the nature of the Bustamante Code and the rest of the conventions, which makes it of difficult application domestically by judges. He noted that, based on the rapporteur's report, the irregularities that have occurred within the CIDIPs' framework should be examined; for example, some of the conventions in private international law were not initiatives of the Juridical Committee, nor were they subjected to its review, which in turn caused a certain lack of harmonization of the norms that derived from said conventions.

Dr. Antonio Fidel Pérez inquired whether it was sensible to continue adopting model laws and about the way to do it. He proposed an evaluation of their benefits to date. He indicated that the process of adoption of model laws in Europe and the United States stems from their orientation towards uniform markets, and suggested that it would be wise to study this process in the community of States of the hemisphere, in order to determine the kind of model laws that are needed.

Dr. Stephen Vasciannie inquired about the reasons why the Caribbean has stood apart from this process. First, he noted, these norms are not sufficiently circulated in the Caribbean. There is also a perception that uniform rules are not necessary since judges already have the necessary tools to resolve eventual problems. On the other hand, most of the problems related to conflict of laws in the Caribbean could eventually arise with Canada or Europe, but not with the Latin American countries. In addition, the large number of existing treaties makes the process of their ratification too complex. Lastly, he noted that the Caribbean might find the ratification of world conventions more useful than regional conventions, considering that there is considerable overlap in their rules.

Dr. Luis Herrera Marcano stated that the CIDIPs have already dealth with the most important subjects and that now the effort seemed to have borne fruit on a universal scale. The lack of mechanisms to drive the process of ratification is evident. He suggested that the next CIDIP analyze the conventions that have been adopted, and study the reasons why they have not been widely ratified. He stressed that this did not mean to revise approved texts, but to strengthen the system as a whole, by obtaining valuable information allowing reflection on the problem.

Dr. Mauricio Herdocia Sacasa addressed the importance of the need of regional norms on private international law, without diminishing world norms, since with regional norms the peculiarities of the countries of the continent can be preserved.

At this session, the Inter-American Juridical Committee adopted resolution CJI/RES.83 (LXVI-O/05), "*Re-examining Inter-American Conventions on Private International Law,"* in which it welcomed with approval the aforementioned document CJI/doc.178/05 corr.1 and requested the rapporteurs on the topic to continue their in-depth analysis on this topic in order to present conclusions and recommendations to the 67th regular session of the Inter-American Juridical Committee. It also recommended to the Permanet Council in the same resolution that in the upcoming CIDIP-VII include in its list of topics the analysis of the reasons for which several inter-American conventions on international private law adopted within the framework of CIDIPs, as yet, do not have a significant number of ratifications by the OAS member States, as well as the degree to which model laws have been incorporated into national legislation by member States, taking into account the referred report CJI/doc.178/05 corr.1, and the report presented by the rapporteurs.

Finally, the Juridical Commitee decided to add Dr. Antonio Fidel Pérez as co-rapporteur on the topic, along with Dr.s Ana Elizabeth Villalta and João Grandino Rodas.

On May 13, 2005, the General Secretariat conveyed a verbal note to the Permant Missions at the OAS, to which the resolution of the Inter-American Juridical Committee was attached, and in which it informs that all the documentation referred to in same can be found on the OAS website.

At its 35th regular session (Fort Lauderdale, June 2005), in resolution AG/RES.2069 (XXXV-O/05) "*Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee*," the General Assembly requested this Organ to continue its review of the situation of private international law in the Americas.

During its 67th regular session (Rio de Janeiro, August, 2005), the Inter-American Juridical Committee examined document CJI/doc.193/05, *The Inter-American Juridical Committee in the codification of international private law and the preparation of the Seventh Inter-American Specialized Conference on International Private Law*, presented by Dr. Ana Elizabeth Villalta Vizcarra.

The rapporteuse of the topic indicated that the report was prepared in compliance with the mandate of the General Assembly, and deals with the antecedents of international private law in the Americas before and during the CIDIPs.

Dr. João Grandino Rodas suggested proposing in a final report on the topic an update of the norms established a long time ago (codes and conventions), seeing that these arose in another reality and did not have the contribution of countries like Canada, the United States and the countries of the Caribbean, so they fail to account for the new panorama of hemispheric reality. He also claimed that there exists a generalized crisis in the various processes of codification of international private law on the world level, both because of the nature of the instruments which support them (treaties and model laws) and because of the amount of ratifications to these conventions. He expressed the opinion that the framework of the processes of harmonization or standardization had never been assessed. He pointed out that it was more and more difficult to codify and even more difficult to ratify the conventions and that many of the Inter-American treaties had fallen into disuse, in other words, it has been a long time since anyone invoked them. That is to say, they are no longer being used. He also suggested re-evaluating the rule that a convention comes into effect with only two ratifications, and to examine if the norms already in place are suitable to the reality of the Caribbean countries and the United States and Canada.

Dr. Galo Leoro Franco was of the opinion that the CIDIPs have to be organized in accordance with the juridical necessity of the States rather than their periodicity. He expressed the idea that the *Bustamante Code* exists and so do other more specific treaties that contain norms contrary to the *Bustamante Code*, which creates a problem for the countries that are party to all of them. He also sees the need to evaluate the benefits of the

Bustamante Code continuing to be in effect or not, seeing that some States may find themselves obliged not to ratify specific treaties due to the problem of compatibility. He also pointed out that the work to be undertaken by the Juridical Committee was important, although complex. On dealing with this theme, he said, the Committee has to face the possibility that the ensuing result may not be sufficient justification for the States to want to proceed towards new instruments on the matters in question.

Dr. Antonio Fidel Pérez, in turn, suggested that the role of the Inter-American Juridical Committee should not be primarily to draft texts but rather to analyze institutional processes and develop criteria on the circumstances in which a model law could be more or less useful than a treaty.

Dr. Stephen C. Vasciannie expressed the opinion that one of the reasons why the process of harmonization or standardization had not become generalized in the Caribbean was that when a problem arose that had to be solved on the legal level, generally the countries of the Caribbean did not concern themselves with what was happening in Latin America but rather the way that the law could attend to the specific circumstances and problems faced by the country in question. Following this intervention, Dr. João Grandino Rodas indicated that it was more necessary than ever before to re-evaluate the process in the whole process of drawing up norms of international private law. The key question, according to him, was whether the countries of the Americas today felt the need to standardize or harmonize the law.

Dr. Ana Elizabeth Villalta Vizcarra also considered that it was important not only to know how many States had ratified certain conventions but also how many were actually applying them.

Following this same line of thinking, Dr. Luis Herrera Marcano emphasized once more that the number of ratifications received by a convention does not necessarily define its utility. It is the use and intensity of such use by the States Parties that defines their utility. He gave the example that only two States might have ratified a convention but that it was precisely a useful instrument for these States in their mutual relations, and so was widely used.

Dr. Luis Marchand Stens asked the rapporteurs that when they study this topic they should bear in mind the specific reality and requirements, without neglecting the importance of the processes for the CIDIP.

The Chairman of the Inter-American Juridical Committee, given the doubts expressed by some members, indicated that the theme of re-examining the conventions on international private law should be developed without jeopardizing the considerations that the Committee should offer regarding the agenda of the next CIDIP-VII, and recalled that a decision already taken by the Juridical Committee was to recommend the CIDIP-VII to include in its agenda the theme of re-examining the Inter-American conventions on international private law.

It was finally agreed that the name of the topic would be changed to “Process of reflection on the Inter-American conventions on international private law”.

Following is the text of the resolution approved by the Inter-American Juridical Committee and the two reports submitted by the rapporteuse during 2005.

CJI/RES.83 (LXVI-O/05)

REEXAMINING THE INTER-AMERICAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING NOTE of document CJI/doc.178/05 corr.1, "Reexamining the inter-American conventions on international private law and the CIDIP-VII", presented by one of the rapporteurs, Dr. Ana Elizabeth Villalta Vizcarra;

CONSIDERING the in-depth analysis that took place during the Juridical Committee session on re-examination of the Inter-American Conventions on International Private Law;

BEARING IN MIND efforts carried out in relation to preparations for the Seventh Inter-American Specialized Conference on International Private Law (CIDIP-VII);

RESOLVES:

1. To welcome with approval document CJI/doc.178/05 corr.1, "Reexamining the inter-American conventions on international private law", presented by one of the rapporteurs on the topic, Dr. Ana Elizabeth Villalta Vizcarra.

2. Request the rapporteurs on the topic, Drs. Ana Elizabeth Villalta Vizcarra, Joao Grandino Rodas and Antonio Fidel Pérez to continue their in-depth analysis on this topic in order to present conclusions and recommendations to the 67th Regular Session of the Inter-American Juridical Committee.

3. Recommend to the Permanent Council that in the upcoming CIDIP-VII include in its list of topics: an analysis of the reasons for which several inter-American conventions on international private law adopted within the framework of CIDIPs, as yet, do not have a significant number of ratifications by the OAS Member States, as well as the degree to which model laws have been incorporated into national legislation by Member States, taking into account the referred report CJI/doc.178/05 corr.1, "Re-examining the inter-American conventions on international private law", and the report presented by the rapporteur.

The present resolution was adopted at the session held on March 9, 2005 by the following members: Drs. Mauricio Herdocia Sacasa, Jean-Paul Hubert, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra, Antonio Fidel Pérez, Stephen C. Vasciannie, Luis Herrera Marcano and Galo Leoro Franco.

* * *

CJI/doc. 178/05 corr.1

RE-EXAMINING INTER-AMERICAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW AND THE CIDIP-VII

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

In its 65th Regular Session, held on August 2 – 27, 2004 in Rio de Janeiro, Brazil, the Inter-American Juridical Committee adopted Resolution CJI/RES. 78 (LXV-O/04), by which it approved the agenda for its 66th Regular Session, to be held from February 28 to March 11, 2005. The Committee approved the topic "Re-examining the Inter-American Conventions on Private International Law," under number 7 of the agenda's "Topics under Consideration," as well as the topic entitled "Seventh Inter-American Specialized Conference on Private International Law" under point 3 of "Topics for Follow-up." The rapporteurs of both topics are Drs. João Grandino Rodas and Ana Elizabeth Villalta Vizcarra.

Based on the above, this reportership presents a preliminary progress report on both topics, to be submitted for consideration and initial debate to the Inter-American Juridical Committee in its 66th Regular Session.

In the inter-American system, the juridical framework of private international law is constituted by: conventions, protocols, model laws, legislative guidelines, uniform documents, as well as documents and instruments that regulate relations between individuals within an international context, given that the essence of private international law is to regulate the relations between individuals from different States.

Within the inter-American sphere, the codification of private international law has been one of the States' permanent juridical activities since the final decades of the nineteenth century.

As of 1975, **Inter-American Specialized Conferences on Private International Law** have been the inter-American institutional framework for private international law. Said conferences are convened by the Organization of American States (OAS) every four to six years and are known as CIDIPs (Inter-American Specialized Conferences on Private International Law), which to date have produced 26 international instruments including conventions, protocols, uniform documents and model laws that have contributed substantially to the codification and standardization of the rules of private international law in the Americas.

The **First Inter-American Specialized Conference on Private International Law (CIDIP-I)** was held in Panama City on January 14 - 30, 1975.

This had as antecedents: the mandate given to the Inter-American Juridical Committee by the Inter-American Council of Jurists: to prepare a study on "the possibility of revising, as appropriate, the Bustamante Code (adopted at the Sixth International Conference of American States, held in Havana, Cuba, in 1928, as the single code of private international law), in light of the Montevideo Treaties of 1888-1889 and 1939-1940 (approved in the South American Congresses of Private International Law, held in Montevideo, Uruguay) and the Restatement of the Law of Conflict of Laws, (prepared by the American Law Institute), in order to unify these three codes."

Beginning in 1951, the Inter-American Juridical Committee prepared several reports about the method that could best be used to carry out codification in order to promote standardization of the rules of private international law of the different countries of the Americas. The Committee prepared a comparative study of the Bustamante Code, the Montevideo Treaties and the Restatement of the Law of Conflict of Laws, submitting its report to the governments for consideration. Only the United States and Ecuador sent observations. At this time, the United States considered that it would be impossible to harmonize the Restatement with the Treaties of Montevideo and the Bustamante Code.

The Inter-American Juridical Committee continued with the review upon which it had embarked. In 1959, the Council of Jurists urged the Inter-American Juridical Committee to continue review efforts in order to ensure standardization of the rules of private international law of American nations, attenuating reservations made with respect to the Bustamante Code.

In 1965, the Inter-American Juridical Committee recommended that a Specialized Conference be held to review the preliminary heading prepared by the Committee, entitled "International Civil Law and International Commercial Law," and that the conference use as a working document the Draft Code of Private International Law prepared by Dr. José Joaquín Caicedo Castilla (member of the Inter-American Juridical Committee.)

In Resolution AG/RES. 48 (I-O/71), approved on April 23, 1971, the OAS General Assembly convened the Inter-American Specialized Conference on Private International Law, entrusting the Permanent Council with the preparation of a draft agenda and conference regulations, and entrusting the Inter-American Juridical Committee with the preparation of studies, reports and draft conventions necessary for use in the Conference.

Through Resolution CP/RES. 109 (120/74), dated March 20, 1974, the Permanent Council designated Panama City as the venue of the Conference and presented the following draft agenda:

1. Multinational commercial companies
2. Commercial companies
3. International purchase / sale of goods
4. International bills of exchange, checks and promissory notes
5. International commercial arbitration
6. International maritime transport, with special reference to bills of lading
7. Application of letters rogatory
8. Taking of evidence abroad in civil and commercial affairs
9. Recognition and execution of foreign juridical judgments
10. Legal regime of powers of attorney to be used abroad
11. Action that must be taken in order to develop other topics of private international law

The **Specialized Conference of Panama (CIDIP-I) initiated the** harmonization process of the rules on conflict of laws in the Americas, approving six Inter-American Conventions on International Commerce and Procedural Law.

The following conventions were approved:

- The "Inter-American Convention on Letters Rogatory," which entered into effect on January 16, 1976 and has been ratified by 17 States.
- The "Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices," which entered into effect on January 16, 1976 and has been ratified by 14 States.
- The "Inter-American Convention on Conflict of Laws Concerning Checks," which entered into effect on January 16, 1976 and has been ratified by 9 States.
- The "Inter-American Convention on the Taking of Evidence Abroad," which entered into effect on January 16, 1976 and has been ratified by 15 States.
- The "Inter-American Convention on International Commercial Arbitration," which entered into effect on June 16, 1976 and has been ratified by 18 States.
- The "Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad," which entered into effect on January 16, 1976 and has been ratified by 16 States.

The Conference approved a resolution requesting to the Permanent Council of the OAS that the Inter-American Juridical Committee be entrusted with the prioritized study and preparation of draft conventions on conflict of laws with respect to checks of international circulation and standard law on this same subject.

The Second Inter-American Specialized Conference on Private International Law (CIDIP-II) was held in Montevideo, Uruguay from April 23 to May 8, 1979 and was convened by Resolution AG/RES. (V-O/75), approved by the OAS General Assembly on May 19, 1975.

The General Assembly entrusted the Permanent Council and the Inter-American Juridical Committee with the preparation of a draft agenda, regulations and standard studies on the subjects to be discussed. The Permanent Council approved the draft regulations, and the Inter-American Juridical Committee prepared draft conventions. This Conference adopted eight international instruments (seven conventions and one protocol) concerning aspects of international commercial law and international procedural law, as well as general aspects related to the subject.

The following conventions were adopted:

- The "Inter-American Convention on Conflicts of Laws Concerning Checks," which entered into effect on June 14, 1980 and has 8 ratifications.
- The "Inter-American Convention on Conflicts of Laws Concerning Commercial Companies," which entered into effect on June 14, 1980 and has 8 ratifications.
- The "Inter-American Convention on the Domicile of Natural Persons in Private International Law," which entered into effect on June 14, 1980 and has 6 ratifications.
- The "Inter-American Convention on Execution of Preventive Measures," which entered into effect on June 14, 1980 and has 7 ratifications.
- The "Inter-American Convention on General Rules of Private International Law," which entered into effect on June 10, 1981 and has 10 ratifications.
- The "Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards," which entered into effect on June 14, 1980 and has 10 ratifications.
- The "Inter-American Convention on Proof and Information on Foreign Law," which entered into effect on June 14, 1980 and has 12 ratifications.
- The “Additional Protocol to the Inter-American Convention on Letters Rogatory," which entered into effect on June 14, 1980 and has 14 ratifications.

The **Third Inter-American Specialized Conference on Private International Law (CIDIP-III)** was held in La Paz, Bolivia from May 15 to 24, 1984. It was convened by Resolution AG/RES. 505 (X-O/80), approved by the OAS General Assembly on November 27, 1980. In this resolution, it was recommended that the Permanent Council prepare a draft agenda and regulations for CIDIP-III, and that the Inter-American Juridical Committee prepare the reports and draft conventions necessary for the conference.

The Permanent Council approved the draft regulations, and in its Regular Sessions of 1981, 1982, 1983 and 1984 the Inter-American Juridical Committee prepared the draft conventions.

The following conventions were adopted:

- The "Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors," which entered into effect on May 26, 1988 and has 6 ratifications.
- The "Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments," which entered into effect on December 24, 2004 and has 2 ratifications.
- The "Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law," which entered into effect on September -
- The "Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad," which entered into effect on November 28, 1992 and has 4 ratifications.

The **Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV)** was held in Montevideo, Uruguay from July 9 to 15, 1989. It was convened through Resolution AG/RES. 771 (XV-O/85), approved by the OAS General Assembly on December 9, 1985, and which, among other things, entrusted the Permanent Council with preparation of a draft agenda and regulations for CIDIP-IV and the Inter-American Juridical Committee with preparation of draft conventions and the respective Statement of Reasons necessary for the Fourth Conference.

Through Resolution CP/RES. 486 (717/87), the Permanent Council approved the following draft agenda on October 23, 1987:

- Abduction and return of children
- Land transportation

- International contracting, and
- Support obligations

The Conference approved three conventions:

- The "Inter-American Convention on Contracts for the International Carriage of Goods by Road," which has not yet entered into effect and has no ratifications.
- The "Inter-American Convention on the International Return of Children," which entered into effect on November 4, 1994 and has 11 ratifications.
- The "Inter-American Convention on Support Obligations," which entered into effect on March 6, 1996 and has 11 ratifications.

Held in Mexico City from March 12 to 19, 1994, the **Fifth Inter-American Specialized Conference on Private International Law** was convened through OAS General Assembly Resolution AG/RES. 1024 (XIX-O/89). The same resolution convened a Meeting of Experts on the topic of international contracts, which took place in Tucson, Arizona (USA) on November 11-14, 1993, and requested that respective documents be prepared by the General Secretariat and that the draft agenda be prepared by the Permanent Council. Through Resolution CP/RES. 588 (911/92), the Permanent Council approved the following draft agenda: law applicable to international contracts; civil and penal aspects of traffic in minors; and juridical aspects of private international law concerning contracts for the transfer of technology. The same resolution requested that the Inter-American Juridical Committee prepare draft conventions and respective studies. For this reason, the Inter-American Juridical Committee presented: a draft for an international convention on "Law Applicable to International Contracts," a study on the "preparation of rules for the regulation of international juridical businesses that so require and of international contracts," and general guidelines related to a "Draft Inter-American Convention on International Traffic in Minors," resulting from a Meeting of Experts on traffic in minors held in Oaxtepec, Morelos, Mexico on October 13-26, 1993, sponsored by Inter-American Children's Institute and the government of Mexico.

Two conventions were approved at this Conference:

- The "Inter-American Convention on International Traffic in Minors," which entered into effect on August 15, 1997 and has 11 ratifications.
- The "Inter-American Convention on Law Applicable to International Contracts", which entered into effect on December 15, 1996 and has 2 ratifications.

Convened by OAS General Assembly Resolution AG/RES. 1339 (XXIX-O/96), the **Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)** was held in Washington, D.C. from February 4 to 8, 2002. Preparatory documents for this Conference included the presentation and report of the Inter-American Juridical Committee entitled "CIDIP-VII and Beyond" (CJI/doc.74/01); the document CIDIP-VI/doc.10/02; the report prepared by the Secretariat for Legal Affairs of the OAS General Secretariat, entitled "The History of the CIDIP Process" (CIDIP-VI/doc. 11/02); as well as results from the meetings of delegations of experts for CIDIP-VI.

Through Resolution AG/RES. 1472 (XXVII-O/97), the OAS General Assembly instructed the Permanent Council to continue its study on the topics of CIDIP-VI.

Through Resolution CP/RES. 744 (1185/99), the Permanent Council approved the draft agenda, which was subsequently ratified by the General Assembly as follows:

i. 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.

ii. 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.

iii. Conflict of laws on extracontractual liability, with an emphasis on competency of jurisdiction and applicable law with respect to civil international liability for transboundary pollution

CIDIP-VI approved the following international instruments:

- Model Inter-American Law on Secured Transactions
- Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road – Negotiable
- Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road – Non-Negotiable

With respect to point III of the approved agenda, the Conference did not reach agreement about any instrument. Instead, it adopted a resolution requesting further studies by the Inter-American Juridical Committee with respect to the topic of extracontractual liability in cases of cross-border contamination, including the examination of documents and precedents, the preparation of a report, and, if approved, the preparation of a draft international instrument to be presented to a group of experts and subsequently submitted for consideration to the General Assembly in 2003.

The Inter-American Juridical Committee designated Dr. Carlos Manuel Vázquez and Dr. Ana Elizabeth Villalta Vizcarra as rapporteurs of this report. They presented their respective reports in the 61st, 62nd and 63rd Regular Sessions of the Inter-American Juridical Committee, concluding their final report in the 63rd Regular Session.

The Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)

Through Resolution AG/RES. 1923 (XX(III-O/03), entitled "Preparations for the Seventh Inter-American Specialized Conference on Private International Law," approved on June 10, 2003, the OAS General Assembly resolved, among other things: to convene the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), to instruct the Permanent Council, with assistance from the General Secretariat, to carry out preliminary consultations with respect to the dates and possible venue for CIDIP-VII and to create mechanisms that facilitate consultations with Member States with respect to the draft agenda and regulations for the Conference; and to instruct the Inter-American Juridical Committee to continue presenting its comments and observations with respect to the agenda proposed for CIDIP-VII.

In this respect, Inter-American Juridical Committee document CJI/doc. 89/02 entitled "Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)," presented by Dr. Carlos Manuel Vázquez and Dr. João Grandino Rodas, refers to three topics mentioned in the Inter-American Juridical Committee report regarding the themes of CIDIP-VII: electronic commerce, transnational insolvency, and migration and the free movement of persons.

Through Resolution AG/RES. 2033 (XXXIV-O/04) entitled "Inter-American Specialized Conferences on Private International Law," approved on June 8, 2004, the OAS General Assembly resolved, among other issues, the following: to urge those Member States that had not yet done so to present proposals and observations with respect to the possible agenda of CIDIP-VII; to request that the Permanent Council, with collaboration from the General Secretariat, study the topics proposed by Member States, as well as the topics' viability and inclusion on the agenda of CIDIP-VII; to entrust the Permanent Council to continue its consultations about the possible venue and date for the Seventh Inter-American Specialized Conference on Private International Law; and to request that the Inter-American Juridical Committee contribute to preparatory efforts for the Seventh Inter-American Specialized Conference

on Private International Law (CIDIP-VII) once the Permanent Council approves the agenda for said Conference.

To date, member States have presented the following topics:

Peru: 1) Transportation: multimodal approach (land, air, sea); 2) Electronic commerce: investment values; 3) Electronic commerce: electronic commercial registries.

El Salvador: 1) Standardization of university degrees: free professional exercise; 2) Extracontractual civil liability: road accidents; Extracontractual civil liability: products; Extracontractual civil liability: environmental contamination.

Brazil: 1) Electronic commerce; 2) Transnational commercial insolvency; 3) Transnational movement: migratory flow of persons; 4) Consumer protection: Inter-American Convention on Consumer Protection in the Americas.

Mexico: 1) Electronic commerce: juridical aspects on the use of electronic media; consumer protection; 2) Transnational movement: migratory flow of persons; 3) Protection of minors.

Canada: 1) Electronic commerce: jurisdictional aspects regarding consumer protection.

Uruguay: 1) International jurisdiction; 2) Extracontractual civil liability: environmental contamination; 3) Electronic commerce: jurisdiction with respect to transnational Internet transactions between businesses and consumers.

United States: 1) Electronic commerce: investment values; 2) Electronic commerce: electronic commercial registries.

Chile: 1) Electronic commerce: investment values; 2) Electronic commerce: electronic commercial registries**.**

The preparatory stage of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) continues. A draft agenda must be approved in order to set the date and venue for the holding of the Conference.

OAS General Assembly Resolutions AG/RES. 1923 (XXXIII-O/03) and AG/RES. 2033 (XXXIV-O/04), respectively, instruct the Inter-American Juridical Committee to continue presenting its comments and observations with respect to the agenda proposed for CIDIP-VII and to contribute to preparatory efforts for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) once the Permanent Council approves the agenda for said Conference.

As of 1975, Inter-American Specialized Conferences (CIDIPs) have been the mechanism used by the inter-American system. These Conferences have produced 26 international instruments on different aspects related to juridical and judicial cooperation between States, promoting security in civil, family, commercial and procedural relations**.**

A total of 23 international conventions were produced in the First, Second, Third, Fourth and Fifth Inter-American Specialized Conference on Private International Law, and three international instruments were produced in CIDIP-VI. Of the 23 conventions, only the "Inter-American Convention on Contracts for the International Carriage of Goods by Road" is not in effect.

Although 22 Inter-American Conventions produced in the CIDIPs are in effect within the system, it is important to emphasize that, as of CIDIP-IV, the number of ratifications by Member States has decreased, as has the number of States participating in the Conferences. This is of great concern for the process of progressive codification of private international law, as well as for the harmonization of rules of private law in the Americas.

In this sense, it is necessary to ensure greater involvement in the CIDIP process, particularly in the progressive codification and development of the rules of private international law. In this area, inter-American law has played a pioneering role through many of its institutions, especially having produced the single code on private international law: the Bustamante Code, approved at the Sixth International Conference of American States in 1928. It is necessary to preserve this historical wealth of international law in the Americas, an effort in which the Inter-American Juridical Committee has played a direct and effective part**.**

For this reason, the CIDIP process must continue to be strengthened as the appropriate path toward progressive codification and development of private international law in the Americas. Efforts must be made to promote and strengthen both the traditional approach of this process, focusing on the preparation of a set of rules, and its modern approach, striving for the harmonization of substantive law. There must be flexibility in each specific case, adopting the approach most appropriate for each particular context.

With respect to the approach focusing on the adoption of model laws, it is necessary to disseminate the benefits that such laws represent for harmonization of the rules of private international law in the Americas, along with the ways in which they can be adopted and implemented in the internal legislation of States. Not all member States of the OAS have the juridical culture of model laws but rather follow the traditional approach of adopting Conventions and then ratifying or approving them in domestic legislation, thus converting them into part of the State's body of laws. For this reason, during preparatory efforts for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) a commission should be established to analyze why the rate of ratification of inter-American conventions on private international law is decreasing and why there is no legislative application of model laws. This **may result** in the need to publicize the advantages that achieving effective codification and progressive development of the rules of private international law within the inter-American system would have for the juridical security of relations between individuals from member States of the Organization of American States (OAS) and for juridical and judicial cooperation.

6. Preparation for the commemoration of the Inter-American Juridical Committee centennial

Resolution

CJI/RES.102 (LXVII-O/05)	*Declaration on the centenary of the Inter-American Juridical Committee*

Annex:

CJI/doc.195/05 rev.4	*Draft declaration on the centennial of the Inter-American Juridical Committee:general principles of law recognized by the inter-American system* (presented by Dr. Eduardo Vío Grossi)

During the 66th regular session of the Inter-American Juridical Committee (Managua, February 28–March 11, 2005), its Chairman reported that when he presented the report on the Committee's activities to the Committee on Political and Juridical Affairs of the Permanent Council in February of 2005, the delegations agreed to the idea that the Permanent Council should hold a solemn session to celebrate the Committee's centennial. The Chairman proposed that a member of the Juridical Committee should attend said session.

The General Secretariat informed on the progress made in the preparations for the Juridical Committee's centennial.

First, it reported on the texts received for the publication of the book on the Centennial and informed that the final deadline for the receipt of texts is August 2005. Dr. Mauricio Herdocia Sacasa offered to present a manuscript on on the right of asylum and recalled that Dr. Ana Elizabeth Villalta Vizcarra and Dr. João Grandino Rodas will write on private international law. Dr. Galo Leoro Franco also offered to present a manuscript on the pacific solution of disputes. Dr. Herdocia requested that the Secretariat distribute among the members of the Board of Editors the manuscripts received for the publication of the book on the occasion of the Centennial.

The General Secretariat also stated that it had produced a document with all the basic information related to the membership of the Juridical Committee since 1939, as well as the work carried out by this Organ. This information will be included in the appropriate webpage. The Chairman of the Committee requested that, in addition to this information, the webpage include the Centennial's icon, with information about the history of the Committee and its contribution to international law.

The Chairman of the Juridical Committee requested that the Secretariat present a budget in August covering all the activities commemorating the Centennial. Dr. Jean-Paul Hubert requested that the budget for the book's publication be available before the month of August in order to initiate the appropriate steps towards its financing.

With respect to the list of entities to be invited, which can be found in the consolidated version of the resolution regarding the Centennial, Dr. Galo Leoro suggested including the Permanent Court of Arbitration in the Hague.

Dr. Mauricio Herdocia requested the Secretariat to forward the texts of the 1996 Declaration of Panama on inter-American international law, and the Inter-American program on the development of international law, in order to proceed with the preparation of the Declaration on the Centennial of the Committee. The General Secretariat forwarded these texts to the coordinator on April 13, 2005.

Finally, Dr. Antonio Fidel Pérez suggested that the Committee look for ways to cooperate with the ASIL "American Society of International Law", which is also celebrating its centennial in 2006.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly adopted resolution AG/RES.2069 (XXXV-O/05) "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee," in which it requested this Organ to continue preparing for the commemoration of its centennial, to be held in 2006, and requested the Permanent Council to hold a meeting in the first half of 2006 as part of the commemorative events.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2005), the coordinator of the theme, Dr. Eduardo Vio Grossi, presented document CJI/doc.195/05, Draft resolution on the centennial of the Inter-American Juridical Committee. Dr. Vio explained the contents of this document, the purpose of which is to commemorate the centenary of the Committee and encourage the General Assembly to proclaim already consolidated principles of international law. He pointed out that the Juridical Committee in various reports and resolutions had already proclaimed these principles. He ended by saying that this document was better understood in the light of the Declaration of Panama on the Inter-American contribution to the development and codification of international law, adopted by the General Assembly of the OAS in 1996 [AG/DEC.12 (XXVI-O/96)].

The Chairman of the Inter-American Juridical Committee underscored the importance of bearing in mind the resolution of the General Assembly that gave the Committee the mandate on this topic, AG/RES.1773 (XXXI-O/01), which recommends that the Centenary Program should consider the possibility of preparing a draft declaration on the role of the Juridical Committee in the development of Inter-American law for the opportune appreciation the General Assembly.

The Inter-American Juridical Committee analyzed paragraph by paragraph the document presented by the coordinator of the theme. The members suggested changes of form and content of the document, which was again analyzed in its revision 1 version, CJI/doc.195/05 rev.1, *Draft declaration on the centenary of the Inter-American Juridical Committee: general principles of law recognized by the Inter-American system*, presented by Dr. Eduardo Vio Grossi.

The members of the Juridical Committee made observations and changes to some paragraphs of this new document. Accordingly, Dr. Antonio Pérez asked that it be stated in minutes that when point 12 on solidarity and cooperation is debated, these concepts should be understood in relation to democracy.

The Inter-American Juridical Committee again examined the document in its revision 2, 3 and 4 versions, and approved it in its version 4 CJI/doc.195/05 rev.4, *Draft declaration on the Centenary of the Inter-American Juridical Committee: general principles of law recognized by the Inter-American system*, presented by Dr. Eduardo Vio Grossi.

This having been resolved, the Inter-American Juridical Committee approved resolution CJI/RES.102 (LXVII-O/05), *Declaration on the Centenary of the Inter-American Juridical Committee*, by which it approves the mentioned project and resolves to take it to the General Assembly of the Organization for its appreciation.

Following is the text of the resolution and the Draft Declaration.

CJI/RES.102 (LXVII-O/05)

DECLARATION ON THE CENTENARY OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING:

The decision adopted at its 56th regular session (Washington, D.C, March 2000), which included in the agenda the topic *Preparation for the celebration of the Inter-American Juridical Committee centennial*, and appointed Dr. Eduardo Vio Grossi as rapporteur;

Resolution CJI/RES.26 rev.1 (LVIII-O/01), adopted at its 58th regular session (Ottawa, March 2001), entitled *Preparing to commemorate the centenary of the Inter-American Juridical Committee*, which provided certain measures in view of the program for that event;

Resolution AG/RES.1773 (XXXI-O/01), adopted by the General Assembly of the Organization at its XXXI regular sessions (San José, June 2001), which, among other mandates, requested the Inter-American Juridical Committee to consider the possibility of preparing a draft declaration on its role in the development of international law for the appreciation of the General Assembly;

The *Draft resolution on the centennial of the Inter-American Juridical Committee*, CJI/doc.195/05, dated August 8, 2005, presented by the rapporteur, Dr. Eduardo Vio Grossi;

The analyses, contributions and comments formulated by the members of the Inter-American Juridical Committee, which give rise to documents CJI/doc.195/05 rev.1, CJI/doc.195/05 rev.2, CJI/doc.195/05 rev.3 and CJI/doc.195/05 rev.4, dated August 15, 16, 17 and 18, 2005 respectively, presented by Dr. Eduardo Vio Grossi and entitled *Draft declaration on the centennial of the Inter-American Juridical Committee: general principles of law recognized by the inter-American system,*

RESOLVES:

1. Pursuant to resolution AG/RES.1773 (XXXI-O/01), to adopt the *Draft declaration on the centennial of the Inter-American Juridical Committee: general principles of law recognized by the inter-American system*, CJI/doc.195/01 rev.4, and to present it to the General Assembly of the Organization for its appreciation.

2. To thank Dr. Eduardo Vio Grossi for his important contribution in the preparation of the above-mentioned document.

This resolution was adopted unanimously at the regular session held on August 19, 2005, in the presence of the following members: Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

Annex: CJI/doc.195/05 rev.4

CJI/doc.195/05 rev.4

DRAFT DECLARATION ON THE CENTENNIAL OF THE INTER-AMERICAN JURIDICAL COMMITTEE: GENERAL PRINCIPLES OF LAW RECOGNIZED BY THE INTER-AMERICAN SYSTEM

(presented by Dr. Eduardo Vio Grossi)

THE GENERAL ASSEMBLY OF THE ORGANIZATION OF THE AMERICAN STATES (OAS),

WHEREAS:

The origins of the Inter-American Juridical Committee go back to the Third International American Conference when, on 23 August 1906, the International Commission of Jurists was created, a body of the Inter-American System that was substituted by the Inter-American Committee of Neutrality, constituted by the First Consultative Meeting of Ministers of Foreign Affairs in September-October 1939, and which, by a 1942 resolution of the Third Consultative Meeting of Ministers of Foreign Affairs adopted the name of Inter-American Juridical Committee, and was thereby incorporated in 1945 to the Charter of the Organization as the Permanent Committee of the Inter-American Council of Jurisconsults and later as the principal body of the OAS, by means of the *Buenos Aires Protocol* of 1967;

Pursuant to its mandates, the Inter-American Juridical Committee and its predecessors, in consultative bodies of the inter-American system on legal affairs, did important work on the codification and progressive development of international law in America, thus contributing toward providing the legal uniqueness that distinguishes and credits it in international society;

Its uniqueness is apparent in the *Declaration of Panama on the inter-American contribution to the development and codification of international law*, adopted by the OAS General Assembly on 5 June 1996, and

For the same reason, the Centennial commemoration of the work of the Inter-American Juridical Committee and its predecessors is an opportunity, with the appropriate ceremony, to highlight the leading role it has played in international law and its universal contribution,

DECLARES:

FIRST: That 2006 will be the year for commemorating the Centennial of the Inter-American Juridical Committee;

SECOND: Its satisfaction at the efforts carried out by the Inter-American Juridical Committee in the sphere of Private International Law, efforts that, in light of the codification of international juridical norms and harmonization of the legislations, have culminated in the signing of treaties and adoption of model laws on a wide variety of topics.

THIRD: Its satisfaction at the efforts carried out by the Inter-American Juridical Committee in elaborating and promoting instruments and norms of Public International Law that together contribute to the juridical uniqueness that characterizes the hemisphere, such as those concerning the right to asylum, human rights, indigenous peoples, peaceful settlement of disputes, collective security, the law of the sea, the struggle against terrorism, corruption and the illicit traffic of narcotics and drugs.

FOURTH: Its gratitude *to* the Inter-American Juridical Committee for its contributions, in the form of resolutions, opinions and reports, in recognizing, among other matters, the following General Principles of Law that are to be found at the juridical base of the Inter-American system:

1. The rule of law is an irreplaceable element for achieving international peace and security, as well as progress and development in each of the States of the hemisphere.

2. The enforcement of law implies using both in preparation and modification legitimate juridical forms that correspond to citizenship or the international community.

3. Respect for the law entails eradicating in its application and interpretation any subterfuge that jeopardizes good faith and the objective and finality of the pertinent norm.

4. International law has preeminence in the international sphere, particularly when no State can call upon its internal law should it fail to meet its international obligations.

5. States must adopt all internal and international measures that are necessary to permit effective compliance with the provision in an international rule of law applicable to them.

6. States must in good faith comply with the international juridical norms that are applicable to them.

7. Violation of an international obligation leads to international liability of the offending State.

8. States must settle their disputes through one of the means of their peaceful settlement provided in International Law.

9. International peace and security are indivisible and sole legal imperatives, for which reason the Organization of American States assumes them in the hemisphere.

10. Democracy is a right of the peoples of the Americas and an international legal obligation of the respective States in the Inter-American System, a right and obligation that may be called upon and demanded, respectfully, by and before the Organization of the American States.

11. Moreover, it is an obligation of the American States to respect, guarantee, protect and promote human rights.

12. Cooperation is an imperative of the American States so as to join forces in order to eradicate poverty and encourage cultural, economic and social development in the hemisphere.

13. The peoples of America must develop in harmony with cultural diversity and especially with the cultural identities of the indigenous peoples.

14. Legal cooperation, particularly against crimes and offences, is a legal imperative to which the American States are committed.

15. The strengthening of international law is not only expressed today in its codification but even more in its progressive development in order to provide solutions to new problems and challenges.

16. Inasmuch as international law regulates a matter until then solely in the sphere of internal, domestic or exclusive jurisdiction of the States, to the same extent such a matter is also part of the sphere of the international legal system.

17. The measures that the Organization of American States adopts in relation to the obligations of the member States express the sovereign will of these members.

FIFTH*:* This Declaration will be called *Commemoration of the Inter-American Juridical Committee Centennial: General Principles of International Law recognized by the Inter-American System.*

* * *

7. International Criminal Court

Resolution

CJI/RES.98 (LXVII-O/05)	*Promotion of the International Criminal Court*
Annex:	
CJI/doc.198/05 rev.1	Questionnaire on the International Criminal Court (presented by Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Antonio Fidel Pérez, Stephen C. Vasciannie and Ana Elizabeth Villalta Vizcarra)

During its 67th regular session (Rio de Janeiro, August 2005), the Inter-American Juridical Committee approved the inclusion of the theme "Promotion of the International Criminal Court" in the agenda, by mandate of the General Assembly of the OAS. Resolution AG/RES.2072 (XXXV-O/05) requested the Juridical Committee to draw up a questionnaire, to be presented to the OAS member States, on how their laws allow for cooperation with the International Criminal Court and, on the basis of the findings of the questionnaire, to present a report to the Permanent Council, which, in turn, will transmit it to the General Assembly at its thirty-sixth regular session.

The Chairman of the Inter-American Juridical Committee opened considerations on the theme recalling that 27 members of the OAS subscribed the *Rome Statute* and 20 ratified it. He indicated that many States have found difficulties in their internal legislation to incorporate or accept some of the norms contained in the *Statute*, so they needed or need to make constitutional amendments or interpretations to these statutory amendments. He quoted as examples the length of sentences, the theme of extradition of nationals and the immunity of certain functionaries. He also recalled that some countries had signed bilateral agreements with the United States in order not to hand over their nationals to the International Criminal Court. This, he added, has also been the subject of several manifestations on the part some States.

Dr. Luis Herrera Marcano suggested that before dealing with the drafting of a questionnaire, he would have to make an inventory of the obstacles faced by the States in order to ratify the *Statute*. He said that a more practical sense could thus be given to the questionnaire.

Dr. Stephen C. Vasciannie indicated that in general the countries of the Caribbean found no difficulties in ratifying the Statute, but that there was some difficulty in implementing it due to the variety of themes covered in the norms contained therein. He gave the examples of the constitutional norms that prohibit double jeopardy, compatibility of signing bilateral agreements such as those signed with the United States with article 98 of the *Statute*, the immunities of Heads of State, and so on. Dr. Vasciannie informed that the Secretariat of the Commonwealth had already prepared a guide on the norms to be adopted to implement the *Rome Statute* in the countries of the Caribbean.

Dr. Ana Elizabeth Villalta Vizcarra indicated that in the internal legislation of El Salvador, although the Constitution had been amended to permit extradition of nationals when a mediating treaty was applicable, the possibility of extraditing nationals to International Courts was not included. She stated that there also existed the problem of lifetime imprisonment contained in the *Statute*, an item not considered in the legislation of El Salvador.

Dr. Galo Leoro Franco expressed his doubts about some States being able to answer a questionnaire of this nature since in the case of Ecuador the constitutionality or unconstitutionality of a norm can only be declared by the Supreme Court at the moment the norm is applied.

Following this initial exchange, it was decided that the questionnaire would be as general as possible and that the Committee should have as many antecedents as possible with regard to the internal legislation of countries to enable it to orient the questions to be included. It was therefore decided that the questionnaire would be drafted at this regular session in order to comply with the mandate of the General Assembly and that it be addressed to all the member States of the OAS. Accordingly, a working group was set up to prepare the draft questionnaire.

In the course of the regular session, the Inter-American Juridical Committee examined document CJI/doc.198/05, *Questionnaire on the International Criminal Court*, presented by Drs. Mauricio Herdocia Sacasa, Luis Herrera Marcano, Antonio Fidel Pérez, Stephen C. Vasciannie and Ana Elizabeth Villalta Vizcarra. Dr. Mauricio Herdocia made an oral presentation of the document.

The members of the Inter-American Juridical Committee proposed some changes that were incorporated into the text and immediately afterwards the document was adopted.

The Inter-American Juridical Committee also adopted resolution CJI/RES.98 (LXVII-O/05), *Promotion of the International Criminal Court*, by which document CJI/doc.198/05 rev.1 is approved, containing the "Questionnaire on the International Criminal Court" in compliance with the mandate assigned by the General Assembly. It was also decided to send this document to the member States of the OAS via the General Secretariat so that the Juridical Committee can present a report on the results of the questionnaire to the Permanent Council of the OAS prior to the XXXVIth regular session of the General Assembly. Accordingly, the deadline date for receiving answers was set at January 30, 2006. Finally, Dr. Mauricio Herdocia Sacasa was appointed rapporteur and he was requested to present a progress report during the 68th regular session of the Inter-American Juridical Committee.

Following is the text of the resolution and the aforementioned questionnaire.

CJI/RES.98 (LXVII-O/05)

PROMOTING THE INTERNATIONAL CRIMINAL COURT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARNG IN MIND resolution AG/RES.2072 (XXXV-O/05) adopted by the General Assembly of the OAS during its 35th regular session (Fort Lauderdale, June 2005), by which the Inter-American Juridical Committee was requested to draw up a questionnaire to be presented to the member States of the OAS concerning the manner in which their legislation is able to cooperate with the International Criminal Court and to present a report on the results of this questionnaire to the Permanent Council, which in turn will present it at the 36th Regular Session of the General Assembly of the Organization;

CONSIDERING that during the 67th regular session (Rio de Janeiro, August 2005), the Inter-American Juridical Committee proceeded to draft a questionnaire regarding the International Criminal Court,

RESOLVES:

1. To approve document CJI/doc.198/05 rev.1, which contains the *Questionnaire on the International Criminal Court* in accordance with the mandate issued by the General Assembly.

2. To forward said questionnaire to the member States of the OAS through its General Secretariat so that the Inter-American Juridical Committee can present a report on the results of the questionnaire to the Permanent Council of the OAS before the XXXVI regular session of the General Assembly.

3. Set January 30, 2006 as the deadline date for receiving answers to the questionnaire.

4. Appoint Dr. Mauricio Herdocia Sacasa as rapporteur for the topic and request him to present a progress report during the 68th regular session of the Inter-American Juridical Committee.

This resolution was adopted unanimously at a regular session held on August 17, 2005 by the following members Drs: Mauricio Herdocia Sacasa, Luis Herrera Marcano, Galo Leoro Franco, Antonio Fidel Pérez, Eduardo Vio Grossi, Stephen C. Vasciannie, Luis Marchand Stens and João Grandino Rodas.

CJI/doc.198/05 rev.1

QUESTIONNAIRE ON
THE INTERNATIONAL CRIMINAL COURT

Is your country party to the Rome Statute of the International Criminal Court?

- ❑ Yes See Annex A
- ❑ No See Annex B

ANNEX A

QUESTIONNAIRE FOR STATES THAT ARE PARTY TO THE

ROME STATUTE

1. Has your legislation established the following crimes provided in the Statute?

Crime of genocide	Yes□	No□
War crimes	Yes□	No□
Crimes against humanity	Yes□	No□

2. If so, please indicate those definitions and their elements.
   Crime of genocide -
   War crimes -
   Crimes against humanity –

3. Indicate whether the State does or does not have procedures applicable to all forms of cooperation provided for in Part IX (On international cooperation and legal aid) and X (On execution of sentence), including –but not limited to– the following:

   a. The surrender of persons accused, including the implementation of requests for provisional arrest;
   b. The taking and submission of evidence, both documentary evidence and evidence in the form of testimony of witnesses; and
   c. The execution of orders of the International Criminal Court: (1) with respect to property of persons found criminally responsible for the purpose of providing for the forfeiture of proceeds derived from the crime and for the award of reparations to victims; and (2), where applicable, to the serving of sentences.

4. If not, please indicate whether your country is prepared to amend its legislation in order to cooperate with the International Criminal Court.

5. Has your country found particular obligations in the Rome Statute inconsistent with the provisions of its Constitution?

   - ❑ Yes
   - ❑ No

6. If so, please indicate which obligations could be inconsistent with your Constitution and the nature of that inconsistency?

7. Do you know of any other legal issue that could affect your country's compliance with the obligations provided for in the Statute?

- ❑ Yes
- ❑ No

8. If so, could you please explain?

9. Does your country have any additional comments of a legal nature?

ANNEX B

QUESTIONNAIRE FOR STATES THAT ARE NOT PARTY TO THE STATUTE OF ROME

1. Has your established the following crimes provided in the Statute?

Crime of genocide	Yes□	No□
War crimes	Yes□	No□
Crimes against humanity	Yes□	No□

2. If so, please indicate those definitions and their elements.
   Crime of genocide -
   War crimes -
   Crimes against humanity –

3. Has your country found particular obligations in the Rome Statute inconsistent with to the provisions of its Constitution?

- ❑ Yes
- ❑ No

4. If so, could you please indicate which obligations could be inconsistent with your Constitution and the nature of that inconsistency?

5. Do you know of any other legal issue that could affect your country's compliance with the obligations provided for in the Statute?

6. Has your country enacted or does it intend to enact amendments to ratify or adhere to the Rome Statute?

7. Is there any impediment of a legal nature to cooperate with the International Criminal Court in the cases provided for in the Statute for a State that is not party?

8. Does your country have any additional comments of a legal nature?

* * *

8. Principles of Judicial Ethics

At the 66th session of the Inter-American Juridical Committee (Managua, February 28–March 11, 2005), its Chairman submitted for the approval of the other members the topic "Writing a Draft Judicial Ethics Codes or General Principles of Judicial Ethics" for inclusion as a topic of its agenda.

Dr. Galo Leoro expressed doubts regarding the title of this topic and remarked that, in practice, a code of similar nature adopted by Ecuador was not truly applied. He was inclined towards the title General Principles of Judicial Ethics, since ethics does not seem to fit the nature of a code, which refers to law.

The Inter-American Juridical Committee approved the inclusion of the topic under said name and decided to pospone the choice of a rapporteur on the topic until the session in August.

Next, the Chairman summarized the background and history of the topic, as of the contacts made with the Justice Studies Center of the Americas (CEJA).

Dr. Jean-Paul Hubert requested a clarification regarding the the purpose of this assignment, *i.e.*, whether it is the Committee who will write the first draft, or whether the Committee will assist the CEJA in their work. The Chairman of the Juridical Committee said that the idea was for the Juridical Committee to write the draft and for the CEJA to lend its assistance at the request of the Committee. The task of the rapporteur would be the drafting of a report on the subject matter, compiling, in an initial stage, the existing norms on the topic, which have already been forwarded to the CEJA.

Dr. Luis Marchand Stens expressed that to prepare a code of this nature and scope was a task for specialists in the subject matter and that it would be advisable for CEJA to prepare a basic document or a first draft for the Committee to work on.

Dr. Ana Elizabeth Villalta Vizcarra suggested that the Chairman speak again with the CEJA and explain that in the current session the Committee again reviewed the topic. In her opinion, the CEJA is precisely the specialized entity to begin this work, which the Committee could support. This proposal was accepted by consensus. The Chairman offered to keep the members informed on the steps he would take for this assignment.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly, by resolution AG/RES.2069 (XXXV-O/05) resolved to encourage initiatives that the Inter-American Juridical Committee may adopt to conduct studies with other organs of the inter-American system, in particular with the CEJA, on various matters geared toward strengthening the administration of justice and judicial ethics.

During its 67th regular session (Rio de Janeiro, August 2005), the Inter-American Juridical Committee received the visit of Drs. Juan Enrique Vargas Viancos (Secretary of the Justice Studies Center of the Americas – CEJA), and Rodolfo Vigo (Minister of the Supreme Court of the Province of Santa Fé, Argentina), representatives of CEJA, with whom there was an exchange of ideas related to the topic.

Dr. Juan Vargas expressed the reasons why it was important to proceed with the drafting of a code of judicial ethics, above all as a tool to recover the image of justice, and stressed the utility of making a joint effort in this sense with the Inter-American Juridical Committee. He underscored the persuasive nature of such principles. He emphasized the importance of civil society also being able to participate in the discussion of these principles and that the theme should also be included in the agenda of the political organs of the OAS. He pointed out further that the ethical theme was only a part of the greater problem involved in reforming the judicial power.

Dr. Rodolfo Vigo also pointed out the reasons why it is important to develop this theme. He indicated that there was a crisis of legitimacy of the judicial powers and that judicial ethics was one of the means to remedy this situation. Theses are demands beyond the law (additional duties) and greater than those demanded of the common citizen. Ethics appeals to the spirit of the judge, he claimed, and so should be the result of consensus between judges rather than the product of law. He referred to the *Ibero-American Statute of the Judge* of 2001, the *Charter of the Rights of Persons before Justice* of 2002 and the *Declaration of Copan* of 2004, as antecedents of the theme. He informed that as a result of the latter declaration a meeting was held in Antigua in 2005 for the purpose of pushing forward a model code of judicial ethics in Ibero-America with 14 principles. He also referred to the negligence by Constitutions in respect to the requisites for becoming a judge and continuing to work in that career. He expressed that a code of ethics leaves certain rules clear where there is more than one option and the judge feels uncomfortable to choose one of them by himself. In counterpart, this also makes it easier for citizens to register complaints.

Following these presentations, Dr. Galo Leoro Franco referred to the theme of improving the administration of justice in the Americas for many years an item in the agenda of the Inter-American Juridical Committee. He expressed certain doubts as to the validity of the codes of ethics given the experience of a similar code in the Congress of his country. He wondered about the applicability and feasibility of a similar code in the judicial system of the countries of the Americas. He also asked about the nature of the norms contained in an eventual code, that is, whether they should be of a substantive or moral nature.

Dr. Eduardo Vio Grossi indicated that it was important to determine the obligatory nature of the instrument being discussed (binding or moral level). With regard to future work, he pointed out that there are many countries that already have a code of ethics, so the possibility of preparing a model code would not be of much use. He suggested that the alternative would be to establish general principles of law on the matter of judicial ethics obligatory for the States, a field in which the Juridical Committee could act. Another alternative would be to work on an inter-American code of judicial ethics to be adopted by the States with the commitment that they should have a certain application on the internal level of their judicial powers.

Dr. Luis Herrera Marcano recalled that in one of his reports, Dr. Jonathan T. Fried, former member of the Inter-American Juridical Committee, included an inventory of the codes of ethics that already existed on the level of the member States of the OAS, and that it would be important for the representatives of the CEJA to have that report available.

Dr. Stephen C. Vasciannie asked the members of the CEJA why they should suppose that the member States that already had a code of ethics should want to adopt a new body of principles on the matter, and in the case of those that did not have a code, why should it be supposed that with the judges having the opportunity to approve their own code of ethics, they would accept principles imposed from the outside. He also stressed that the premise that supposed a corrupt judicial power in need of a body of ethical rules was not shared in several countries of the Caribbean.

Dr. Antonio Fidel Pérez referred to several internal situations that generally occurred and were a product of the circumstances but did not necessarily amount to cases of corruption. So, the methods of approaching such situations, though they might well require a code of ethics, this would not be exclusive.

Dr. João Grandino Rodas emphasized the importance of ethical principles but expressed his interest that such principles, applied in practice, should not contribute to a greater amount of bureaucracy at the bases of judicial power. Dr. Luis Marchand Stens also wondered to what extent these principles could perhaps restrict the capacity of action of judges in matters in which a correct decision is alien to considerations of an ethical nature.

The Chairman of the Inter-American Juridical Committee ended by dealing with the areas of cooperation between the CEJA and the Juridical Committee. On the proposal of Dr. Juan Vargas, it was decided that the Inter-American Juridical Committee should remain wait until the CEJA has a more concrete document on ethical principles on which the Committee can form an opinion.

9. Right to information: access and protection of information and personal data

At its 66th session of the Inter-American Juridical Committe (Managua, February 28 – March 11, 2005), its Chairman reminded the assignment given to the rapporteur of the topic, Dr. Alonso Gómez Robledo, of bringing up to date the report presented by the former Committee member, Dr. Jonathan Fried, at the request of the political organs of the Organization.

At its 35th regular session (Fort Lauderdale, June 2005), in its resolution AG/RES.2069 (XXXV-O/05) "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee," the General Assembly noted the importance of the topic and requested that it include an updated report on the protection of personal data, based on comparative law, in its next annual report.

During its 67th regular session (Rio de Janeiro, August 2005), the Inter-American Juridical Committee did not consider this theme. Nevertheless, it was agreed to address a letter to Dr. Alonso Gómez-Robledo, rapporteur of the theme, asking him to consider sending to the Juridical Committee by a set date the final report on the theme of the right to information as requested by the General Assembly.

* * *

10. Legal aspects of Inter-American security

At the 66th regular session of the Inter-American Juridical Committee (Managua, February 28 – March 11, 2005), its Chairman stated that the political organs of the Organization have expressed a clear interest that the Committee, in developing this topic, take into consideration the multidimensional character of security contained in the Declaration on Security in the Americas, adopted in Mexico in 2003.

Dr. Galo Leoro Franco expressed his opinion that regional organizations could not deny the foundation upon which the supreme importance of the United Nations regarding topics of security rests. Dr. Luis Herrera explained that the General Assembly had not given the Juridical Committee a specific mandate, but should the Committee decide to study the topic, it should do so within the framework of the Declaration on Security in the Americas. Dr. Luis Herrera Marcano suggested resuming the matter in the August regular session with the participation of the rapporteur for the topic, Dr. Eduardo Vío Grossi. This proposal was accepted by the other members.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly, by resolution AG/RES.2069 (XXXV-O/05) "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee," requested the Inter-American Juridical Committee, should it decide to conduct new studies on its agenda item "Legal aspects of inter-American security," to take into account and use as a basis, without excluding other international instruments, the Declaration on Security in the Americas, adopted at the Special Conference on Security, held in Mexico City, in October 2003, in particular with regard to the multidimensional approach to security, and, in that event, to keep the Permanent Council informed of its decision.

During its 67th regular session (Rio de Janeiro, August 2005), the Inter-American Juridical Committee did not consider this theme and decided to change it from a theme under consideration to a follow-up theme in its agenda for the next regular session.

* * *

11. Application of the Inter-American Democratic Charter

At its 66th regular session (Managua, February 28–March 11, 2005), the Inter-American Juridical Committee decided to add Dr. Antonio Pérez as one of the topic's rapporteurs. Dr. Luis Herrera recalled that the Juridical Committee had kept this topic on the agenda as a follow-up topic, should a new mandate from the General Assembly be given, or should the need arise for the Committee to review some specific topic.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly did not assign any tasks on this topic to the Inter-American Juridical Committee.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2005), the co-rapporteur of the theme, Dr. Eduardo Vio Grossi, expressed his doubts on the role played by the Juridical Committee on this matter, since it corresponded basically to the Permanent Council to bear the responsibility for the application of this instrument. Both he and the other co-rapporteur, Dr. Antonio Fidel Pérez, felt the need to wait for some juridical consultation on the part of the Permanent Council before returning to the study of the theme.

Dr. Galo Leoro Franco also considered that the follow-up of this theme on the part of the Juridical Committee was not opportune at the present moment. Furthermore, he indicated that the primordial responsibility for this follow-up of the Democratic Charter belonged to the Permanent Council and the Secretary-General.

Dr. Jean-Paul Hubert was of the opinion that the theme should remain in the agenda of the Juridical Committee as a follow-up theme to convey the message to the political sectors of the OAS that the Committee is interested in the matter. The same opinion was shared by Drs. Ana Elizabeth Villalta Vizcarra and João Grandino Rodas.

The Director of the Department of International Legal Affairs declared that in the future the Inter-American Juridical Committee might be consulted on a specific problem, that is, whether the *Inter-American Democratic Charter* should be extended, changed or updated for those cases in which a situation arise that does not correspond to article 20, but where an international crisis exists nonetheless, and the government does not resort to applying articles 17 or 18, since the very Executive Power is the destabilizing element.

The Inter-American Juridical Committee decided to keep this theme in its agenda as a follow-up theme and to change the title of the theme to "Follow-up of the application of the Inter-American Democratic Charter".

* * *

12. Preparation of a draft Inter-American convention against racism and any kind of discrimination and intolerance

At its 66th regular session of the Inter-American Juridical Committee (Managua, February 28– March 11, 2005), its Chairman reported that during the presentation of the Committee's annual report to the Committee on Political and Juridical Affairs of the Permanent Council, two delegations stressed the importance of this topic for the Organization. Dr. Jean-Paul Hubert stated that until a new express mandate is received from the General Assembly, the topic should continue in the Juridical Committee's agenda as a follow-up topic. Dr. Ana Elizabeth Villalta concurred.

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly did not assign any new task to the Juridical Committee regarding this topic. By resolution AG/RES.2126 (XXXV-O/05), "Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention," the General Assembly instructed the Permanent Council to establish a working group in charge of receiving inputs from, *inter alia*, the Inter-American Juridical Committee, with a view to the Working Group's preparation of a draft Convention in this subject matter.

During the 67th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2005), the Chairman of the Committee recalled the report that Dr. Felipe Paolillo, ex-rapporteur of the theme, had prepared concerning this theme. He pointed out that the report of the rapporteur is still in effect and that it is now in the power of the working group of the Permanent Council to deal with the theme. During this regular session the Juridical Committee made no further considerations on the topic.

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CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE IN 2005

A. Presentation of the Annual Report of the Inter-American Juridical Committee

During the 67th regular session of the Inter-American Juridical Committee (in Rio de Janeiro, in August 2005), the Committee Chair, Dr. Mauricio Herdocia Sacasa, referred to his presentation of the Annual Report of the Inter-American Juridical Committee on its activities in 2004 during the regular session of the General Assembly in Fort Lauderdale, Florida, in June 2005. Dr. Herdocia stated that the main suggestions made by the various delegations were taken up in the corresponding resolution, which includes a number of mandates for the Committee. That presentation is reproduced in document CJI/doc.206/05, *Presentation by the Chair of the Inter-American Juridical Committee to the OAS General Assembly at its thirty-fifth regular session (held in Fort Lauderdale, Florida, June 7, 2005*), which is transcribed in Part C of this chapter.

B. Course on International Law

The Inter-American Juridical Committee and the Office of Inter-American Law and Programs organized the XXXII Course on International Law, which was held from August 1 to August 26, 2005 and attended by 28 teachers from different countries in America and Europe, 28 OAS scholars chosen from among more than 70 candidates, and 14 students who paid to participate. The central theme of the Course was "The Contribution of International Organizations to Current International Law."

The XXXII Course on International Law was inaugurated on August 1, 2005, during the 67th regular session of the Inter-American Juridical Committee (in Rio de Janeiro, in August 2005), in the presence of the members of the Inter-American Juridical Committee, and various authorities who had been invited, including the representative of the Ministry of Foreign Affairs of Brazil, Counselor Nelson Antonio Tabajara de Oliveira, Head of the OAS Division, representatives of the General Secretariat, and the scholars and other participants in the Course. During this inaugural session, tribute was paid to the memory of Dr. José Gustavo Guerrero.

The Course program was as follows:

Week One

Monday, August 1

10:00 Opening

Homage to Dr. José Gustavo Guerrero, spoken by Dr. Mauricio Herdocia Sacasa, Chair of the Inter-American Juridical Committee

12:00 Meeting of the participants in the Course with general coordinator.

Tuesday, August 2

9:00 – 10:50 João Clemente Baena Soares
Former Secretary General of the OAS and member of the United Nations International Law Commission
Challenges, threats, and changes at the United Nations I

11:10 – 1:00 Dyalá Jiménez Figueres
Director, International Chamber of Commerce (ICC) Dispute.Resolution Services, Latin America
The ICC arbitration system I

2:30 – 4:30 Mauricio Herdocia Sacasa
Former Chair of the Inter-American Juridical Committee and member of the United Nations International Law Commission
The work of the Inter-American Juridical Committee

Wednesday, August 3

9:00 – 10:50 João Clemente Baena Soares
Challenges, threats, and changes at the United Nations II

11:10 – 1:00 Dyalá Jiménez Figueres
The ICC arbitration system II

2:30 – 4:30 Dyalá Jiménez Figueres
The ICC arbitration system III

Thursday, August 4

9:00 – 10:50 Jean-Michel Arrighi
Director of the OAS Office of Inter-American Law and Programs
The contribution of the inter-American system to public international law

11:10 – 1:00 FREE TIME

2:30 – 4:30 Antonio Fidel Pérez
Member, Inter-American Juridical Committee
The many faces of the IAEA – International Organization Law from "Atoms for Peace" to the "War against terrorism" I

Friday, August 5

9:00 – 10:50 Jean-Michel Arrighi
The contribution of the inter-American system to public international law

11:10 – 1:00 Ana Elizabeth Villalta Vizcarra
Member, Inter-American Juridical Committee
The contribution of Central American international organizations to international law

2:30 – 4:30 Antonio Fidel Pérez
The many faces of the IAEA – International Organization Law from "Atoms for Peace" to the "War against terrorism" II

Week Two

Monday, August 8

9:00 – 10:50 Mónica Canafoglia
Legal Officer, UNCITRAL
The work of UNCITRAL

11:10 – 1:00 Mauricio Alice
Counselor, Office of the Director General of Legal Advisory Services of the Ministry of Foreign Affairs, International Trade, and Worship of the Argentine Republic
Democracy and the Inter-American System I

2:30 – 4:30 Felipe Paolillo
Ambassador, former Representative of Uruguay to the United Nations
The contribution of the United Nations to the development of international law on peace and security I

Tuesday, August 9

9:00 – 10:50 Renaud Sorieul
Senior Legal Officer, UNCITRAL
UNCITRAL and its contribution to international trade arbitration

11:10 – 1:00 Mauricio Alice
Democracy and the Inter-American System II

2:30 – 4:30 Felipe Paolillo
The contribution of the United Nations to the development of international law on peace and security II

Wednesday, August 10

9:00 – 10:50 Renaud Sorieul
UNCITRAL and its contribution to electronic commerce

11:10 – 1:00 Mauricio Alice
Democracy and the Inter-American System III

2:30 – 4:30 Felipe Paolillo
The contribution of the United Nations to the development of international law on peace and security III

Thursday, August 11

9:00 – 10:50 Stephen Vasciannie
Member, Inter-American Juridical Committee
Caribbean perspectives on human rights

11:10 – 1:00 Welber Barral
Professor of International Economic Law at the Universidade Federal de Santa Catarina and Professor of Trade and Development at the American University, Washington, D.C.
The contribution of the GATT and the WTO

3:00 – 5:00 Enrique Iglesias
President of the Inter-American Development Bank
The IDB's contributions to international law

Friday, August 12

9:00 – 10:50 Felipe Paolillo
The contribution of the United Nations to the development of international law on peace and security IV

11:10 – 1:00 Galo Leoro Franco
Member, Inter-American Juridical Committee
Arbitration and mediation in the International Center for Settlement of Investment Disputes - ICSID

2:30 – 4:30 FREE TIME

Monday, August 15

9:00 – 10:50 Diego Fernández Arroyo
Professor, Universidad Complutense, Madrid
The contribution of the inter-American system to private international law I

11:10 – 1:00 Charlotte Ku
American Society of International Law
Emerging Collective Accountability in International Military Operations

2:30 – 4:30 José Alvarez
President – Elect, American Society of International Law
The promise and perils of international organizations

Tuesday, August 16

9:00 – 10:50 Gabriel Valladares
Legal Advisor for the International Committee of the Red Cross (ICRC) regional delegation to cover the Southern Cone
The contribution of the ICRC to international law

11:10 – 1:00 Diego Fernández Arroyo
The contribution of the inter-American system to private international law II

2:30 – 4:30 Antón Camen
Legal Advisor for Latin America and the Caribbean, International Committee of the Red Cross
The contribution of the ICRC to international law

Wednesday, August 17

9:00 – 10:50 Diego Fernández Arroyo
The contribution of the inter-American system to private international law III

11:10 – 1:00 Ricardo Méndez Silva
The United Nations Security Council and the resolutions on Afghanistan and Iraque

2:30 – 4:30 Arnulf Becker
Dr. of Juridical Science (SJD) candidate, Harvard law School
International law in Latin America or Latin-American international law? Rise, fall, and memories of a regionalist legal tradition I

Thursday, August 18

9:00 – 10:50 Arnulf Becker
International law in Latin America or Latin-American international law? Rise, fall, and memories of a regionalist legal tradition II

11:10 – 1:00 Ricardo Méndez Silva
The United Nations Security Council and the resolutions on Afghanistan and Iraq II

2:30 – 4:30 Mauricio Herdocia Sacasa
Challenges to sovereignty and international organizations

Friday, August 19

9:00 – 10:50 Arnulf Becker
International law in Latin America or Latin-American international law? Rise, fall, and memories of a regionalist legal tradition III

11:10 – 1:00 Ricardo Méndez Silva

The United Nations Security Council and the resolutions on Afghanistan and Iraq III

2:30 – 4:30 Antonio Guerreiro
Head of the Department of International Organizations of the Ministry of Foreign Affairs of Brazil
The law-making powers of the United Nation Security Council

Week Four

Monday, August 22

9:00 – 10:50 Adriana Dreysin
Professor of private international law at the Universidad Nacional de Córdoba and member of the list of MERCOSUR arbitrators for Argentina
The new challenges facing MERCOSUR: From international law to integration law I

11:10 – 1:00 Adriana Dreysin
The new challenges facing MERCOSUR: From international law to integration law II

2:30 – 4:30 Hans van Loon
Secretary General of the Hague Conference on Private International Law
The Hague Conference on Private International Law and its achievements in perspective

Tuesday, August 23

9:00 – 10:50 Didier Opertti Badán
Secretary General of the Latin American Integration Association (ALADI)
Globalization and integration: ALADI's current role I

11:10 - 1:00 Adriana Dreysin
The new challenges facing MERCOSUR: From international law to integration law III

2:30 – 4:30 Hans van Loon
The Hague Conventions on legal co-operation and those on protection of children

Wednesday, August 24

9:00 – 10:50 Hans van Loon
Recently adopted and ongoing work on Conventions: the Convention of Choice of Court Agreements and the progress on a Convention on the International Recovery of Child support and other forms of family Maintenance

11:10 – 1:00 Adriana Dreysin
The new challenges facing MERCOSUR: From international law to integration law IV

2:30 – 4:30 Adriana Dreysin
The new challenges facing MERCOSUR: From international law to integration law V

Thursday, August 25

10:10 – 1:00 João Grandino Rodas
Member, Inter-American Juridical Committee

Dispute Settlement in MERCOSUR I

Friday, August 26

10:00 Closing session and presentation of certificates

During its 66th regular session (in Managua, March 2005), the Inter-American Juridical Committee decided that the theme of the Course on International Law in 2006 would be The Inter-American Juridical Committee: *A century of contributions to international law."*

C. Relations and forms of cooperation with other inter-American organizations and with similar regional or world organizations.

Participation of the Inter-American Juridical Committee as an Observer or Guest of various organizations and conferences

The following members of the Inter-American Juridical Committee acted as observers and participated in various forums and international organizations in 2005, as representatives of the Committee:

- Dr. Mauricio Herdocia Sacasa, Chair of the Inter-American Juridical Committee, presented the Annual Report of the Committee on its 2004 activities to the Committee on Juridical and Political Affairs of the Permanent Council on February 24, 2005 and to the OAS General Assembly at its thirty-fifth regular session in Fort Lauderdale in June 2005.
- Dr. Ana Elizabeth Villalta Vizcarra represented the Juridical Committee before the United Nations International Law Commission (ILC/UN).
- Dr. João Grandino Rodas represented the Juridical Committee at the Twentieth Diplomatic Session of the Hague Conference on Private International Law.

Transcribed below are the presentations given by members of the Inter-American Juridical Committee in their capacity as observers, representatives, or participants in a series of meetings during 2005.

CJI/doc.205/05

PRESENTATION OF THE ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE CORRESPONDING TO 2004 TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS OF THE PERMANENT COUNCIL OF THE OAS (Washington, D.C., February 24, 2005)

(presented by Dr. Mauricio Herdocia Sacasa**)**

Dear President,

Representatives of the member States of the Organization, and

Officials of the General Secretariat of the OAS,

On expressing my thanks for the opportunity to present this report, I feel I am the beneficiary of a triple privilege: that of sharing with you all the vision and the development of the work of the Inter-American Juridical Committee, on the one hand, and on the other that of receiving your observations and comments that improve and enrich our common task in the spirit of strengthening our relations and facilitate a fruitful dialogue that potentializes our contribution to the goals and objectives of the Organization.

I am also very especially pleased that this session is being held in the Dr. José Gustavo Guerrero room, named after the illustrious Central-American jurist to whom I am devoted, a man who was President of the two world Courts of Justice, joined past to

future and forged for himself an exceptionally remarkable destiny.

Thirdly, I am pleased at the honor granted to my country by making it the venue of the 66th regular session of the Inter-American Juridical Committee a few days after my return to Nicaragua. This will be the first time that the centenary Committee will hold its sessions in Central America, a region that will give it a warm welcome, manifesting its faith in the values of integration, democracy, international law and the quest for sustainable development.

The Inter-American Juridical Committee has the honor of presenting to the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States a synthesis of its *Annual Report* of the activities undertaken in 2004.

Topics dealt with by the Inter-American Juridical Committee during the regular session corresponding to 2004

As is traditional during this period, the Inter-American Juridical Committee held two regular sessions. Both took place in the main office in the city of Rio de Janeiro, Brazil, during the months of March and August. In the course of both sessions, the Juridical Committee examined the following topics, which I shall comment on briefly below:

1. Legal aspects of compliance within States with decisions of international tribunals or courts or other international bodies with jurisdictional functions

During the 64th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2004), the Committee analyzed document CJI/doc.146/04 rev.1*, Legal aspects of compliance within States with decisions of international tribunals or courts or other international bodies with jurisdictional functions*, presented by Dr. Luis Herrera Marcano.

It is interesting to note that the topic was presented to and keenly appreciated by the Legal Advisors of the Ministries of Foreign Affairs during their last Joint Meeting with the Inter-American Juridical Committee.

The Juridical Committee drew up a questionnaire to enable gathering information needed to proceed with the works.

The questionnaire indicates that the purpose of the topic is to study, from a strictly legal perspective, the applicable norms and practice of the member States of the OAS in carrying out the following decisions:

- sentences passed by international law courts;
- reports by arbitration courts on disputes between States;
- reports by arbitration courts on disputes between States and investments of other States;
- decisions of panels of organizations or free-trade treaties.

The following pertinent topics should be examined:

- what are the international courts or other similar bodies to whose jurisdiction each State can be submitted in accordance with treaties or other international instruments?
- the constitutional and legal provisions of each State, as well as the administrative practices that order, permit or facilitate compliance with decisions to which the topic refers;
- the sentences, reports and other sorts of international decisions dictated in litigations to which the State has been party, possibly with a brief summary of their most important provisions,
- the form of compliance with such decisions, including the legal acts adopted specifically (laws, decrees, sentences, administrative acts, etc.),

- in the case of failure to comply, the legal causes for this failure.

The following aspects are not included in the topic:

- obligatory decisions of bodies of a non-juridical nature, such as the United Nations Security Council;
- decisions of foreign tribunals, that is, the domestic courts of other States;
- international arbitration decisions between private parties or between private parties and a State acting as a private party;
- international consequences of non-compliance, such the international responsibility of the State.

The Juridical Committee's Secretariat sent the questionnaire to the Legal Advisors of the Ministries of Foreign Affairs of the OAS member States.

During the 64th regular session, several members of the Juridical Committee made a full and detailed presentation of their respective reports on the matter, as had been agreed upon.

In turn, during its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly took note of the inclusion of this topic in the agenda of the Inter-American Juridical Committee and asked for a progress report to be included in the next annual report corresponding to 2004.

On September 21, 2004 the General Secretariat sent to the Legal Advisors of the Ministries of Foreign Affairs advance document CJI/doc.167/04 rev.2, as well as resolution CJI/RES.82 (LXV-O/04). This resolution approved the document entitled "Report on the current *status* of the topic on *Legal aspects of compliance within States with decisions of international tribunals or courts or other international bodies with jurisdictional functions"*. The Assistant Secretary for Legal Affairs was also asked to address once again those Legal Advisors who have not yet answered the questionnaire drawn up by the Committee for this topic and, using the contacts established with several teaching and research centers in the field of international law in the continent, asked them for information and opinions on the matters referred to in the questionnaire, which has already been done.

The report on the current *status* of the topic concludes that up to that moment answers to the questionnaire had been received from eleven member States: Belize, Canada, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Uruguay, United States and Venezuela. In some cases the answers came from a member of the Committee, in others from a Legal Advisor, and in others from both sources.

The number of answers received so far, representing about a third of the member States, is still not enough to draw definitive conclusions. However, they do constitute an important contribution to orient the study of the topic.

With some exceptions, the countries examined up to now lack a specific legal norm to generally regulate compliance within the States with international decisions. Peru has adopted a "law that regulates the procedure of carrying out sentences passed by supra-national courts".

Two countries (Canada, United States) have adopted specific provisions to enable compliance with decisions of some international criminal courts.

In the case of some international decisions (the Inter-American Court of Human Rights, Arbitration in the International Center for Settlement of Investment Disputes (ICSID), and arbitration according to the rules of UNCITRAL), the part of the sentence that sets indemnities can actually be carried out directly in the internal sphere as if it were the decision of a national court.

Certain international tribunals (the Inter-American Court of Justice, the Court of Justice of the Caribbean) exert in the member States, in addition to international

jurisdiction proper, direct jurisdiction on other matters (constitutional questions in the former, civil and criminal in the latter).

Some treaties on trade (the World Trade Organization) provide, in the case of non-compliance with a decision from the respective dispute-settlement body, application of trade sanctions against the member States involved.

The Juridical Committee hopes to receive a greater number of answers to the questionnaire by its next regular session.

The Juridical Committee plans to analyze some specific problems, such as those concerning international decisions that require action not only from the executive power but also from the States or provinces that make up a federal State.

The Committee hopes that when this study is concluded it will be useful for member States to know the problems faced by other States in complying with international decisions and the solutions found to these problems.

2. Legal aspects of Inter-American security

During the 64th regular session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2004), Dr. Eduardo Vío Grossi made a presentation of document CJI/doc.147/04 rev.1, *Legal aspects of hemispheric security (working document for the preparation of a draft resolution on the action of the Organization of American States on the matter of international peace and security)*, referring to some of the norms that might be contained in an ensuing resolution on the subject.

He pointed out that the objective would be to expose systematically the norms applicable to OAS action in the ambit of international peace and security. He indicated that a systematic ordering of these norms would permit their precision and development in order to strengthen the Organization itself.

Some members of the Committee stressed the importance of bearing in mind all the elements referring to a new view of security contained in the *Declaration of Mexico,* which it would be interesting to submit to juridical initiatives within the Juridical Committee. That is, to reflect not only the current law, which is very useful, but also what "should be" in accordance with the *Declaration on Security in the Americas*.

In light of all these considerations, the Inter-American Juridical Committee decided to return to the analysis of the topic in the regular session corresponding to the month of August. Nevertheless, emphasis should be made of one of the propositions of the author of the study in respect to the recommendations made: "*The decisions of the OAS on questions of international peace and security should be interpreted in accordance with the Principles, Values and Views Shared and Commitments and Actions of Cooperation as expressed in the Declaration on Security in the Americas, and consequently according to the multidimensional scope of hemispheric security adopted there".*

In turn, during its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly asked the Inter-American Juridical Committee, if it decided to conduct new studies on this topic, to take into account the Declaration on Security in the Americas adopted at the Special Conference on Security held in Mexico City in October 2003, in particular the part corresponding to international peace and security.

During its 65th regular session (Rio de Janeiro, August, 2004), the Inter-American Juridical Committee examined document CJI/doc.159/04 corr.1, Legal aspects of inter-American security: principles or general rules on the action of the Organization of American States on the matter of international peace and security, presented by the rapporteur.

With regard to the factors involved in the action of the OAS, the rapporteur mentioned four, namely: specificity, progressive development, the preeminence of the United Nations, and the role of the sovereign State.

The rapporteur concluded his report by quoting 16 principles or general norms that regulate the action of the OAS in matters of international peace and security, indicating that it can be inferred from there that the OAS has a system established on the matter and that this is not limited to application of the TIAR.

Finally, the Inter-American Juridical Committee adopted resolution CJI/RES.75 (LXV-O/04): Legal aspects of inter-American security, which provides the inclusion of the report of the rapporteur as an annex in the Juridical Committee's Annual Report, as a contribution to the permanent analysis of the question by the Organization. Item 2 of the Resolution states: "To express that the Inter-American System of Peace and Security is consubstantial with the Organization and that the Declaration on security in the Americas is a broad, solid expression of the political will of the member States in order to foster the process of progressive development of International Law in its environment, and especially within the new multidimensional view on security."

3. Application of the Inter-American Democratic Charter

During its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly asked the Inter-American Juridical Committee to analyze, within the framework of this topic and in light of what is contained in Chapter III of the Inter-American Democratic Charter, the legal aspects of the interdependence between democracy and economic and social development, bearing in mind, among others, the Recommendations of the High-Level Meeting on Poverty, Equity and Social Inclusion contained in the Declaration of Margarita, the Monterrey Consensus, the Declarations and Plans of Action issued by the Summits of the Americas, and the objectives contained in the United Nations Millennium Declaration.

The discussions on this topic referred to article 1 of the Inter-American Democratic Charter, which claims that democracy is essential for the social, political and economic development of the peoples of the Americas. The possibility was suggested that the Committee should collaborate, as it did with the Inter-American Democratic Charter, in drafting a binding instrument on this matter.

One member stated that in the OAS Charter there are commitments that constitute starting points and propose the tie between democracy and full development. It was also recalled that the last General Assembly adopted a resolution concerning a "Draft Social Charter for the Americas: Renewing the Hemispheric Commitment to the Struggle against Extreme Poverty in the Region" –AG/RES.2056 (XXXIV-O/04)– and that its contents should be borne in mind.

The Inter-American Juridical Committee finally decided to add another topic to the Committee's agenda entitled "Legal aspects of the interdependence between democracy and economic and social development" as a topic for consideration and with Dr. Jean-Paul Hubert as rapporteur, and leave the topic *Application of the Inter-American Democratic Charter* as a follow-up topic.

4. Joint efforts of the Americas in the struggle against corruption and impunity

During its 65th regular session (Rio de Janeiro, August, 2004), the Inter-American Juridical Committee examined the resolution of the General Assembly AG/RES.2022 (XXXIV-O/04): Joint efforts of the Americas in the struggle against corruption and impunity, through which the Committee was asked to prepare a study on the legal effects of giving safe haven in regional or extra-regional countries to public officials and persons accused of crimes of corruption after having exercised political power and cases where violating the law can be considered fraud or abuse of the right to dual nationality.

Several members indicated as a starting point that it was necessary to analyze the current norm on asylum and shelter, stressing that the word “safe haven” can be understood in the resolution as protection or impunity enjoyed by people involved in acts of corruption. Another element to emphasize was the notion of extradition. As for the second point of the resolution, which deals with double nationality, it was explained that this refers to people who claim double nationality in order to avoid the consequences of their acts of corruption.

Other members mentioned the obligation of cooperation among the States in the name of international justice.

One of the members said that this resolution gives effect to the Declaration of Quito on social development and democracy in the face of corruption, adopted during the last General Assembly of the OAS, its objective being to prevent impunity and establish the primacy of justice by improving the mechanisms so that this impunity is eliminated.

As a result of all these debates, Resolution CJI/RES.77 (LXV-O/04): Joint efforts in the Americas in the struggle against corruption and impunity was adopted. Dr. Ana Elizabeth Villalta Vizcarra was appointed to prepare a study on this resolution requested by the General Assembly, bearing in mind the following pertinent elements:

a) the *Inter-American convention against corruption*, particularly as concerns judicial assistance and cooperation, and the fact that corruption is an extraditable crime;

b) the pertinent provisions of the *United Nations convention against corruption*, especially as regards international cooperation;

c) the contents and scope of the provisions set forth in several General Assembly resolutions in respect to the existing obligation both to abstain from lending asylum to corrupt public officials who have exercised political power and to cooperate so that they be placed at the disposition of the corresponding authorities of the countries where these crimes have taken place in order to be tried by the national courts;

d) the existing international jurisprudence on “effective nationality or genuine bind”, especially the sentences of the International Court of Justice in the Nottebohm case (Liechtenstein *versus* Guatemala) and the sentence of the Permanent Arbitration Court of The Hague in the Canevaro case (Italia *versus* Peru);

e) the treatment that should be given to requests for asylum in those cases involving persons charged with crimes of corruption, in order to avoid impunity.

Before concluding this topic it is important to remember that, just as the United Nations International Law Commission recognized on dealing with the topic of diplomatic protection, nationality cannot be acquired in a way that contradicts international law. Fraud occurs when people use the facility they enjoy to change the circumstances of connection or point of contact for the exclusive purpose of eluding a legislation that is contrary to or jeopardizes their purposes or interests, or else to put themselves under the care of another more favorable legislation. On the topic of the struggle against corruption, one cannot ignore this artifice of using nationality to avoid a request for extradition.

The 1981 Inter-American convention on general norms of Private International Law says (article 6) that “the law of a State Party shall not be applied as foreign law, when the basic principles of the law of another State Party have been fraudulently evaded, ..”.

Several resolutions and declarations of American States, such as the Declaration of Nuevo León of January 2004 and the Declaration of Quito on social development and democracy affected by incidence of corruption, of June 2004, among another impressive set of resolutions, offer important elements on the commitment of denying shelter to corrupt public officials, to those who corrupt them and the produce of their corruption, as well as cooperating towards their extradition. The scope of this commitment implies the refusal to accept justifications based on nationality acquired through fraud or abuse of

law, in violation of the principles in respect to international judicial cooperation and due provision of international justice**.**

At its next session in Managua, the Juridical Committee will hear a report from rapporteuse Dr. Villalta on the topic that is already being distributed, and I trust that we will approve it and adopt an energetic resolution to combat the scourge of corruption and close the doors to impunity.

5. Preparing the Commemoration of the Centenary of the Inter-American Juridical Committee

During its 64th regular session (Rio de Janeiro, March, 2004), the Inter-American Juridical Committee dedicated itself to discussing this topic. It was recalled that the General Assembly of the OAS had asked the Juridical Committee to prepare a Declaration on International Law as soon as possible. The Inter-American Juridical Committee decided to form an Editorial Committee to plan the preparation of the Book of the Centenary, which will also include a selection of the work of the Committee.

During its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly requested the Inter-American Juridical Committee to continue with the preparation of the commemoration of its Centenary.

During its 65th regular session (Rio de Janeiro, August, 2004), the Inter-American Juridical Committee dwelled in detail on the preparations for the commemoration of the Centenary of the Committee. The Inter-American network (which contained points of contact) was already organized on the part of the General Secretariat. So we have entered the second stage of the preparations for the Centenary, but the budget situation has forced certain adjustments to be made. It is fundamental that both this activity and the publication of the commemorative book be carried out without any danger of budget cuts.

During this period of sessions, a resolution was adopted that resolves to commemorate the Centenary under the title "Centenary of the Inter-American Juridical Committee: A century of contributions to international law" and to re-arrange the III Stage of the Centenary Program as follows:

a) Hold a single event on August 21 to 23, 2006 on "The Centenary of the Inter-American Juridical Committee: A century of contributions to international law", with representatives from all the organs, organizations and institutions mentioned in previous resolutions, in addition to other guests connected with international law.

b) This event will consist of five sessions. The first four will take place on August 21 and 22 and will be dedicated to the main contributions and challenges of the Inter-American system, especially in the spheres of International Private Law, Maintaining International Peace and Security, International Jurisdiction and International Economic Law.

c) The fifth session will be held on August 23, 2006 and will consist of a Solemn Session to Commemorate the Centenary of the Inter-American Juridical Committee.

This event will be part of the 32nd Course on International Law.

The Secretariat was requested to draft a full text for the Centenary Program.

6. Right to Information: access to and protection of information and personal data

During its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly took note of the importance that this topic has been included in the agenda of the Inter-American Juridical Committee and asked that an updated report on the subject be included in the next annual report.

During its 65th regular session (Rio de Janeiro, August, 2004), the Inter-American Juridical Committee examined document CJI/doc.162/04, *Right to information: access to and protection of information and personal data*, presented by Dr. Alonso Gómez Robledo. The rapporteur of the topic emphasized in this report the interdependence between accountability and transparency in the exercise of democracy. In general his report is based on the Mexican juridical reality on this topic. In this sense the author referred basically to appeals for revision in Mexico's Federal Institute of Access to Public Information (IFAI).

Later on, some members of the Inter-American Juridical Committee stressed the fact that the topic of democracy was related to that of the right to information. Emphasis was also made of the treatment in the report of the right to protection of personal data in addition to the right to access to information. The importance was shown of looking again at the work of Dr. Jonathan Fried, above all his report of August, 2000, in order to have an update on what has been happening on that topic within the Juridical Committee.

The Inter-American Juridical Committee decided to adopt resolution CJI/RES.81 (LXV-O/04) thanking the rapporteur for presenting the report and asking him to provide an update report for analysis.

7. Improving the systems of administration of justice in the Americas: access to justice

During its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly asked the Inter-American Juridical Committee, when making up its agenda, to bear in mind, within the scope of its duties, the relevant recommendations of the Meetings of Ministers of Justice or Ministers or Attorneys General of the Americas (REMJA).

During the deliberations, it was expressed that the topic has in itself its own dynamic within the framework of the REMJAS and the Center of Studies of Justice in the Americas, and so duplications should be avoided. It was therefore suggested to make contact with the Center in order to analyze the contribution that the Juridical Committee might be able to make. Until the results of this exchange are available, the Inter-American Juridical Committee decided to remove this topic from its agenda.

During the period of recess of the Inter-American Juridical Committee, Dr. Eduardo Vío established contact with the Executive Director of the CEJA, Juan Enrique Vargas Viancos, for the purpose of exploring possible areas of collaboration between the Committee and the CEJA on the subject of the Administration of Justice in the Americas, and in particular the possibility of writing a draft Code of Judicial Ethics or of General Principles of Judicial Ethics, that could be adopted by the inter-American system. Acting on this basis, as Chairman of the Inter-American Juridical Committee I corresponded with the President of the Board of the CEJA, Dr. Federico Callizo Nicora, concerning the understanding that the Juridical Committee and the CEJA will collaborate closely to undertake this task.

I deem it important to suggest that the resolution to be proposed at the next General Assembly of the OAS with regard to this report should encourage the initiatives of the Committee as regards improving the administration of justice and engaging in studies on a draft Code of Judicial Ethics or General Principles of Judicial Ethics, with the collaboration, in particular, of the Center of Studies of Justice of the Americas (CEJA).

8. Seventh Inter-American Specialized Conference on Private International Law - CIDIP-VII

During its 34th regular session (Quito, June, 2004), through resolutions AG/RES.2042 and 2033 (XXXIV-O/04), the General Assembly asked the Inter-American Juridical Committee to contribute to the preparatory work for the CIDIP-VII once the Permanent Council approves the agenda for the Conference.

During the 65th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2004), an account was given of the progress of the topic within the

Committee. It was explained that, as part of the preparations for the CIDIP-VII, the Juridical Committee had already presented a document on the successive stages and the future of the CIDIP, which is featured in the Committee's *Annual Report* for 2002.

I would like to add that this document reflects the topics suggested by the Committee to be dealt with in the framework of the CIDIP-VII. Such topics were: electronic commerce, transborder insolvency and migration, and free transit of persons. It should also be remembered that through a resolution of 2003 –(CJI/RES.59 (LXIII-O/03)– the conclusion was reached, on the topic of Applicable law and competence of international jurisdiction concerning extracontractual civil responsibility, that at present there exist favorable conditions to draw up an inter-American instrument to deal with the jurisdiction and law applicable to extracontractual obligations resulting from traffic accidents; in the case of extracontractual responsibility of the manufacturers and other agents due to defective products (responsibility for product) and finally extracontractual obligations resulting from transborder environmental damage.

Furthermore, the Juridical Committee held an intense debate on the process of codification of Private International Law in general. One member indicated that the existence today of sub-regional economic blocs is converting private law into sub-regional law, unlike International Public Law. Nevertheless, to date no full process has been concluded to review the codes and norms that continue to rule private relations. He proposed conducting this review process within the framework of the Juridical Committee from 1928 until the CIDIP-V.

Finally, the Inter-American Juridical Committee decided to include in its agenda "Re-examining the Inter-American Conventions on International Private Law", together with the topic of the CIDIP-VII. Also, the rapporteurs, Drs. Ana Elizabeth Villalta and João Grandino Rodas, were asked to present some progress report on this re-examination in the next regular session.

In the opinion of the Chairman, it is most important that any resolution that deals with the topic of the CIDIP-VII should take the Inter-American Juridical Committee into account so that it continues to contribute the preparatory work of the CIDIP-VII on the basis of the agenda approved by the Permanent Council.

9. Preparing a draft inter-American convention against racism and all forms of discrimination and intolerance

During the 65th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2004), Dr. Felipe Paolillo, rapporteur of the topic, gave a brief description of the progress of the work of the Juridical Committee on this matter.

Seeing that this topic was already the object of a report on the part of the Inter-American Juridical Committee, it was decided to keep it as a follow-up topic until the comments of the Permanent Council on the question are disclosed. Dr. Paolillo added that during the last regular session of the General Assembly, a resolution on the topic was adopted deciding to request reports from several entities of the Inter-American system so that, together with the report presented by the Juridical Committee, these be analyzed and used as a basis to examine the suitability of adopting a Convention against racism and all forms of discrimination and intolerance.

Activities carried out by the Inter-American Juridical Committee during 2004

Course on International Law

The Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs organized between August 2 and 27, 2004 the 31st Course on International Law, the core topic of which was *International Law, trade, finances and development*. There were 25 professors from different countries of the Americas, 27 OAS scholarship-holders chosen among over 70 candidates, and 10 pupils who paid their own fees.

The Juridical Committee chose the following title for the 32nd Course on International Law: *The contribution of international organizations to current international law*.

The Inter-American Juridical Committee decided that the jurists to be paid tribute to during the 2005 Course would be Santiago Benadava and José Gustavo Guerrero. Drs. Eduardo Vío and Mauricio Herdocia were assigned to prepare these tributes.

Before closing, I would like to remind you of some matters of interest to the Committee:

The first refers to the imminence of the Centenary of the Inter-American Juridical Committee and the suitability of holding a hemispheric and world celebration appropriate to the contributions of our Americas to international law. One might consider the possibility of the Committee on Juridical and Political Affairs conveying to the Permanent Council an initiative to celebrate the Centenary also in the head offices in Washington.

Secondly, I would like to stress the importance of the country advisors answering the questionnaire distributed on the topic of compliance within States with decisions of international tribunals or courts or other international bodies with jurisdictional functions.

Thirdly, the utility of continuing to count on the Committee's work to prepare the CIDIP-VII.

Fourthly, the possibility of advancing in the topic of drawing up a Code of Judicial Ethics or General Principles of Judicial Ethics with the collaboration of the competent bodies of the Inter-American system and in particular the Center of Studies of Justice of the Americas (CEJA).

Mr. President, you can be assured and confident that the Committee will resolve – soon – those mandates of the General Assembly such as the study of the struggle against corruption and impunity that we shall discuss next in Managua.

I would like to stress the complexity and interactions that surround the topic of the interdependence between democracy and economic and social development, on which we shall surely have frequent meetings and debates.

Finally, I would like to repeat the offer of maintaining during my Chairmanship of the Committee very close relations with the Committee on Juridical and Political Affairs, for the benefit of an ever more fruitful and productive dialogue. I shall especially seek frequent meetings with the President of the Committee with a view to forging a dynamic and effective relationship. The rapporteurs of the Juridical Committee could also be invited to the inter-American meetings on the matters under study.

The commemoration of the Centenary of the Committee in 2006 will be an opportunity to show the contributions to the great changes in international law and also a special moment to manifest our determination to face the new juridical challenges with a spirit of responsibility and human calling in an era that more than ever before demands solidarity to make a reality of the hemispheric goals that mark the agenda of the 21st century.

Mr. President, honorable Delegates, thank you for your patience and for the honor of receiving me.

Many thanks!

Mauricio Herdocia Sacasa
Chairman
Inter-American Juridical Committee

CJI/doc.206/05

PRESENTATION BY THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE THIRTY-FIFTH REGULAR SESSION OF THE GENERAL ASSEMBLY OF THE OAS (Fort-Lauderdale, Florida, June 7, 2005)

(presented by Dr. Mauricio Herdocia Sacasa)

Dear President of the General Assembly,

Secretary General of the OAS,

Honorable Ministers and Heads of Delegations,

Before presenting you with a brief summary of the *Annual Report of the Inter-American Juridical Committee corresponding to 2004*, I would like to emphasize the honor granted to Central America by choosing the city of Managua as the venue for the Committee's 66th regular session held in February-March this year.

This was the first time in history that the centenarian Inter-American Juridical Committee has held its sessions in Central America, a region that welcomed its members enthusiastically, given its vocation for international law, a vocation made manifest in the creation of the first court of justice in the world; the consecration of *jus standi* of private parties before the Courts, and more recently the contributions of its model of democratic security and sustainable development, as well as the democratic clause proper with the antecedents of the treaties of Peace and Friendship of 1907 and 1923 and the Tegucigalpa Protocol of 1991.

Dear President:

In the course of the year 2004, the Inter-American Juridical Committee held two regular sessions, both in the main office in the city of Rio de Janeiro, Brazil, in the months of March and August. The Inter-American Juridical Committee examined the themes that I shall present briefly below.

1. **Legal aspects of compliance within States with decisions of international tribunals or courts or other international bodies with jurisdictional functions**.

It is interesting to note that the theme was presented to and keenly appreciated by the legal advisors of the Ministries of Foreign Affairs during their last Joint Meeting with the Inter-American Juridical Committee.

The Committee drew up a questionnaire to enable gathering information needed to proceed with the works.

The questionnaire indicates that the purpose of the theme is to study, from a strictly legal perspective, the applicable norms and practice of the member States of the OAS in carrying out the following decisions:

- sentences passed by international law courts;
- awards by arbitration courts on disputes between States;
- awards by arbitration courts on disputes between States and investments of other States;
- decisions of panels of organizations or free-trade treaties.

The following pertinent topics should be examined:

- what are the international courts or other similar bodies to whose jurisdiction each State can be submitted in accordance with treaties or other international instruments?

- the constitutional and legal provisions of each State, as well as the administrative practices that order, permit or facilitate compliance with decisions to which the theme refers;

- the sentences, awards and other sorts of international decisions dictated in litigations to which the State has been party, possibly with a brief summary of their most important provisions;
- the form of compliance with such decisions, including the legal acts adopted specifically (laws, decrees, sentences, administrative acts, etc.);
- in the case of failure to comply, the juridical causes for this failure.

During the 64th regular session, several members of the Juridical Committee made a full and detailed presentation of their respective reports on the matter, as had been agreed upon.

The report on the *status* quo of the theme concludes that up to that moment answers to the questionnaire had been received from eleven member States: Belize, Canada, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru, Uruguay, United States and Venezuela. In some cases the answers came from a member of the Committee, in others from a Legal Advisor, and in others from both sources. Answers were later received from Colombia, Costa Rica, the Dominican Republic, Haiti, Jamaica and Mexico, giving a total of 17 member States to date.

The number of answers received so far constitute an important contribution to orient the study of the theme.

With some exceptions, the countries examined up to now lack a specific juridical norm to generally regulate compliance within the States with international decisions.

Certain international tribunals (the Inter-American Court of Justice, the Court of Justice of the Caribbean) exert in the member States, in addition to international jurisdiction proper, direct jurisdiction on other matters (constitutional questions in the former, civil and criminal in the latter).

The Juridical Committee hopes to receive a greater number of answers to the questionnaire.

The Juridical Committee plans to analyze some specific problems, such as those concerning international decisions that require action not only from the executive power but also from the legislative or judicial powers of the States or provinces that make up a federal State.

The Juridical Committee hopes that when this study is concluded it will be useful for member States to know the problems faced by other States in complying with international decisions and the solutions found to these problems, thereby strengthening the international administration of justice in relation to the Inter-American system.

2. A second theme deals with the legal aspects of Inter-American security

During its regular session in August, the Inter-American Juridical Committee examined document CJI/doc.159/04 corr.1, *Legal aspects of inter-American security: principles or general norms on the action of the Organization of American States on the matter of international peace and security*, presented by the rapporteur.

In his report the rapporteur proposed 16 principles or general norms that regulate the action of the OAS in matters of international peace and security, indicating that it can be inferred that the OAS has a system establish on this matter and that this is not limited to application of the Rio Treaty (TIAR).

Finally, the Inter-American Juridical Committee adopted a resolution which provides the inclusion of the report of the rapporteur as an annex in the Committee's Annual Report, as a contribution to the permanent analysis of the question by the Organization. Item 2 of the resolution states:

To express that the Inter-American Peace and Security System is consubstantial with the Organization and that the *Declaration on security in the Americas* is a broad, solid expression of the political will of the member States in order to foster the process of

progressive development of International Law in its environment, and especially within the new multidimensional view on security.

3. Application of the Inter-American Democratic Charter

During its 34th regular session, the General Assembly asked the Inter-American Juridical Committee to analyze, within the framework of this theme and in light of what is contained in Chapter III of the Inter-American Democratic Charter, the legal aspects of the interdependence between democracy and economic and social development, bearing in mind, among others, the pertinent declarations and recommendations

The discussions on this theme referred to article 1 of the *Inter-American Democratic Charter*, which claims that democracy is essential for the social, political and economic development of the peoples of the Americas.

It was stated that in the *OAS Charter* there are commitments that constitute starting points and propose the tie between democracy and full development. It was also recalled that the last General Assembly adopted a resolution concerning a "Draft Social Charter for the Americas: Renewing the Hemispheric Commitment to the Struggle against Extreme Poverty in the Region".

The Inter-American Juridical Committee finally decided to add another topic to the Committee's agenda entitled "Legal aspects of the interdependence between democracy and economic and social development" as a theme for consideration and with Dr. Jean-Paul Hubert as rapporteur, and leave the theme *Application of the Inter-American Democratic Charter* as a follow-up theme.

4. Joint efforts of the Americas in the struggle against corruption and impunity

***During its regular session in August, the Inter-American Juridical Committee examined the resolution of the General Assembly requesting the Committee to prepare a study on the legal effects of giving safe haven in regional or extra-regional countries to public officials and persons charged with crimes of corruption after having exercised political power and cases where violating the law can be considered fraud or abuse of the law in respect to dual nationality*.**

As a result of these debates, a resolution was adopted that contemplates certain criteria to guide the reporter's work, including the following:

a) the *Inter-American convention against corruption*, particularly as concerns judicial assistance and cooperation, and the fact that corruption is an extraditable crime;

b) the pertinent provisions of the *United Nations convention against corruption*, especially as regards international cooperation;

c) the contents and scope of the provisions set forth in several General Assembly resolutions in respect to the existing obligation both to abstain from lending asylum to corrupt public officials who have exercised political power and to cooperate so that they be placed at the disposition of the corresponding authorities of the countries;

d) the existing international jurisprudence on "effective nationality or genuine bind", especially the sentences of the International Court of Justice in the Nottebohm case (Liechtenstein *versus* Guatemala) and the sentence of the Permanent Arbitration Court of The Hague in the Canevaro case (Italia *versus* Peru);

e) the treatment that should be given to requests for asylum in those cases involving persons charged with crimes of corruption, in order to avoid impunity.

Just as the United Nations International Law Commission recognized on dealing with the theme of diplomatic protection, nationality cannot be acquired in a way that contradicts international law.

Several resolutions and declarations of American States confirm this. The scope of this commitment to combat corruption implies the refusal to accept justifications based on nationality acquired through fraud or abuse of law, in violation of the principles in respect to international judicial cooperation and due provision of international justice.

I would like to comment that at the meeting in Managua, the Juridical Committee successfully issued an opinion on the theme, with the following conclusions:

> The main precedents concerning dominant nationality and the need for an effective link in determining nationality have taken place in the context of diplomatic protection established in International Law. Nonetheless, the Juridical Committee believes that certain conclusions derived from the context of diplomatic protection could be applied in the field of extradition, although these conclusions do not necessarily reflect the current status of international law. These conclusions include:
>
> 1. In the case of a conflict of nationality, the Juridical Committee considers that if the nationality of the requesting State is the dominant nationality, or the genuine and effective link, extradition should not be refused on the basis of nationality.
>
> 2. When nationality is acquired or invoked through fraud or abuse of the law, extradition should not be denied solely on the basis of nationality**.**
>
> These conclusions are desirable because they would have the juridical effect of avoiding that acts of corruption go unpunished, which would otherwise affect the general aims of international criminal justice, would harm judiciary cooperation between States; would undermine the Rule of Law in international relations; and would ignore the interests of the requesting State. The Committee supports them as appropriate for the progressive development of international law and in order to strengthen and achieve the aims of international justice.

5. Mr. President, I present to the General Assembly a theme of the utmost importance, namely the preparations for the commemoration of the centenary of the Inter-American Juridical Committee

During its regular session in August, the Inter-American Juridical Committee dwelled in detail on the preparations for the commemoration of the Centenary of the Committee and the commemorative book. The inter-American network (which contained points of contact) was already organized on the part of the General Secretariat. So we have entered the second stage of the preparations for the Centenary.

During this period of sessions, a resolution was adopted that resolves to commemorate the Centenary under the title “Centenary of the Inter-American Juridical Committee: a century of contributions to international law” and to re-arrange the III Stage of the Centenary Program as follows:

a) Hold a single event on August 21 to 23, 2006 on “The Centenary of the Inter-American Juridical Committee: a century of contributions to international law”, with representatives from all the organs, organizations and institutions mentioned in previous resolutions, in addition to other guests connected with international law.

b) This event will consist of five sessions. The first four will take place on August 21 and 22 and will be dedicated to the main contributions and challenges of the inter-American system, especially in the spheres of International Private Law, Maintaining International Peace and Security, International Jurisdiction and International Economic Law.

c) The fifth session will be held on August 23, 2006 and will consist of a Solemn Session to Commemorate the Centenary of the Inter-American Juridical Committee.

6. Right to Information: access to and protection of information and personal data

During its 34th regular session (Quito, June, 2004), through resolution AG/RES.2042 (XXXIV-O/04), the General Assembly took note of the importance that this theme has been included in the agenda of the Inter-American Juridical Committee and asked that an updated report on the subject be included in the next annual report.

During its regular session in August, the Inter-American Juridical Committee examined the document *Right to information: access to and protection of information and personal data*, presented by the rapporteur of the theme. The report emphasized the interdependence between accountability and transparency in the exercise of democracy.

The Inter-American Juridical Committee decided to adopt a resolution thanking the rapporteur for presenting the report and asking him to provide an update report for analysis later on.

7. Improving the systems of administration of justice in the Americas: access to justice

During the deliberations, it was expressed that the theme has in itself its own dynamic within the framework of the REMJAS and the Center of Studies of Justice in the Americas, and so duplications should be avoided.

During the period of recess of the Inter-American Juridical Committee, contact was established with the CEJA, for the purpose of exploring possible areas of collaboration between the Committee and the CEJA on the subject of the Administration of Justice in the Americas, and in particular the possibility of writing a draft Code of Judicial Ethics or of General Principles of Judicial Ethics, that could be adopted by the inter-American system.

This Chair suggested that the resolution to be proposed at the next General Assembly of the OAS with regard to this report should encourage the initiatives of the Committee as regards improving the administration of justice and engaging in studies on a draft Code of Judicial Ethics or General Principles of Judicial Ethics.

8. Seventh Inter-American Specialized Conference on International Private Law - CIDIP-VII

During the regular session of the Inter-American Juridical Committee in August, an account was given of the progress of the theme within the Committee. It was explained that, as part of the preparations for the CIDIP-VII, the Juridical Committee had already presented a document on the successive stages and the future of the CIDIP.

I would like to add that this document reflects the themes suggested by the Committee to be dealt with in the framework of the CIDIP-VII.

Furthermore, the Juridical Committee held an intense debate on the process of codification of International Private Law in general. One member indicated that the existence today of sub-regional economic blocs is converting private law into sub-regional law, unlike International Public Law. Nevertheless, to date no full process has been concluded to review the codes and norms that continue to rule private relations. He proposed conducting this review process within the framework of the Juridical Committee from 1928 until the CIDIP-V.

Finally, the Inter-American Juridical Committee decided to include in its agenda "Re-examining the Inter-American Conventions on International Private Law", together with the theme of the CIDIP-VII. Also, the rapporteurs were asked to present some progress report on this re-examination in the next regular session.

In the opinion of the Chairman, it is most important that any resolution that deals with the theme of the CIDIP-VII should take the Inter-American Juridical Committee into account so that it continues to contribute the preparatory work of the CIDIP-VII on the basis of the agenda adopted by the Permanent Council.

9. Preparing a draft Inter-American Convention against racism and all forms of discrimination and intolerance

During the regular session of the Inter-American Juridical Committee in August, the rapporteur of the theme gave a brief description of the progress of the work of the Juridical Committee on this matter.

Seeing that this theme was already the object of a report on the part of the Inter-American Juridical Committee, it was decided to keep it as a follow-up theme until the comments of the Permanent Council on the question are disclosed. The rapporteur added that during the last regular session of the General Assembly, a resolution on the theme was adopted deciding to request reports from several entities of the Inter-American system so that, together with the report presented by the Juridical Committee, these be analyzed and used as a basis to examine the suitability of adopting an inter-American convention against racism and all forms of discrimination and intolerance. It is hoped that a resolution on the matter will be adopted at this General Assembly with a fully receptive and cooperative spirit.

Activities carried out by the Inter-American Juridical Committee during 2004

Course on International Law

The Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs organized between August 2 and 27, 2004 the 31st Course on International Law, the core theme of which was International Law, trade, finances and development. Attendance was excellent, with 25 professors from different countries of the Americas, 27 OAS scholarship-holders chosen among over 70 candidates, and 10 pupils who paid their own fees.

The Juridical Committee chose the following title for the 32nd Course on International Law: *The contribution of international organizations to current international law*.

The Inter-American Juridical Committee decided that the jurists to be paid tribute to during the 2005 Course would be Santiago Benadava and José Gustavo Guerrero.

Before closing, Mr. President, I would like to remind you of some matters of interest to the Committee:

The first refers to the imminence of the Centenary of the Inter-American Juridical Committee and the suitability of holding a hemispheric and world celebration appropriate to the contributions of our Americas to international law. The possibility of the Centenary also being celebrated at the Permanent Council in the head offices in Washington has been received with great sympathy.

Secondly, I would like to stress the importance of the country advisors answering the questionnaire distributed on the theme of compliance within States with decisions of international tribunals or courts or other international bodies with jurisdictional functions.

Thirdly, the utility of continuing to count on the Committee's work to prepare the CIDIP-VII.

Fourthly, the possibility of advancing in the theme of drawing up a Code of Judicial Ethics or General Principles of Judicial Ethics with the collaboration of the competent bodies of the Inter-American system and in particular the Center of Studies of Justice of the Americas (CEJA).

I would like to emphasize that we have already proceeded, with a sense of urgency and opportunity, to emit an Opinion on the matter concerning the legal effects of granting sanctuary to persons charged with corruption. This document shall be sent to the Permanent Council as son as possible.

I would like to stress the complexity and interactions that surround the theme of the interdependence between democracy and economic and social development, on which we shall surely have frequent meetings and debates.

In my presentation of the Report to the Committee on Juridical and Political Affairs I repeated my offer to maintain during my period as Chairman of the Committee close relations wit the Committee on Juridical and Political Affairs for the benefit of an ever more fruitful and productive dialogue.

The commemoration of the Centenary of the Committee in 2006 will be an opportunity to show the contributions to the great changes in international law and also a special moment to manifest our determination to face the new juridical challenges with a spirit of responsibility and human calling in an era that more than ever before demands solidarity to make a reality of the hemispheric goals that mark the agenda of the 21st century.

Mr. President, Secretary General, Honorable Ministers and Delegates, thank you for your patience and for the honor of receiving me.

Many thanks!

Mauricio Herdocia Sacasa
Chairman
Inter-American Juridical Committee

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CJI/doc.191/05

REPORT ON THE MEETING WITH THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

The Inter-American Juridical Committee, at its 66th regular session from February 28 to March 11, 2005, in Managua, Nicaragua, appointed Dr. Ana Elizabeth Villalta Vizcarra to represent it in the International Law Commission of the United Nations, as confirmation of the cooperation between both bodies.

The International Law Commission set the date of June 1, 2005, for such a hearing at 10 a.m., during its 57th session, May 2-June 3, 2005 and from July 11-August 5, 2005, at the UN headquarters in Geneva, Switzerland.

The meeting began on that date at 10 a.m. and ended at midday, and was chaired by the chairman of the International Law Commission (ILC), Mr. Djamchid Momtaz (Iran), the content of which is as follows:

"International Law Commission

Fifty-seventh session

Date: 1st June 2005. 10 a.m.

Session number 2847th.

Dear Colleagues, Ladies and Gentlemen,

I hereby declare open the 2847th Meeting of the International Law Commission.

Before we discuss the first point in our program this morning, I would like to inform you that there has been a change in our program for today and tomorrow. Yesterday I said that the planning group was going to meet now after the plenary. This meeting will be moved to Thursday morning after the meeting of the study group on the fragmentation of international law. This morning the plenary will be conducted by the working group for unilateral acts chaired by Mr. Alain Pellet. A new version of the work program is being distributed.

I now have the pleasure to welcome Mrs. Ana Elizabeth Villalta Vizcarra, representing the Inter-American Juridical Committee, who will give us a talk about the activities of the item in the order of the day “Cooperation with other organizations”, followed by an exchange of opinions. I now give the floor to Mrs. Villalta Vizcarra.

- **PRESENTATION BY DR. ANA ELIZABETH VILLALTA VIZCARRA**
- **MEMBER OF THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE**
- **INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS (ILC-UN)**

I. Background of the Inter-American Juridical Committee (IAJC)

At the Third International American Conference in Rio de Janeiro in 1906, the **“International Board of Jurists”** was created as an legal consultative body and for codification of both private and public international law. Its first working meeting was held in 1912.

In 1923, at the Fifth International American Conference in Santiago, Chile, it was agreed that the system to be adopted by IAJC for the codification of international law would be gradual and progressive.

In 1939, at the Meeting of Ministers of Foreign Affairs of the American Republics in Panama, the IAJC took the name “Inter-American Commission of Neutrality” and in 1942 at the Third Meeting of Consultation of Ministers of Foreign Affairs in Rio de Janeiro, changed its name again to “Inter-American Juridical Committee”.

In 1948, at the Ninth American Conference when the *Charter of the Organization of American States* (OAS) was adopted and recognized as the *Bogota Charter*, the Inter-American Commission of Jurists was created and through which the Inter-American Juridical Committee now became a permanent committee.

In 1967, the *Buenos Aires Protocol* that amended the *OAS Charter*, extinguished the “Inter-American Council of Jurists” and promoted the Inter-American Juridical Committee to principal body of the Organization of American States (OAS).

Pursuant to article 99 of the *OAS Charter*, the mission of the Inter-American Juridical Committee was to act as an advisory body to the Organization on legal matters, promote progressive development of international law and study the legal problems referring to the integration of the developing countries on the Continent and the possibility of standardizing its laws wherever convenient.

The IAJC consists of eleven jurists from the member States elected by the General Assembly from a triple list presented by the States for a four-year period, with possible re-election.

Its duties were to undertake studies and preparatory work requested by the General Assembly, Meeting of Consultation of Ministers of Foreign Affairs and OAS councils. It could also act on its own initiative whenever it considers it convenient and suggest holding specialized legal conferences.

It not only represented the entire group of OAS member States but also had the most comprehensive technical autonomy.

The Inter-American Juridical Committee could establish cooperation relations with universities, institutes and other academic centers, as well as with national and international commissions and entities for the study, investigation, teaching or dissemination of legal matters of international interest.

It is based in the city of Rio de Janeiro, Brazil, but may hold meetings elsewhere in Brazil or in the territory of any other member State, on the vote of at least six of its members.

II. Agenda

Some of the main topics recently discussed by the Inter-American Juridical Committee at its recent regular sessions are the following:

1. Legal aspects of compliance within the States with decisions of international courts or tribunals or other international organs with jurisdictional functions

The coordinator of the reports is Dr. Luis Herrera Marcano. It is worth mentioning that this topic was presented at the 5th Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, August 25-26, 2003, within the framework of the IACJ 63rd regular session, when there was a satisfactory exchange of opinions.

In order to develop it the Juridical Committee members were asked to present a report on the legal status in their countries on this matter. The Juridical Committee drew up a questionnaire to help collect the information required to continue its work, and which was also forwarded to the legal advisors of the Ministries of Foreign Affairs of the OAS member States.

On this matter it has been found that most States do not have specific legal regulations for internal compliance with international rulings in general, but that they recognize their mandatory nature in conventional law or treaties that constitute jurisdictional bodies.

The distributed questionnaire explains that the purpose of the subject is to undertake a strictly juridical study of applicable rulings and practice of the OAS member States in taking the following decisions:

- Decisions of international courts of law;
- Arbitral awards in inter-State disputes;
- Arbitral awards in inter-State disputes and investment disputes of other States,
- Bench decisions on free trade organizations or treaties.

It examined the following:

- Which are the international courts or like bodies under whose jurisdiction each State may be bound, pursuant to treaties or other international instruments;
- The constitutional and legal provisions of each State, and the administrative practices which it orders, permits or facilitates compliance with the rulings to which the topic refers;
- International rulings, judgments and other similar decisions passed in legal disputes in which the State is a party, with as brief a summary as possible of their more relevant provisions.
- The way in which these decisions are enforced, including the legal acts specifically adopted for such a purpose (laws, decrees, judgments, administrative acts, etc.);
- In the event of non-compliance, when legal actions have not been enforced.

The following aspects are excluded from the topic:

- Mandatory decisions of non-legal organizations, such as the UN Security Council;
- Foreign court decisions, that is, internal courts of other States;
- International arbitral awards between private parties or between private parties and a State acting as a private party,
- The international consequences of non-compliance, such as international liability of the State.

The Secretariat sent the questionnaire to all legal advisors in the Ministries of Foreign Affairs of the OAS member States in order to complete its study.

During the 64th regular session, several members of the Juridical Committee gave a comprehensive and detailed presentation of their reports on the matter, as agreed.

In turn, the OAS General Assembly during its 34th regular session (Quito, June 2004), pursuant to resolution AG/RES.2042 (XXXIV-O/04), took note of the inclusion of this topic in the agenda of the Inter-American Juridical Committee, and asked to include a study on its progress in its next *Annual report* for 2004.

The report on the current status of the subject informs that answers to the questionnaire had been received from eleven member States: Belize, Canada, El Salvador, Guatemala, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay and Venezuela. In some cases the answer was given by a member of the Juridical Committee, in others from a legal advisor and others from both.

The considerable number of answers received to date, around one third of the member States, is still not enough to reach a final conclusion. Nevertheless, it is a valuable contribution toward the focus of the study on this issue.

With some exceptions, the countries examined to date do not have a specific legal rule that generally regulates internal compliance with all international rulings. Peru enacted a "law regulating the procedure to enforce rulings passed by supranational courts".

In the case of some international decisions (Inter-American Court for Human Rights, arbitration in the International Center for Settlement of Investment Disputes – ICSID, and arbitration under the rules of UNCITRAL), the part of the ruling that provides for compensation can, in fact, be internally enforced directly as if it were a national court ruling.

Some international courts (Central American Court of Justice, Caribbean Court of Justice), in addition to international jurisdiction itself, exercise direct jurisdiction on other matters (constitutional matters in the former, and civil and criminal matters in the latter case).

The Juridical Committee expects to analyze some specific problems, such as, for example, those that present international rulings requiring action not only by the Executive but also by the Legislative or Judiciary of the States or provinces within a federal State.

The Juridical Committee hopes, after concluding this study, that it may be useful for member States to learn about the problems confronted by other States when complying with international decisions and their solutions.

During the 66th IAJC regular session in Managua, Nicaragua, February 28-March 11, 2005, the coordinator of the topic was asked to prepare a report on the current status for the 67th regular session.

2. Legal aspects of inter-American security:

The rapporteurs of this topic are Drs. Eduardo Vío Grossi, Luis Marchand Stens, Ana Elizabeth Villalta Vizcarra and Mauricio Herdocia Sacasa

One of its rapporteurs, Dr. Eduardo Vío Grossi, stated that its purpose is to systematically discuss the regulations applicable to the work of OAS in the sphere of international peace and security. Some members of the Inter-American Juridical Committee commented that the importance of this topic lies in the fact that it includes all elements on the new approach to security in the *Declaration on security in the Americas* approved by the Special Conference on Security in Mexico D.F. in October 2003.

On this matter, the OAS General Assembly, at its 34th regular session in Quito, Ecuador, under resolution AG/RES. 2042 (XXXIV-O/04), asked the Inter-American Juridical Committee, should it decide to carry out new studies on this subject, to consider the *Declaration on security in the Americas*, especially the part corresponding to international peace and security.

Accordingly, the rapporteurs of the topic agreed that "OAS decisions concerning international peace and security must be interpreted in accordance with shared principles, values and focus, and the commitments and cooperative measures expressed in the *Declaration on security in the Americas* and, consequently, within the multidimensional scope of the concept of hemispheric security adopted therein".

On this topic the IAJC stated that: "the System of Inter-American Security and Peace is inherent to the Organization and that the *Declaration on security in the Americas* is a comprehensive and firm expression of the political wishes of its member States in order to boost the process of progressive development of international law in this sphere, especially in that of the new multidimensional view of security.

3. Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)

The rapporteurs of the topic are Drs. João Grandino Rodas, Ana Elizabeth Villalta Vizcarra and Antonio Fidel Pérez.

The OAS General Assembly on several occasions asked the Inter-American Juridical Committee to continue contributing to the preparatory work of the forthcoming CIDIP-VII.

Accordingly, the Inter-American Juridical Committee submitted a report in 2002 on the successive stages and future of Inter-American Specialized Conferences on Private International Law - CIDIP, suggesting the following topics for it: electronic commerce, transborder insolvency, and migration and free movement of persons. It should also be mentioned that the Sixth Specialized Conference on Private International Law requested IAJC "to examine the documentation on the topic regarding applicable law and competency of international jurisdiction with respect to extracontractual civil liability".

On this topic of "Applicable law and competency of international jurisdiction concerning extracontractual civil liability", the Inter-American Juridical Committee concluded that favorable conditions currently exist to draw up an inter-American instrument on the subject of jurisdiction and applicable law concerning extracontractual obligations arising from road accidents; that today there are favorable conditions currently for drafting an inter-American instrument on the subject of jurisdiction and applicable law concerning non-contractual liability of manufacturers and third parties in the event of faulty goods (goods liability), and lastly, the preparation of an inter-American instrument on jurisdiction and applicable law concerning non-contractual liability arising from transborder environmental damage.

It was concluded that it was important for the Inter-American Juridical Committee to continue contributing toward the preparatory work of the CIDIP-VII.

4. Legal aspects of interdependence between democracy and economic and social development

The rapporteur of this topic is Dr. Jean-Paul Hubert.

The General Assembly, during its 34th regular session (Quito, June 2004), asked the Inter-American Juridical Committee to analyze, within the framework of this topic and in the light of the terms in Chapter III of the *Inter-American Democratic Charter*, the legal aspects of interdependence between democracy and economic and social development. It included, among others, the recommendations of the High Level Meeting on Poverty, Equity and Social Inclusion contained in the *Declaration of Margarita*, the *Monterrey Consensus*, declarations and action plans resulting from the Summits of the Americas, and the objectives in the *UN Millennium Declaration*.

It included the provision in article 1 of the *Inter-American Democratic Charter* that stressed that democracy is vital to economic, political and social development of the peoples of the Americas. It was suggested that the Juridical Committee could contribute to preparing a binding instrument on this topic, as it had done on the occasion of the *Inter-American Democratic Charter*.

There was widespread discussion on this point from the members of the Inter-American Juridical Committee at its 66th regular session in Managua, Nicaragua, in February and March 2005, requesting the rapporteur for another report at the next regular session.

5. The joint effort of the Americas in the struggle against corruption and impunity

The rapporteuse for the topic is Dr. Ana Elizabeth Villalta Vizcarra.

This topic took into consideration the resolution of the OAS General Assembly AG/RES. 2022 (XXXIV-O/04), *The joint effort of the Americas in the struggle against corruption and impunity*, by which the Inter-American Juridical Committee was asked to prepare a study on: a) the legal effects of granting safe haven in regional or extra-regional countries to government employees and persons accused of crimes of corruption, and b) cases that may figure fraud against the law or abuse of law in relation to the principle of dual nationality.

Likewise, it is found in the AG/DEC.36 (XXXI-O/04) *Declaration of Quito on social development and democracy, and the impact of corruption,* in which it is committed to "Deny safe haven to corrupt officials, …and to cooperate in their extradition".

Moreover, the rapporteuse was asked to take into account: a) the Inter-American convention against corruption, particularly with regard to legal aid and cooperation, and the fact that corruption is an extraditable crime; b) provisions in the UN convention against corruption, especially those relating to international cooperation; c) the contents and scope of the terms of several resolutions of the OAS General Assembly relating to the existing obligation to abstain from providing shelter to corrupt public servants who have held political power, and to cooperate toward placing them at the disposal of the corresponding authorities of the countries where they committed such crimes to be judged by their national courts; d) existing international jurisprudence on "effective nationality or genuine bond", especially rulings by the International Court of Justice in the Nottebohm case (Liechtenstein x Guatemala); as well as the Ruling of The Hague Permanent Court of Arbitration in the Canevaro case (Italy x Peru); and e) treatment to be given to requests for asylum in such cases involving persons accused of crimes of corruption, with view to preventing impunity.

This study acknowledges the international significance and scope of acts of corruption, the threat that they represent for international security, and the requests for effective cooperation between the States to prevent, combat and eradicate them.

Another of its valuable contributions the was *Draft articles on diplomatic protection* prepared by the UN International Law Commission. This draft points out that a State is entitled to decide who are its nationals, and that this right is not absolute to the extent that a State against which a claim is made can contest the nationality of the person when it has acquired the nationality in contradiction to international law, because the onus of the proof will belong to the State that contests the nationality of the injured person.

Moreover, in the case of multiple nationality and the claim of nationality from a State (article 7, draft), the Commission provides that the claimant State demonstrates that its nationality is predominant, both at the moment of injury and the date of the official submission of the claim. The Commission also reckoned that the principle that permits a State of the "dominant or effective" nationality to submit a claim to another State of the nationality reflects the current position in international common law. On this matter, it is true that doctrine uses the terms "effective" or "dominant" to describe the necessary bond between the claimant State and its national in situations when a State of the nationality submits a claim to another State of the nationality.

The Commission considered using the term "predominant" to describe this bond, since it gives the idea of relativity and indicates that the person has closer bonds with one State than with another. This was also the term adopted by the "Italy-USA Reconciliation Commission" in the Mergé case, which may be considered the starting point for the development of current common law.

Fraud against the law occurs when people use a facility that they enjoy to change the circumstances of connection or points of contact solely in order to evade a law contrary or detrimental to their intents or interests, and put it under the rule of the more beneficial law. This device on nationality to avoid a request for extradition cannot be neglected in the fight against corruption. The 1981 *Inter-American convention on general rules of private international law*" regulates fraud against the law in its article 6, as follows: "The law of a State Party shall not be applied as foreign law when the basic principles of the law of another State Party have been fraudulently evaded. The competent authorities of the receiving State shall determine the fraudulent intent of the interested parties". Accordingly, fraud against the law would be an exception to the application of foreign law.

Resolutions and declarations made by the Organization of American States (OAS) under study in this topic establish important elements in the commitment to refuse shelter to corrupt government employees, those who corrupt them and to property resulting from corruption, and to cooperate toward their extradition.

In the case of a person accused of a crime of corruption who has or intends to have both the nationality of the country that shelters him or her and of the country in which he or she presumably committed the crime of corruption and exercise of public authority, the granting of safe haven would consist of refusing the duly requested extradition, basing the refusal on the sole fact that the accused party has the nationality of the requested country. If a State cannot grant extradition of its own national, it is bound to judge him or her.

The case where the nationality of the requested State was obtained fraudulently or abusively by the person in question must also be considered.

Article 7 of the *Draft of the International Law Commission on diplomatic protection* states the following on the subject: "The State of the nationality cannot give diplomatic protection to a person against another State of which the person is also a national, unless the nationality of the first State is predominant at the moment of injury and on the date when the claim is officially submitted".

In the light of the above, the Inter-American Juridical Committee concluded:

The main precedents concerning dominant nationality and the need for an effective bond to determine the nationality were considered within the context of diplomatic protection established by international law. Nevertheless, the Juridical Committee considers that certain conclusions from the context of diplomatic protection are applicable to the field of extradition, although it may be that these conclusions do not necessarily reflect the current status of international law. These conclusions include:

In event of a nationality dispute, the Juridical Committee reckons that if the nationality of the claimant State is dominant, predominant or a genuine and effective bond, extradition should not be refused solely on the basis of nationality.

When nationality is obtained or invoked by fraud against the law or abuse of the law, extradition should not be refused solely on the basis of nationality.

These conclusions would have a legal effect that prevents impunity of crimes of corruption; that the general purposes of international criminal justice are affected; that legal cooperation between States is harmed; that the Rule of Law in international relations is undermined, and underestimating the interests of the State applying for extradition. The Juridical Committee endorses them as convenient for the progressive development of international law and for achieving the purposes and strengthening international justice.

6. Right to information: access to and protection of information and personal data

The rapporteur of this topic is Dr. Alonso Gómez-Robledo, who gave his first report during the 65th regular session of IAJC, highlighting the interdependence between the rendering of accounts and transparency in exercising democracy and the right to protect personal data and the right to access to information.

The Inter-American Juridical Committee asked the rapporteur of the topic for an update report to be analyzed.

7. Preparations for the Centennial Commemorations of the Inter-American Juridical Committee

During the 65th regular session of the Inter-American Juridical Committee, approval was given to commemorate its Centennial on the theme of "**Centennial of the Inter-American Juridical Committee: a century of contributions to international law**". It was agreed to hold a single event on August 21, 22 and 23, 2006, in which bodies, organizations, institutions and other guests relating to international law would participate. The event will consist of five sessions. The first four will be held on August 21 and 22 and will address the main contributions and challenges of the inter-American system, especially in the fields of private international law, maintaining peace and international security, international jurisdiction and the economic international law; the fifth session to be held on August 23, 2006, will be a ceremony in commemoration of the Centennial; the event will be registered within the framework of the 33rd Course on International Law.

8. Re-examination of inter-American conventions on private international law

The rapporteurs of the topic are Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez.

The undersigned as rapporteur of this topic in the 66th regular session pointed out that the legal framework of private international law in the inter-American system consists of conventions, protocols, model laws, legislative guides, uniform documents, and documents and instruments that regulate the relation between individuals in an international context. A review was also made of the results of the various specialized conferences on the subject and reference was made to the preparations of CIDIP-VII and the proposed topics by various countries. She stressed that since the CIDIP-IV the number of ratifications by member States has diminished and the number of participating States has decreased at such conferences, which is why she proposed to continue reinforcing the process of the CIDIPs (Inter-American Specialized Conferences on Private International Law) as a suitable way toward codification and progressive development of private international law in the Americas, promoting not only its traditional focus (conventions) but also the modern (model laws), considering the harmonization of the fundamental law. She also suggested that in the preparations for CIDIP-VII the plan is to create a committee to analyze the reasons why there is a decreasing number of ratifications and the reasons for the non-application of model laws".

In this sense the Inter-American Juridical Committee resolved to recommend to the Permanent Council to include in the agenda of the next CIDIP-VII the analysis of the reasons why some of the inter-American conventions on private international law adopted in the framework of the CIDIP do not have a larger number of ratifications by the OAS member States, and the degree of inclusion of the model laws in the internal legislation of the member States.

9. Principles of Legal Ethics

During the period of recess of the Inter-American Juridical Committee contacts were made with the Center of Justice of the Americas (CEJA), to establish areas of cooperation between IAJC and CEJA in the sphere of administration of justice in the Americas and the possibility of drafting general principles of legal ethics that could be adopted by the Inter-American System.

III. Activities of interest held by the Inter-American Juridical Committee:

Course on International Law

Every year since 1974 IACJ holds the Course on International Law in conjunction with the Office of Inter-American Law and Programs, to which are invited distinguished lecturers and specialists from the different areas of international law, and which is basically attended by scholars from the OAS member States. The Course is structured on various class modules given daily with mandatory attendance, and the work is done in groups on current topics in the development of international law.

The 32nd Course on International Law will be held from August 1 to 26, 2005, in Rio de Janeiro, Brazil, on the central topic "The contribution of international organizations to current international law".

Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of OAS Member States

Every two years since August 1993, the Inter-American Juridical Committee organizes the Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of OAS Member States, to tighten the ties between IAJC and the legal consultative bodies of the Ministries of Foreign Affairs. The 5th Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States was held on August 25-26, 2003, in Rio de Janeiro, Brazil, during the 63rd regular session of the Inter-American Juridical Committee, with the following agenda:

a) Hemispheric security;

b) Examination of the mechanisms to face up to and prevent serious recurring violations against humanitarian international law and international law of human rights, and the role that the International Criminal Court plays in this process;

c) The inter-American juridical agenda;

d) Juridical aspects of internal compliance of States with rulings of international courts or tribunals and other international bodies with jurisdictional functions.

The Inter-American Juridical Committee Annual Report

The Inter-American Juridical Committee annual reports are available on internet, on the Organization of American States site (www.oas.org/documents/eng/structure). To read the reports, access the "Department of Legal Affairs and Services", option "Inter-American Juridical Committee" and "Reports". For screen viewing the annual reports it is necessary to have the Adobe Reader program.

IV. List of IAJC members

Dr. Mauricio Herdocia Sacasa	Chairman (Nicaragua)
Dr. Jean-Paul Hubert	Vice-chairman (Canada)
Dr. Eduardo Vío Grossi	(Chile)
Dr. João Grandino Rodas	(Brazil)
Dr. Luis Herrera Marcano	(Venezuela)
Dr. Ana Elizabeth Villalta Vizcarra	(El Salvador)
Dr. Luis Marchand Stens	(Peru)
Dr. Alonso Gómez-Robledo Verduzco	(Mexico)
Dr. Antonio Fidel Pérez	(United States of America)
Dr. Galo Leoro Franco	(Ecuador)
Dr. Stephen C. Vasciannie	(Jamaica)

V. Inter-American Juridical Committee headquarters – in Rio de Janeiro

Address:	Av. Marechal Floriano, 196/ 3º andar – Palácio Itamaraty Centro – 20080-002 Rio de Janeiro–RJ
Tel:	(55-21) 2206-9903
Fax:	(55-21) 2203-2090
e-mail:	cjioea.trp@terra.com.br

We thank you very much. We have been listening with great interest to your talk which gave us very relevant information about the activities of the Inter-American Juridical Committee. Now the floor is open for questions and comments.

Mr. **Martti Koskenniemi** (Finland): the following topics seem to be of the utmost importance: "Juridical aspects of internal compliance of the States with the rulings of international courts and tribunals or other bodies with jurisdictional functions" and "Legal aspects of Inter-American security".

- That the relations between ILC-UN and IAJC should not be restricted to an exchange of information that is quickly forgotten and leaves no trace. Cooperation between both committees should include the support of drafts, a more dynamic support in the opinions of both committees on the agendas. For example, the opinion of the International Law Commission would be very relevant to IAJC on the "Draft on International Liability of the States" as a regional juridical body that valorizes international law. This draft is also known to Dr. Mauricio Herdocia Sacasa, who was until recently a member of the International Law Commission.

Mr. **Victor Rodríguez Cedeño** (Venezuela) also pointed out the need to strengthen cooperation and mutual support between both committees, and said:

- That he believed that the topic on "Democracy and Social Development" was very important since it is a subject that reinforces the *Inter-American Democratic Charter.*

- Likewise, the topic on compliance with international rulings under study in this topic at a domestic level is implemented in the *Rome Statute*.

- That he also believes it to be very important in the inter-American sphere to combat corruption and transnational organized crime.

Mr. **Michael Matheson** (USA)

- That the theme on "Legal aspects of compliance within the States with decisions of international courts or tribunals or international organs with jurisdictional functions" seemed to be very important, and that it would be interesting on this matter to also study the aspects on how international rulings apply to a federal such as the United States and their connection (rulings) was studied, it would be interesting to study the aspectos on how international rulings aplly in a federal system.

- That importance should also be given to the topic on interdependence between democracy and socioeconomic development.

Mr. **Constantin P. Economides** (Greece)

- That he believed it very important to know in what way the Inter-American Juridical Committee, in the topic "Joint effort of the Americas in the struggle against corruption and impunity", addressed the matter of "diplomatic protection" under analysis by the International Law Commission. It is observed how American regionalism is a framework that encouraged the regulation of international law, as well as the dynamics considering regionalism in the progressive development of international law.

- That there should be further cooperation in these topics and that it is important to stress the influence of the OAS as a driving force of American regionalism.

Mr. **Choung Chee** (Republic of Korea)

- That he was impressed by the theme "Joint effort of the Americas in the fight against corruption and impunity", especially in relation to the topic of diplomatic protection, and that this topic could act as a basis for extradition of corrupt former government employees.

- That he attributes great importance to the new scope of inter-American security, which goes far beyond the 1945 concept of security in the *UN Charter* and of the Chapultepec Conferences.

- That regional practice has promoted leadership and gave examples of the European Union with its European Court of Justice, and the Inter-American Court of Human Rights in the Inter-American System that has given jurisdictional practice on the matter.

Mr. **Enrique Candioti** (Argentina)

- He gave thanks for the presentation and said it was very important that the Inter-American Juridical Committee had included in its agenda currently relevant topics, such as regional security; interdependence between democracy and socioeconomic law; and the fight against corruption and impunity.

- That he was very pleased that the Inter-American Juridical Committee in the topic on the “fight against corruption and impunity” included topics such as “diplomatic protection”, for example, in the agenda of the International Law Commission. Consequently, there should definitely be further interaction between the Commission and Committee.

- That it is advisable for the Inter-American Juridical Committee to consider the possibility of analyzing the International Law Commission reports and their comments on the matter, which could occur at the annual meeting held by both bodies.

- That the topic on non-ratification of the conventions on private international law by the States should also be extended to public international law, since many States did not ratify the conventions on public international law.

- That the International Law Commission would be interested in actively participating in the Inter-American Juridical Committee Centennial, and members of the Commission could, therefore, give classes in the Course on International Law to be held during the Centennial, at which event many more members of the International Law Commission could attend.

- That it is very interesting to have direct access to the Inter-American Juridical Committee documents, which could be considered a kind of cooperation between both bodies and lead to a more active relationship.

- He congratulated Dr. Mauricio Herdocia Sacasa, Chairman of the Inter-American Juridical Committee, who had also been a member of the International Law Commission.

Mr. **Guillaume Pambou-Tchivounda**, Vice-chairman of the Commission (Gabon)

He said that it was advisable to have a closer relationship and exchange between the International Law Commission and Inter-American Juridical Committee.

Mrs. **Paula Escarameia** (Portugal)

- She said that there should be closer relations with the Inter-American Juridical Committee, since many of the inter-American topics under study are serious problems to be confronted at a global level.

- That importance should be given to the relationship between the Inter-American Juridical Committee and other bodies in the inter-American system, such as CEJA, and especially when wishing to sign a cooperation agreement.

- On this matter she stresses the need for a closer relationship between the International Law Commission and Inter-American Juridical Committee.

- That the International Law Commission, besides its relationship with the Inter-American Juridical Committee, also has a relationship with other bodies such as, for example, the International Court of Justice, European Committee for Juridical Cooperation, Committee of Legal Advisors on Public International Law of the Council of Europe and the Asian-African Legal Consultative Organization.

Mr. **Djamchid Momtaz**, Chairman of the International Law Commission (Iran)

- He also commented that the Inter-American Juridical Committee plays a leading role in harmonizing legislation; that the topic “Joint effort of the Americas in the fight against corruption and impunity” is a forerunner on this matter; and in the progressive development of international law.

- Whether the Inter-American Juridical Committee has considered including in its agenda the harmonizing of national laws concerning pardon, clemency or prescription of crimes.

He again thanked Mrs. Villalta Vizcarra for her presentation on the work of the Inter-American Juridical Committee and wished her a pleasant stay in Geneva and a good return journey.

Dear colleagues,

As previously mentioned, the working group on unilateral acts will meet after the coffee break in this room. This afternoon, the working group on shared natural resources will meet at 3 p.m. Tomorrow morning the study group on fragmentation of international law will meet at 10 a.m., followed by the planning group. Our next plenary session will be held on Wednesday morning at 10 a.m. We will listen to the Committee's report on the topic of "Liability of international organizations".

The session adjourns at midday."

Remarks of the undersigned on the meeting with the International Law Commission of the United Nations refer to the convenience of having closer cooperation between both bodies. Outside the meeting, some members expressed interest in a cooperation agreement and more active participation in the work of the Inter-American Juridical Committee, and to participate as lecturers in the Course on International Law. They also acknowledged that it is one of the best regional courses, and that participation could begin when commemorating the Inter-American Juridical Committee Centennial; that it was convenient for the Inter-American Juridical Committee to comment on the drafts in the agenda of the International Law Commission and that such comments were expressed at the annual meeting of both bodies. This cooperation could be established between the Chairs of both bodies, and for this reason I forward the 2004 report of the International Law Commission.

In the light of the above, it is considered that this is a good time to strengthen the academic relations and those of the organization between the International Law Commission and the Inter-American Juridical Committee and to benefit from this opportunity for the progressive development of international law.

Meetings organized by the Inter-American Juridical Committee

The Inter-American Juridical Committee invited the following people to take part in its meetings in 2005:

- Ambassador João Clemente Baena Soares, former Secretary General of the OAS.
- Dr. Hans Van Loon, Secretary General of the Hague Conference on Private International Law
- Dr. Renaud Sorieul and Mónica Canafoglia, Legal Officers at UNCITRAL.
- Dr. Charlotte Ku, Executive Director of the American Society of International Law and José Álvarez, President-elect of that Society.
- Dr. Juan Enrique Vargas Viancos, Secretary of the Justice Studies Center of the Americas – CEJA, and Rodolfo Vigo, Minister of the Supreme Court of the province of Santa Fe, Argentina.
- Counselor Nelson Antonio Tabajara de Oliveira, Head of the OAS Division of the Ministry of Foreign Affairs of Brazil.

During its regular session in Managua, Nicaragua, the Inter-American Juridical Committee also met with the President of the Republic of Nicaragua, Mr. Enrique Bolaños; the Minister of Foreign Affairs of Nicaragua, Chancellor Norman Caldera; the magistrates of the Central American Court of Justice; the President of the Central American Parliament; the magistrates of the Supreme Court of Justice of Nicaragua; representatives of the OAS national office in Nicaragua; and with representatives of the Ecuadorian and Peruvian embassies in Nicaragua.

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Annex

CJI/doc.190/05 rev.1

LEGAL ASPECTS OF THE INTERDEPENDENCE BETWEEN DEMOCRACY AND ECONOMIC AND SOCIAL DEVELOPMENT: PROGRESS REPORT

(presented by Dr. Jean-Paul Hubert**)**

Summary[1]

Part I 1. Preliminary note. 2. The mandate 3. Interpretation of the mandate 4. Methodology
Part II: Some Initial Considerations and Reflections. 1. The interrelationship between democracy and economic and social development. 2. 'Democracy first' *versus* 'development first'. 3. The "right to democracy". 4. Democracy as a "human right" 5. "Development as a right" and as a "human right". 6. The notion of "Integral Development". 7. Remedies to lack of economic and social development as a threat to democracy. 8. The "Progressive Development of International Law".
Part III: The Inter-American Democratic Charter . 1. The Inter-American Democratic *Charter* seen as part of the 'Democratic Architecture' of the OAS. 2. The *Inter-American Democratic Charter* and the "progressive development of international law"; the *Charter* as a "resolution"
Annexes: 1. United Nations *Charter. 2. Charter* of the Organization of American States. 3 The Santiago Commitment to Democracy and the Renewal of the Inter-American System, & Resolution 1080 on "Representative Democracy" (June, 1991). 4. First Summit of the Americas, "Declaration of Principles" (Miami, December 1994). 5.First Summit of the Americas, "Plan of Action" (Miami, December 1994). 6.Second Summit of the Americas, "Declaration of Principles" (Santiago, April 1998). 7.Second Summit of the Americas, "Plan of Action" (Santiago, April 1998). 8.United Nations Millennium Declaration (New York, September 2000). 9. Third Summit of the Americas, "Declaration of Principles" (Quebec City, April 2001). 10. Third Summit of the Americas, "Plan of Action" (Quebec City, April 2001). 11.Inter-American Democratic *Charter* (Lima, September 2001). 12. Monterrey Consensus (March 2002). 13. Declaration of Margarita (Venezuela, October 2003). 14. *Declaration on Security in the Americas* (Mexico City, October 2003). 15. Declaration of Nuevo León (Monterrey, January 2004). 16. Some relevant opinions on the *Inter-American Democratic Charter* in relation to democracy and economic and social development.

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LEGAL ASPECTS OF THE INTERDEPENDENCE BETWEEN DEMOCRACY AND ECONOMIC AND SOCIAL DEVELOPMENT (Progress report)

PART I

1. Preliminary note

The present progress report builds upon an earlier paper of very much a preliminary nature, which was initially considered and discussed at the 66th regular session of the Inter-American Juridical Committee (Managua, Nicaragua, March 2005). It takes into account the views and orientations expressed on that occasion by members of the Inter-American Juridical Committee, and introduces some precisions as to the shape the final report is expected to take, once the present content are reviewed and enriched by further discussion and guidance at the 67th regular session of the Juridical Committee in Rio de Janeiro (August 2005).

[1] This is a provisional summary, which may, and probably will, change in the course of preparation of the final version of this report.

2. The mandate

On June 8, 2004, the 34th General Assembly of the Organization of American States held in Quito, Ecuador, adopted AG/RES. 2042 (XXXIV-O/04) "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee". That Resolution contains several specific mandates addressed to the Juridical Committee, among which the following:

> *7. To request the Inter-American Juridical Committee, in the context of its agenda item "Application of the Inter-American Democratic Charter," to analyse legal aspects of the interdependence between democracy and economic and social development, taking account, inter alia, of the recommendations of the High-Level Meeting on Poverty, Equity, and Social Inclusion contained in the Declaration of Margarita, the Monterrey Consensus, the Declarations and Plans of Action issued at the Summits of the Americas, and the objectives of the United Nations Millennium Declaration.*

3. Interpretation of the mandate

Upon its initial considerations of the language of the above mandate, the IAJC unanimously agreed that it was important to note that the analysis entrusted to it is to be carried within the precise context of its agenda item relating to the application of the *Inter-American Democratic Charter,* adopted on September 11, 2001 at a special session of the OAS General Assembly held in Lima, Peru.

Thus, the *Inter-American Democratic Charter* must therefore be a central focus of this study.

That in turn necessarily entails that the *OAS Charter* itself, though not expressly mentioned in the mandate, must serve as the overall backdrop, so to speak, of our entire considerations. This is expressly recognized by the *Inter-American Democratic Charter* itself when it sees fit to recall in its very first preamble "… *that the Charter of the Organization of American States recognizes that representative democracy is indispensable for the stability, peace, and development of the region, and that one of the purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of nonintervention; …";* thus simply repeating language found in Art. 2 (b) of the *OAS Charter* itself.

Then, we are asked to concentrate, in our analysis, on what are referred to as "the legal aspects of the interdependence between democracy and economic and social development". The General Assembly, in adopting that precise wording, therefore posited that such interdependence between democracy and economic and social development is an established fact. That such interdependence exists is thus clearly taken for granted. As we shall see, indeed the linkage between democracy on one hand, and economic and social development on the other hand, is very widely and repeatedly proclaimed in a large number of Hemispheric documents of various natures. Yet, given what at first glance may appear as the novelty of having to look for and analyze the 'legal' interdependence between the two, something which is not self-evident, that should prompt us to survey, at least in part, the various –and at times quite different– ways in which such linkage is expressed in those diverse documents. The Juridical Committee agreed that looking at how and in what fashion such interrelationship arises in various Hemispheric and other international documents, could indeed be relevant.

The above also raises the complex issue of "definitions". We had to ask ourselves whether an analysis of the "legal interdependence" between those concepts requires a prior attempt at defining them in any 'abstract' way, separately and individually.

The Juridical Committee agreed that "democracy" taken in the abstract can hardly be defined in any precise 'authoritative' manner. It is indeed well agreed that while what democracy entails in a general fashion can be, and has been, indeed described (notably by simply using some of its constitutive element), it is not a 'fixed' concept; especially and above all when looked upon through the modalities of its practical application in individual

countries. So, rather than attempting such a general, abstract definition, we have opted to limit our consideration of what "democracy" means to how it is actually 'defined' or presented as *per* the language actually found in the various documents under study.

The same reasoning is applied, for the same reasons, to attempts at defining with any precisions the notions of "economic" and "social" developments (more below).

Our analysis is also expected to be carried out in light of the contents of various documents listed non-exhaustively in the mandate, some adopted within an inter-American hemispheric context, others of a more global nature. It has been found advisable to add, besides the UN and (for the specific reasons evoked above) *OAS Charter*s, the *Santiago Commitment to Democracy and the Renewal of the Inter-American System,* as well as *Resolution 1080 on Representative Democracy,* given their specific and immediately-related contents. We have also reviewed two more recent documents, namely the *Declaration on Security in the Americas* (Mexico City, October 2003) and the *Declaration of Nuevo León* issued at the Special Summit of the Americas (Monterrey, January 2004).

Finally, looking at the overall language of the mandate, and keeping in mind the discussions that led to its drafting and, later, its adoption, the Juridical Committee was quick to recognize that the question submitted to it was not, far from it, devoid of any 'political' considerations. That should not be surprising if one remembers that, as we shall see later, the adoption of the *Inter-American Democratic Charter* was the direct and immediate result of, and in total keeping with, express instructions issued by the Heads of State and Government of the Americas, gathered at the Third Summit of the Americas, held from April 20 to 22, 2001 in Quebec City, Canada. And there can hardly be any higher and more authoritative expression of political will than that emanating from such summits. Ours is not of course, by its very nature, expected to be a 'political' study. It tries to skirt the hard-to-avoid political issues and challenges that naturally underlie the putting in practice, promotion and defence of democracy and the attainment of higher levels of development under all of its facets (*i.e*. economic, social, and many others) in our Hemisphere, two central aims of the Inter-American System.

4. Methodology

A word about the way chosen for the general approach to the task entrusted to the Juridical Committee. As indicated above, we focussed principally on an actual review of the instruments identified in our Mandate, plus a few more that seemed particularly relevant. Again, and for ease of reference those were:

1. *United Nations Charter*
2. *Charter of the Organization of American States*
3. *The Santiago Commitment to Democracy and the Renewal of the Inter-American System, and Resolution 1080 on Representative Democracy* (June, 1991)
4. First Summit of the Americas, *Declaration of Principles* (Miami, December 1994)
5. First Summit of the Americas, *Plan of Action* (Miami, December 1994)
6. Second Summit of the Americas, *Declaration of Principles* (Santiago, April 1998)
7. Second Summit of the Americas, *Plan of Action* (Santiago, April 1998)
8. *United Nations Millennium Declaration* (New York, September 2000)
9. Third Summit of the Americas, *Declaration of Principles* (Quebec City, April 2001)
10. Third Summit of the Americas, *Plan of Action* (Quebec City, April 2001)
11. *Inter-American Democratic Charter* (Lima, September 2001)
12. *Monterrey Consensus* (March 2002)
13. *Declaration of Margarita* (Venezuela, October 2003)
14. *Declaration on Security in the Americas* (Mexico City, October 2003)
15. *Declaration of Nuevo León* (Monterrey, January 2004)

As can be expected, we limited our review of the actual provisions of those documents to the immediate and specific purview of our mandate, *i.e.* we looked at them from the particular angle of the relationship posited between democracy on one hand, and economic and social development on the other hand. To better accomplish our purpose, we devised a 'template' to be similarly applied to each of the above documents. That template was divided into three parts or headings, corresponding respectively to the treatment given by each document to the concepts of "Democracy", "Social and Economic Development" taken together, and "Democracy & Social and Democratic Development Interrelated". For each of the above-identified documents we then proceeded to 'fill in' each of those headings with various extracts corresponding to those concepts[2]. Immediately following some of those extracts, brief comments are offered, some of which would later find their way, in whole pr in part, in the body of the present report.

Those templates, complete with texts and comments, are appended at the end of the present report, as annexes (numbered as *per* above).

Given the place it came to occupy in the constant evolution of the Inter-American System, the *Inter-American Democratic Charter* has naturally been, and still is, the object of countless declarations on the part of political figures and state officials, as well as of a large number of scholarly studies and analysis. We have therefore found it potentially helpful to reproduce a limited -but hopefully representative- sample of reactions and opinions emanating from those involved in a proximate fashion in diverse stages of its preparation, adoption and application. Some useful guidance can follow therefrom. Those have been regrouped under Annex 16, under the heading "*Some relevant opinions on the Inter-American Democratic Charter in relation to democracy and economic and social development".*

PART II

Some Initial Considerations and Reflections

Preliminary reviews by the Juridical Committee of the documents thus presented led to some early considerations and reflections, which were to guide the rapporteur for the later development and elaboration of the present study.

1. The interrelationship between democracy and economic and social development

An immediate conclusion the Juridical Committee came to was to the effect that, as stated earlier and posited in our mandate, there cannot indeed be any doubt whatsoever that the existence of interdependence between democracy and economic and social development has been, and is still being, widely and repeatedly proclaimed in various Hemispheric texts and documents of diverse natures. Yet, given what may somehow appear as the 'novelty' of having to look for and analyze the "legal" aspects of that interdependence or interrelationship (something which is far from self-evident), a close look at the various and often quite different angles from which such linkage is expressed in those documents, appeared called for. For example, at times the argument seemingly being put forward is that democracy leads to, is a pre-condition for, development. At other times, the proposition seems to rather be that, *a contrario*, for democracy to flourish there must be development first. But most often, those lines are blurred and the proposition simply is that the two are inseparable and/or mutually supportive. The Juridical Committee therefore agreed that looking at how and in what fashion such interrelationship arises in various Hemispheric and other international documents, could indeed be relevant.

2. 'Democracy first' *versus* 'development first'

That being said, and taking into account that the relative merits of 'democracy first' *versus* 'development first' approaches have been the object of countless academic

[2] Admittedly, it proved impossible to avoid some arbitrariness in the choice of those extracts and the decision as to where exactly to locate them within each template.

studies, both theoretical and empirical, the Juridical Committee was of the view that such a 'debate', is primarily political in nature, rather than legal; that probably explains why its remains, to this date, so inconclusive. Hence the lack of immediate relevance of such a debate to the present study.

3. The "right to democracy"

Article 1 of the *Inter-American Democratic Charter* proclaims: "*The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. (…)".* This clear affirmation (a) that there is such a thing as a "right to democracy", (b) that such a right belongs to "the peoples", and (c) that the governments of the Americas have an "obligation" to promote and defend that right, is of course of prime significance to the present study. Indeed, that part of Art. 1 of the *Inter-American Democratic Charter* has been said to be at the very center of what is now commonly referred to as the inter-American democracy 'architecture'. Indeed, the emphatic recognition of the existence of a "right to democracy" is at the heart of the entire instrumentation that the OAS and its members have developed over time in order to fulfill the 'obligation' to promote and defend democracy. Thus, the 2003 *Declaration on Security in the Americas* (Mexico City) declared: "*We reaffirm that democracy is a right (…)"*[3]. And in 2004, the heads of States and Governments assembled at a Special Summit in Monterrey, Mexico, adopted the *Declaration of Nuevo León* in which the exact same phrase as quoted just above from the *Inter-American Democratic Charter* is repeated *verbatim*[4].

4. Democracy as a "human right"

As shall be seen, the above question of a "right to democracy" has sometimes been confused in Hemispheric and other international instruments with the notion of democracy as a "human right". Given the more readily accepted notion that development, economic and social, is a part of human rights[5], and that the often used expression "the promotion of democracy and human rights" would seem to indicate that the two notions, though intimately related as we shall see, are not to be confused, the Juridical Committee agreed that within a study on the legal aspects of the interdependence between democracy and economic and social development, it should be concluded that democracy as a right cannot be entirey subsumed in the sphere of human rights, notwithstanding their readily recognized mutually reinforcing character.

5. Development as a "right" and as a "human right"

If, as seen, above, OAS instruments do proclaim outright that democracy is a right, its approach to development as a right is more circumlocutory. Thus, the *OAS Charter*, in its Article 17, enounces that *"Each State has the right to develop its cultural, political, and economic life freely and naturally (…)".* And in its Article 45, one reads*"(…) : a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being".* Worthy of note, whereas in Art. 17 the "right to develop" belongs to the State, in Art. 45 the right "to material well-being" – and here we are assuming that this is equivalent to "development", is presented as an individual one. On the other hand, UN-inspired documents are more forthright in their references to a "right to development". For example, in paragraph 11 or Part III of the 2000 *Millennium Declaration,* one finds; *"(…) We are committed to making the right to development a reality for everyone (…)".* And in paragraph 24 of Part V, interestingly labelled *"Human Rights, democracy and good governance",* one can read: *"We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development".*[6] In the 2002 *Monterrey Consensus,* another UN-type document, one can

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3 Ch. III, para. 5.

4 3rd Ch, 8th para.

5 Though it is arguable that democracy, development and human rights, even if closely interdependent and mutually reinforcing, are better treated as three separate concepts.

6 Note that a clear distinction is made between promoting democracy and promoting human rights, thus reinforcing the argument that democracy and human rights are not really concepts that belong to the exact same order.

read in part: "*(…)Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing".*[7]

6. The notion of "Integral Development"

Though our mandate speaks of "economic and social development", several members of the Juridical Committee wondered whether and to what extent it would not be quite appropriate to factor into our study the more "modern" or recent concept of "integral development".

As we all know, the *OAS Charter* now has a long chapter[8] entirely devoted to "integral development", and has created the Inter-American Council for Integral Development, directly responsible (like the Permanent Council) to the General Assembly[9], with its composition and purposes set out in its Chapter XIII. Declaring integral development for the peoples of the Americas to be a condition essential to peace and security, the *OAS Charter* then confers upon that same notion a wide-ranging meaning by saying that "*(…) Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved"*[10]. It then immediately proceeds to state that inter-American cooperation for integral development " *(…) should include the economic, social, educational, cultural, scientific, and technological fields, support the achievement of national objectives of the Member States, and respect the priorities established by each country in its development plans".*[11]

It is not without consequence for the present report that the *OAS Charter*, still in its Chapter devoted to the Inter-American Council for Integral Development, further proclaims that its *"(…) Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development"*[12]. Though there is no direct mention of "democracy" as such here, the reference to "full participation in decisions (…)" can certainly be interpreted as establishing a link between, on one hand, development in its 'integral', *i.e.* all-encompassing form -which as we have seen naturally incorporates economic and social development- and, on the other hand, democracy.

Finally, one finds yet another, this time more direct, reference to democracy at it relates to "integral development" in the first part of Article 31[13] when the *OAS Charter* establishes that *"Inter-American cooperation for integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the inter-American system".* It is arguable that such a reference to "within the framework of the democratic principles" of the System, can be interpreted as meaning that such common and joint responsibility can only be fully exercised if undertaken by States placing themselves within the ambit of such "democratic principles" as are enunciated by the *Charter*.

So, any "legal" obligations attached to 'integral development' in the *OAS Charter* may well be a factor in determining the legal aspects of the interdependence between democracy and economic and social development.

7. Remedies to lack of economic and social development as a threat to democracy.

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7 Part II, section (A), para. 11.
8 Ch. VII, Art. 30 to 52.
9 Art. 70.
10 Art. 30.
11 Art. 31.
12 Art. 34.
13 Already quoted in part, above.

Upon reviewing, in Annex 11, the text of the *Inter-American Democratic Charter* some comments were made in relation to its Chapter IV (entitled *Strengthening and Preservation of Democratic Institutions*), which are worth repeating here, at least in part.

Chapter IV (Arts. 17-22) is of course a key part of that *Charter*. Some would say it represents the "teeth" of the *Democratic Charter.* It enunciates specific action which member States or the OAS itself are empowered to take and implement in the promotion, defense and restoration of democracy in the Americas. One might argue that it is the lack of a more visible or readily identifiable parallel avenue –or avenues- for the achievement of higher levels of "social and economic development', especially if such absence of development came to be perceived as putting democracy in danger, that has lead to the request for the present report to be undertaken.

In that context, Article 17 of the *Inter-American Democratic Charter* raises an interesting question. Found at the very beginning of Chapter IV it reads: *"When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system".*

The questions that arise are: (a) In light of the broadly recognized and often proclaimed interdependence between democracy and economic and social development, does this article open the door for a member State which would consider its lack of economic and social development to put at risk its "democratic political institutional process" or "its legitimate exercise of power" to request assistance from the Secretary General or the Permanent Council? And if so, what would be the measures expected from those? And of the member States? Or (b), in light of the remainder of the language in Chapter IV of the *Inter-American Democratic Charter,* could one argue that Article 17 was not, and is not, meant to offer the remedy to such a situation, and that the answer to such a situation is to be found in other instruments of the OAS?[14]

Indirectly, that raises another fundamental issue: quite obviously, as is apparent from so many hemispheric basic documents, a country has a clear (and, many would say, not only 'binding' but accepted by all as such) obligation to democracy if it is to be part of the OAS; no less obviously, development at any level is no such condition for membership, and the lack thereof is no bar to such membership.

The corollary to what precedes would seem to be that whereas (a) a member can be "sanctioned" if it drifts away from democracy (and such "sanctions" have been described in detail, have been applied and can certainly still be in the future), and (b) there are well-defined 'triggers' that can be resorted to in order to impede or stop such drifting, no less obviously (c) there hardly could be any "binding" obligation to be developed, and (d) the remedies to the danger to democracy that lack of appropriate levels of development can come to represent are far less 'institutionalized'.

I would seem that what the Juridical Committee is in fact being asked is whether there are legal answers that would correct or improve upon that situation.

8. <u>The "Progressive Development of International Law</u>"

In line with its mandate as it is described in the *OAS Charter*, the Juridical Committee considered it would be important to keep in mind the notion of the 'progressive development of international law' in the course of the present analysis and in the drawing of its final conclusions and recommendations[15].

All the more so that the drafters of the *Inter-American Democratic Charter,* one of the main frames of reference for the present analysis and its central departure point (since, again, it is within the express context of the application of the *Democratic Charter*

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[14] Could it be that the "democratic political institutional process" or the "legitimate exercise of power" are to be distinguished from democracy taken more generically?

[15] Indeed, Art. 99 of the *OAS Charter* states in part: *"The purpose of the Inter-American Juridical Committee is (…) to promote the progressive development and the codification of international law".*

that our mandate states that we are to consider 'the legal aspects of the interdependence between democracy and economic and social development'), saw fit to include the following important language in the last paragraph of its preamble: *"BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the … OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice, (…)".*

Furthermore, the *Declaration of Nuevo León* adopted at a Special Summit of the Americas held in January 2004, did not hesitate to state that the *Inter-American Democratic Charter* constitutes *"an element of regional identity, and, projected internationally, is a hemispheric contribution to the community of nations".*[16] Such a statement surely must be seen as an important factor in the most interesting debate as to whether, or to what extent, evolving international law may already harbour an "obligation to democracy".

PART III

The *Inter-American Democratic Charter*

The *Inter-American Democratic Charter* is of course the main focal point of the present analysis. Its adoption by the OAS General Assembly at a special session held in Lima, Peru, on September 11, 2001 was, as stated before, the direct result of express instructions issued at the highest political level, namely by the Heads of State and Government of the Americas gathered at their Third Summit in Quebec City in April of the same year. Hence its being often referred to as being first and foremost a "political" document. For example, Uruguay's former Minister of Foreign Affairs, Didier Opertti, described it as *"a political Charter*", at the Protocolar Session of the Permanent Council held on 16 September 2002, to commemorate the 1st anniversary of the *Inter-American Democratic Charter*. Similarly, it was labelled *"the Hemispheric instrument with the most transcendental political character since the advent of the OAS Charter"* at the "Informal Dialogue" of the 2002 Bridgetown General Assembly[17].

The *Inter-American Democratic Charter,* which finds its origins in the *OAS Charter* itself and its later amendments, the *Santiago Commitment to Democracy and the Renewal of the Inter-American System*[18] and Resolution 1080 on *Representative Democracy*[19] (both adopted at the OAS 21st regular session of the OAS General Assembly), and in the above-mentioned Third Summit, is often recognized as the centerpiece of what is now commonly referred to as the "inter-American democracy architecture.

Hence the need and utility, in dealing with the application of the *Inter-American Democratic Charter,* to look at the various aspects dealt with in the present chapter.

1. The *Inter-American Democratic Charter* seen as part of the "Democratic Architecture" of the OAS

As Uruguay's then Foreign Minister Didier Opertti would rightly recall during the Protocolar Session of the Permanent Council of 16 September 2002 to commemorate the first anniversary of the adoption of the *Inter-American Democratic Charter,* that *Charter* was not a magic and instantaneous phenomenon that suddenly just happened, in some unusual fashion. No less rightly, he pointed out that its coming into being had to be seen not only as inscribed within the context of the evolution of the OAS, but also as part of a process which is all at once political, normative and historical.[20]

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16 2nd para. of 3rd Ch. of the *Declaration of Nuevo León.*

17 By the representative of Peru, Eduardo Ferrero Costa; the theme of that "Informal Dialogue" was: *"Follow-up and Development of the Inter-American Democratic Charter"*.

18 AG/RES. (XXX-O/91), June 4, 1991.

19 AG/RES. 1080 (XXI-O/91), June 5, 1991.

20 See DE LA CALLE, Humberto. *Carta Democrática Interamericana: documentos e Interpretaciones.* Consejo Permanente, Oganización de los Estados Americanos; Columbus Memorial Library, Washington; 2003; 347 p., at p. 231; that document can to be found on-line at http://www.oas.org/OASpage/esp/Publicaciones/CartaDemocratica_spa.pdf

And speaking of "historical" process, we all know that if the *Inter-American Democratic Charter* of 2001 takes its natural roots within the original *OAS Charter*, more immediately it comes at the –no doubt provisional– end of an evolutionary road that later went from the 1991 *Santiago Commitment to Democracy and the Renewal of the Inter-American System* and Resolution 1080 on *Representative Democracy*, to the 1992 *Protocol of Washington*[21], to the political mandate issued at the 2001 Quebec Summit of the America.

From the legal angle of (a) the application of an *Inter-American Democratic Charter* which was adopted as a "mere" resolution of an OAS General Assembly, and, (b) within the ambit of such application, of an analysis of the legal aspects of the interdependence found therein between democracy and economic and social development as called for by the mandate given to the Inter-American Juridical Committee, a look at the varying juridical nature of some of those hemispheric documents (*Charter*s, resolutions, declarations, ...) would seem to be warranted. And there of course exist many diverse opinions of that subject, as exemplified –and in part only– in a study conducted by the Director of the Office of Inter-American Law and Programs in the OAS Department of Legal Affairs and Services, Jean-Michel Arrighi[22].

Though Chapter 6 in Arrighi's book deals specifically with "The defense of the democratic system", some of the points he makes therein in relation to the immediate subject of his study no doubt would be, and can be, considered as relevant to the treatment given in hemispheric and other documents to, besides the promotion and defense of democracy, what could be justifiably called if not the 'parallel' at least the inescapably related promotion of social and economic development.

Looking at the *OAS Charter*, the *Santiago Commitment to Democracy and the Renewal of the Inter-American System*, Resolution 1080 on *Representative Democracy,* and the *Inter-American Democratic Charter*, Arrighi underlines the following considerations that he acknowledges can sometimes be open to some differences of opinion:

(A) First, 1991*Resolution 1080*:

- being only a resolution of the OAS General Assembly, the extent, if any, of its binding character for individual member States, is debatable[23];
- the initiative to set in motions the mechanisms foreseen therein belongs to the Secretary General;
- it takes an actual *"sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states*" for action by the Secretary General to be triggered;
- no specific measures or sanctions are foreseen, but *"any decisions deemed appropriate"* must be *"in accordance with the Charter and international law".*

(B) Then, Article 9 of the *OAS Charter*, following the entry into force of the Protocol of Washington in 1997:

- the *Charter* being a treaty, it has of course binding force, unlike, many would argue, General Assembly resolutions; but only for those members of the OAS that have ratified it;
- for Article 9 to be triggered, there has to have occurred the overthrow *"by force"* of the *"democratically constituted government"* of a member State;[24]
- in Article 9, a precise sanction is spelled out, *i.e.* suspension *"from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized*

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21 Which amended the *OAS Charter* as a result of the above-referenced documents adopted in Santiago the year before.

22 In a book entitled *OEA.* ARRIGHI, Jean Michel. *OEA.* Barueri, São Paulo : Manole, 2004).

23 More on this later.

24 Which is generally considered to mean a *coup d'état*; a question remains as to whether this, i.e. a *coup d'état*, is also what had been meant by the expression "*sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government"* in *Resolution 1080*.

Conferences as well as in the commissions, working groups and any other bodies (…)", a 'limitation' one does not find in Resolution 1080.

As a result of those important differences, Arrighi pointedly raises the question as to whether it is possible, in a given situation that would qualify under both, to invoke and apply (i) Resolution 1080, with its opening on a wider but unspecified array of 'sanctions' but is not legally binding on members, and (ii) Article 9 of the *OAS Charter,* more limited 'sanction'-wise but with a superior legal status.[25]

But as would be seen in later developments, the OAS and its members, in a large part under the political impetus of various Hemispheric Summits, would come to develop further its approach to the defense and promotion of democracy, as other forms of breach or interruption of the legal democratic order materialized. Sometimes even in the hands of previously democratically elected governments[26]. Furthermore, existing texts, such as those in Resolution 1080 and Article 9 of the *OAS Charter,* only dealt with situations *ex post facto,* and then only to consider possible sanctions[27].

An important step was taken at the Third Summit of the Americas in Quebec City, Canada in 2001, when Hemispheric leaders instructed their Foreign Ministers *"to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy",* given that *"any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process".* That directly lead to what would become the *Inter-American Democratic Charter* adopted by the General Assembly later that same year at a special session held in Lima, Peru.

(C) Then came the *Inter-American Democratic Charter:*

- like Resolution 1080, this *Charter* took the form 'only' of a General Assembly resolution; it therefore lacks, under traditional concepts of international law as accepted by most, the juridical hierarchy of a full treaty;
- it goes beyond both Resolution 1080 and Article 9 of the *OAS Charter* in that it extends the type of situations when the OAS can consider or take action; for example, and quite clearly, it goes from the realm of the restoration of democracy to that of its preservation[28];
- thus, it allows for a member State which *"considers that its democratic political institutional process or its legitimate exercise of power is at risk"* (Art. 17) to seek assistance from the Secretary General or the Permanent Council directly[29];
- in the same vein, the Secretary General or the Permanent Council can take preventive or remedial measures, with the consent of the State affected, *"when situations arise in a member State that may affect the development of its democratic political institutional process or the legitimate exercise of power"…* (Art. 18);
- finally (and here we are back to what Resolution 1080 and Article 9 of the *OAS Charter* contemplate, but extending the notion of *coup d'état* to its widest interpretation), should there be *"an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state*" (Art. 20), any member State or the Secretary General may set in motion a process of consultations, initiatives and actions that can eventually lead to

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[25] Arrighi answers his own question by writing: *"(...) Yes, both can be invoked, for various reasons: the Protocol of Washington has obligatory force only on the States Parties thereto, which has its limitations and a source of possible discrepancies, besides it only allows for suspension from the Organization; Resolution 1080 implicates all the member States (...) And allows for a greater margin in relation to the possible measures to be agreed upon. Hence I believe that those, however distinct in their juridical nature and hierarchy, are perfectly compatible and complementary".*

[26] Such as, but not exclusively, so-called "*auto golpes*".

[27] Which, as Arrighi rightfully points out, often end up having negative effects mostly on those whose democratic rights have been trampled with.

[28] And it is here, *i.e.* in relation to the recognized need to take the necessary steps to preserve democracy, that possibly can arise some legal consequences between the interdependence between democracy and economic and social development.

[29] In relation to Art. 17 and some interesting question it raises, see section 7 in Part II above, on *Remedies to lack of economic and social development as a threat to democracy.*

suspension; the extension to "any member" of such faculty to initiate is noteworthy.

To sum up the above, looking jointly at Resolution 1080, Article 9 of the *OAS Charter* and the *Inter-American Democratic Charter,* and quoting Arrighi:

(...) we have on one hand rules that originate with General Assembly resolutions, and on the other hand norms derived from treaties; norms that apply to a very reduced number of situations (...), and others that also contemplate a much larger set of situations; rules that call for precise sanctions, and others that are much more imprecise.

With Arrighi one can wonder if just like the applicable-to-all but non-binding *Resolution 1080* led to the adoption of the binding but only-applicable-to-signatories *Protocol of Washington*, one day we may not have a new Protocol amending the *OAS Charter* a result of which would be to confer higher legal hierarchy to the *Inter-American Democratic Charter.* Or could it be argued that all those norms taken together can be considered as evidencing what has become, or is in the process of becoming, a "regional custom", and as such not requiring the form of a stand-alone treaty to acquire full legal validity and application?

That is where important considerations relating to the "progressive development of international law" come in. And such considerations are bound to influence the debate as to what effects the fact that the *Inter-American Democratic Charter* as "only" adopted as a resolution of the OAS General Assembly may have, legally speaking, on its application.

2. The *Inter-American Democratic Charter* and the "progressive development of international law"; the *Charter* as a "resolution".

As recalled earlier, the drafters of the *Inter-American Democratic Charter,* one of the main frames of reference for the present analysis and its central departure point (since it is within the express context of its application that our mandate states that we are to consider 'the legal aspects of the interdependence between democracy and economic and social development'), saw fit to include the following language in the last paragraph of its preamble: *"BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice, (…)".*

Which leads Amb. Humberto de la Calle, the coordinating editor of *Carta Democrática Interamericana: documentos e interpretaciones*,[30] to remind readers in his preface that the *Democratic Charter*, in spite of being a resolution and not a Treaty, is in reality more than 'just an ordinary Resolution' "because", he writes, *"it was conceived as a tool to actualize and interpret the fundamental Charter of the OAS, within the spirit of the progressive development of international law".*[31]

That important aspect of what we might call the overall 'legal atmospherics' –if we may use such an expression– within which the *Inter-American Democratic Charter* is to be viewed, as been underlined, stressed, and expanded upon by many, politicians and scholars alike.

For example, the then Brazilian Foreign Minister, Celso Lafer, addressing the question as to whether the approval of the *Democratic Charter* by way of a resolution of the General Assembly "was viable", answers in the positive, for the reason that *"it would represent an exercise of actualization of positive norms in vigour, in accordance with the principle of the progressive development of International Law".* An opinion, he added, *"that all of us would later adopt"*.[32]

Still early in the drafting of what would become the *Inter-American Democratic Charter,* Amb. Manuel Rodríguez Cuadros, Vice Minister and Secretary General for

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30 Consejo Permanente, Oganización de los Estados Americanos; Columbus Memorial Library, Washington; 2003; 347 pages; it can be found to be found on-line at http://www.oas.org/OASpage/esp/Publicaciones/CartaDemocratica_spa.pdf

31 Introduction, p. viii.

32 At the San José General Assembly XXXI Regular Session of the General Assembly of June 2001 in San José, as quoted by Amb. Valter Pecly Moreira at the regular session of the Permanent Council of September 6, 2001, in de la Calle, p. 64.

External Relations of Peru, in his address to the September 2001 Regular Session of the Permanent Council, having first labelled democracy "*a global condition of the present international system*" and spoken of *"new norms of international laws, formal and customary, regional and universal, which consecrate it [democracy] and submit it to international responsibility"*, added: *"Those processes allow us to see there now begins to exist a universal tendency to look at democracy from a juridical angle, as an internationally exigible obligation. The Inter-American Democratic Charter constitutes, in that context, a contribution to that world-wide tendency, maybe the most developed and the most advanced (…). In many ways the Charter goes beyond the prior status quo in terms of principles, norms and mechanisms relating to then preservation and defence of democracy in the OAS, as seen in the dynamic perspective of the progressive development of international law".*[33]

On the same occasion, the representative of Paraguay explained that in addressing the need for an *Inter-American Democratic Charter,* her country had been guided by "*(…) the necessity to go further and deepen the inter-American normative ambit relating to democracy."*[34]

Speaking at the Protocolar Session of the Permanent Council of 16 September 2002 held in commemoration of the first anniversary of the *Inter-American Democratic Charter*, the then Minister of Foreign Affairs of Uruguay, Didier Opertti, also dealt with clarity with the issue at hand. He said: *"(…) we were asking ourselves how to make of the Charter a resolution which at the same time would have the very rank of a binding international instrument, over and above the normative level the hierarchical pyramid of the OAS reserved for it. And it is then (…) that sprang the idea of making of that Charter a chapter in the progressive development of our contemporary international law, and conferring upon it the character of an authentic interpretation. The General Assembly, supreme organ of the System, interprets this [Democratic] Charter as a progressive development of the OAS Charter".*[35]

The subject was dealt with at some length by Peruvian Ambassador Eduardo Ferrero Costa in a presentation made at the *Jornadas de Derecho Internacional* [36] in 2002, in Florianopolis, Brazil. In his essay, entitled *La Carta Democrática y el sistema interamericano*, he proposed to formulate an initial analysis of *"(…) the juridical purview of the Democratic Charter within the angle of the progressive development of international law, together with a few thoughts in relation to he sources of public international law and the obligatory nature of the resolutions of the general assembly of an international organization".*[37]

In line with much of what we have seen above, Amb. Ferrero Costa, looking as the genesis of the *Inter-American Democratic Charter*, pointedly attributes its coming about to not only a hemispheric consensus in relation to democracy (and human rights), but also to the general sentiment that the system was perceived as lacking adequate juridical instruments to deal with the situation. There was of course Resolution 1080, applied to the cases of Haiti (1991), Peru (1992), and Guatemala (1993). In his words, such applications of Resolution 1080 can be considered as evidence of *"an accepted mode of international conduct",* but also of *"a mechanism which, if it did not prove entirely effective in its application, was not objected to"* by any states in the Hemisphere.[38]

But at the same time, and that would come to have a major influence on the final wording of the *Inter-American Democratic Charter,* member States were increasingly convinced, and said so in the 1993 *Managua Declaration for the Promotion of Democracy and Development,* that *"democracy, peace and development are inseparable and*

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33 In de la Calle, p. 78; underlining provided.
34 Margarita Escobar, in de la Calle, p. 80.
35 As quoted in de la Calle, p. 232, underlining provided.
36 The full report of those "Jornadas" has been published as *Jornadas de Derecho Internacional* (Florianopolis, Brazil, 2002), Secretaría General de la OEA, Washington DC, 2003. Amb. Ferrero Costa; presentation can be found at pp. 427-446, future references to his text will be simply given as "*Jornadas, Florianopolis*".
37 *Jornadas, Florianopolis*, p. 428.
38 *Jornadas, Florianopolis*, p. 430.

indivisible parts of a renewed and integral vision of hemispheric solidarity, and that the capacity of the Organization to play a role in the preservation and strengthening of the democratic structure of the Hemisphere would depend upon the realization of a strategy inspired by the interdependence and complementarities of those values".[39]

It is against that background and with that in mind that the negotiators of the *Democratic Charter* came to address the issue of whether to draw up a text that would take the form of a formal treaty to be submitted to the individual approval/ratification of each member State of the OAS, or as a resolution to be approved by the usual consensus, *i.e.* with no one objecting, at an OAS General Assembly.[40] And as Min. Opertti would later indicate, Amb. Ferrero Costa confirms that conceiving the *Charter* as part of the progressive development of international law was seen as a solution to everybody's desire to confer legal weight and value upon the *Charter*, while remaining short of using the formal treaty route.[41]

That being said, whether every one would go so as far as Amb. Manuel Rodríguez Cuadros, one of the principal Peruvian negotiators of the *Charter,* in his following interpretation remains debatable: in his opinion, it is because the *Charter* is based on the principle of the progressive development of international law that it could in fact "reform"[42] the *OAS Charter* without the necessity of having recourse to a new treaty. And as quoted by Amb. Ferrero Costa, Amb. Rodríguez Cuadros concludes: *"That is why the Inter-American Democratic Charter is binding: it constitutes a normative development of the OAS Charter".*[43]

Of course, progressive development of international law notwithstanding, there is no unanimity amongst legal scholars that a 'resolution' passed by the body of an international organization can be of legally obligatory application unless the constitutional texts of such organizations expressly allow it. As stated by Amb. Ferrero Costa, such an interpretation would result in the *Democratic Charter* having mere "recommendatory" character.[44] But international law is not static; it does evolve, or 'progressively develops', largely of course on the basis of the concordant behaviour of Sates and the expression of their political will. That, we would submit, is especially true when those States are regrouped within a regional organization with strong habits of decisions by consensus.

Besides, as Amb. Ferrero Costa recalls, many are the specialists for whom the listing of sources of international law found in Article 38 the Statute of the International Court of Justice, is merely indicative, and not limitative, thus *"leaving the door open to the possibility that there may exist or develop other sources*[45] *as a result of the evolution of international society".* [46]

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39 *Jornadas, Florianopolis*, p. 432; underlining provided.

40 The following extract, also taken from Amb. Ferrero Costa (*Jornadas, Florianopolis*, p. 443), is relevant to this issue: *"Even more, contrary to the United Nations, in the case of resolutions on the General Assembly of the OAS, those in practice are negotiated and approved by consensus, in spite of the fact the OAS Charter foresees a voting system. Such a situation results in all member States being more committed, since a resolution adopted by consensus entails that it has been adopted without any formal opposition from any States. Consensus commits all member States, thus conferring more legitimacy to resolutions thus adopted, since, as says George Abi-Saab, agreements and resolutions are adopted 'with the agreement concordance and participation of all those who are part of the Organisation'."*

41 See *Jornadas, Florianopolis*, p. 440, and the last para. in the preamble of the *Inter-American Democratic Charter.*

42 Note that he did not use "amend".

43 In *Jornadas, Florianopolis*, p. 441, underlining provided.

44 *Jornadas, Florianopolis*, p. 442.

45 Such as certain types of "resolutions", depending on a series of factors? Jorge Castañeda, who has studied this issue, would agree that no matter what one concludes in strict legal theory regarding the legal standing of 'resolutions', the fact remains that States do accept to apply them as if binding. Writes Castañeda, as quoted by Amb. Ferreo Costa (*Jornadas, Florianopolis"* p, 283): *"… ordinary recommendations lack obligatory applicability from a juridical sense. Their value (or 'force' as one usually says) is political and moral. But that distinction is neither obvious nor clear. In theory, one can distinguish between obligatory applicability (sanción) in a technical sense aimed at complying with pre-existing legal obligations, and pressure aimed at the accomplishment on a non-obligatory conduct, but considered as desirable and recommended as such by an international body. More even, it happens that the measures of pressure used by international bodies to obtain the execution of a typically political recommendation, non-binding in nature, are the same as those they use and which are of an obligatory applicability to impose compliance with juridical obligations. In practice, it is hard to determine where the dividing line is".* Castañeda advances that there is no unanimous doctrine yet on the legal purview of [those] resolutions. Furthermore, he adds, their content may vary a great deal since: *"There is no unanimous doctrine yet on the legal purview of [those] resolutions. Furthermore, their content may vary a great deal since a resolution can*

We can conclude this part on "*The Inter-American Democratic Charter and the 'progressive development of international law'; the Charter as a 'resolution' "* by suggesting that given (1) the fact the that the *Charter* was the result of a primarily political decision, (2) that it was conceived and brought forward with the clearly stated and accepted notion that it was to inscribe itself within the ambit of the development progressive international law, and (3) that in practice not only is it being used and applied, but the mandate given to the Inter-American Juridical Committee evidences a political will to look for ways to better fulfil the aspirations it is built upon and which in turn are directly guided and inspired by the principles and high aims solemnly proclaimed in the *OAS Charter* itself, the *Charter* does indeed create for all member States, individually and collectively, a series of obligations and duties.

And that such obligations and duties, based on the very language of the *Charter,* deal with the preservation, defence and strengthening of democracy not only conceived as a *sine qua non* condition for inter-American solidarity and cooperation, but which by necessity require social and economic development to endure and flourish.

Or, as the then Secretary General, Cesar Gaviria, referred to it when he addressed the September 2002 Protocolar Session of the Permanent Council held in commemoration of the first anniversary of the adoption of the *Inter-American Democratic Charter* globalization, he was quick to recall that it is to be seen not only as *"a guide for democratic behaviour"* but also as "*a code of conduct (… which …) evidences a deep commitment to democracy."*[47]

NOTE

What precedes, together with the following annexes, was discussed at the 66th regular session of the IAJC (March 2005). Together with the discussions then held on the basis of this progress report it will serve as a general canvass for what it is intended to be the rapporteur's final report to be tabled before the IAJC at its next session in March 2006.

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constitute an order, an invitation, or a range various intermediary forms; it can deal with technical matters or with matters which are eminently political; it can be is of a materially legislative nature, i.e. express juridical norms, or constitute an individual administrative act; it can be directed to another body of the same system, to a distinct international body, to all states in general, to some states, or even to individuals; it can be the result of a decision-making mechanism, which implicates representation of an equal or unequal nature; it can have been adopted following a voting system requiring unanimity, or simply on the basis of a majority." ("Obras Completas, Tomo I, Naciones Unidas. México: Instituto Matías Romero de Estudios Dipómaticos de la Secretaría de Relaciones Exteriores y el Colegio de México, 1955, p. 271-272.

[46] *Jornadas, Florianopolis*, p. 443

[47] de la Calle, p. xi; underlining provided.

Annex 1

UNITED NATIONS CHARTER[48]

Democracy

Text:

- **Opening words:** *We the Peoples of* ***the United Nations Determined***
  - to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and
  - to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and
  - to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and
  - to promote social progress and better standards of life in larger freedom (…)

Comment: → The *UN Charter* makes no direct mention of "democracy". It has been argued that "cold war politics" at the time of the drafting of the *Charter* is what precluded the express inclusion of the term "democracy" in it.[49]

In a commentary[50] on democracy and the *UN Charter*, the Office of the United Nations High Commissioner for Human Rights, acknowledging such direct absence therein of any mention of democracy, suggests that "however, with the opening words of that document 'We the Peoples of the United Nations', the founders invoked the most fundamental principle of democracy, rooting the sovereign authority of the member States, and thus the legitimacy of the Organization which they were to compose, in the will of their peoples". It adds that "their commitment to democracy was further reflected in the stated 'Purposes' of the United Nations", which include [as shall be seen below] respect for the principle of equal rights and self-determination of peoples, and the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction.[51]

The Office of the UNHCR then rightly points out that the *Universal Declaration of Human Rights,* adopted by the General Assembly in 1948, "elaborated on this original commitment to democracy by proclaiming that 'the will of the people shall be the basis of the authority of government' and guaranteeing to everyone the rights that are essential for effective political participation". Furthermore, the *International Covenant on Civil and Political Rights*, adopted by the UN General Assembly in 1966, "conferred binding legal status on the right of individuals to participate in the processes that constitute the conduct of public affairs, and further strengthened the protection accorded to participatory rights and freedoms".

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48 http://www.un.org/aboutun/*Charter*/

49 For example, Rich, Roland, "Bringing democracy into international law', *Journal of Democracy*, 12(13), 20–34. In a similar commentary, the Office of the UNHCR comments: *"While the Charter, the Universal Declaration and the International Covenant on Civil and Political Rights provided a strong normative foundation for a United Nations role in promoting democracy, the onset of the cold war effectively stalled United Nations support for democratization. It was not until the end of the cold war that the drive for democratization gained momentum, bringing with it renewed prospects for pursuing neglected elements of the Charter's original purposes. The pursuit of democracy restarted both within and outside the United Nations system in a series of complementary and mutually reinforcing processes."* (See footnote 11 for the reference).

50 See http://www.ohchr.org/english/issues/democracy/

51 For very similar language, see the UN Secretary General "Supplement to Reports A/50/332 and A/51/512 on Democratization" (17 December 1996) para. 28, at http://www.library.yale.edu/un/un3d3.htm

In the same general commentary, the Office of the UNHCR refers to the fact that nearly every year the UN General Assembly has adopted at least one resolution dealing with some aspect of democracy. As one example, Steven Wheatly in "Democracy in International law: a European Perspective"[52], refers to Resolution A/RES/50/133 *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* which affirmed that "democracy is one of the principles enshrined in the *UN Charter*"[53].

The UNHCR commentary further points out that the Commission "has also sought to enhance its relevance in the promotion of democracy and has committed itself to further exploring the interdependence between democracy and human rights". For example, in its Resolution 2001/36 *Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy*[54], the UNHCR looked at "democratic development in the broader context of sustainable human development and realization of all human rights, including the right to development" and examined "the interrelationship between poverty and democracy".

Text:

• Art 1.2 ***The Purposes of the United Nations are (…)***

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*;*

Comment: → It might be argued that such a mention of "self-determination" did not relate to the concept of "democracy" as understood today.[55] But then, there is also Art. 73. b, immediately below.

Text:

• Art 73.b: ***Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government (…) accept (…)***

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;

Comment: → Taken from Chapter XI, *Declaration regarding non-self-governing territories*", this does lend itself to the interpretation that to the extent that the "development of (…) free political institutions could be equated to "democracy", that latter concept was indeed considered to be a universal goal.[56]

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52 In International and Comparative Law Quarterly (ICQL), vol. 51, April 2002, pp 225-247, at p. 227, footnote 10.

53 A/RES/50/133 was adopted by UNGA at its 96th plenary meeting, on 20 December 1995. The 3rd para. of its preamble reads: *"Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations, including the promotion and encouragement of respect for human rights and fundamental freedoms for all and other important principles, such as respect for the equal rights and self-determination of peoples, peace, democracy, justice, equality, the rule of law, pluralism, development, better standards of living and solidarity, (…)".* Full text at http://www.un.org/documents/ga/res/50/a50r133.htm

54 Adopted by a roll-call vote of 28 votes to 4, with 21 abstentions, 71st meeting, on 23 April 2001; full text at http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2001.36.En?Opendocument

55 See also Article 55, from Chapter IX on *International economic and social co-operation* for a reference to the principle of equal rights and self-determination of peoples.

56 The same language can be found in Art. 76 of Chapter XII on the *International trusteeship system* established under the *Charter*.

Text:

• Art. 1.3 ***The Purposes of the United Nations are (…)***

To achieve international co-operation (…) in promoting and encouraging respect for human rights and for fundamental freedoms (…)[57]

Comment: → Based on later developments, it might be argued that "democracy" could be considered as impliedly included in such language.

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Social and Economic Development

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• Preamble, 4th para.: ***We the Peoples of the United Nations determined (…) to promote social progress and better standards of life in larger freedom, …***

Text:

• Preamble, 8th para.: ***We the Peoples of the United Nations determined (…) to employ international machinery for the promotion of the economic and social advancement of all peoples, …***

Text:

• Art 1.3: ***The Purposes of the United Nations are (…)***

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, (…)

Text:

• Art. 55: *(…)* ***the United Nations shall promote****:*

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. ***solutions of international economic, social, health, and related problems; (…)***

Text:

• Art 73.b: ***Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government (…) accept (…)***

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses; (…)

d. to promote constructive measures of development, (…) with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; (…)[58]

Social and Economic Development Interrelated

Text:

• Art 1.3: ***The Purposes of the United Nations are (…) To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human***

[57] See also Article 55 of the *UN Charter* for a reiteration of the duty of the UN to "promote (…) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (…)".

[58] See footnote 5, above.

rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion;[59]

Comment: → Again, and in spite of the absence any specific mention of "democracy" in that article, it does directly juxtapose –though without actually linking or interrelating them– concepts of socio-economic problems in general and of basic rights and freedoms, amongst which one could possibly include democracy.[60]

Text:

- Art 55: ***With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:***

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Comment: → Art. 55 heads the *Charter*'s Chapter IX on *International economic and social co-operation*. Again here we have juxtaposition which mirrors the language found in Art. 1.3 on the UN "purpose". See the comment immediately above.

Text:

- Art 62.1**: *The Economic and Social Council may make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters (…).***

2. It may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

Comment: → Art. 62 and 68, below, are part of an entire Chapter in the *Charter* (Ch. 10) devoted to the Economic and Social Council it sets up. Again, the language therein mirrors the language found in Art. 1.3 on the UN "purpose". See the comment immediately above.

Text:

- Art 68: ***The Economic and Social Council shall set up commissions in economic and social fields and for the promotion of human rights, and such other commissions as may be required for the performance of its functions.***

* * *

[59] **Article 13.1 of the *UN Charter* stipulates that the General Assembly shall initiate studies and make recommendations for those same purposes.**

[60] In that same light, one can note that in the 8th paragraph of its preamble, UNHCR Resolution 2001/36 *Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy* (23 April 2001) includes, amongst the principles enshrined in the *Charter of the United Nations*, *"promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, rule of law, pluralism, development, better standards of living and solidarity".* For the full text of that Resolution: http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2001.36.En?Opendocument

Annex 2

CHARTER OF THE ORGANIZATION OF AMERICAN STATES[61]

T

Democracy

Text:

- **Art 2:** ***The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (…):***

b) To promote and consolidate representative democracy, with due respect for the principle of non-intervention;

Comment: → The reference to "the principles on which it is founded" as a source of the "essential purpose" that is the promotion and consolidation of representative democracy, is noteworthy. That same language was repeated in the very first paragraph of the preamble to the *Inter-American Democratic Charter*. Article 2.b was added to the *OAS Charter* in 1995.

Text:

- Art. 3: ***The American States reaffirm the following principles: (…)***

d) The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy; (…)

Comment: → Taken together, those articles 2.b and 3.d have led one observer to conclude that the OAS Charter thus "consecrates the commitment of the American States to the exercise of representative democracy, and the intention, if not the obligation, of the Organization to work to insure such exercise". [62]

Text:

- Art. 9: ***A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established. (…):***

a) The power to suspend shall be exercised only when such diplomatic initiatives undertaken by the Organization for the purpose of promoting the restoration of representative democracy in the affected Member State have been unsuccessful; (…),

d) The suspension notwithstanding, the Organization shall endeavor to undertake additional diplomatic initiatives to contribute to the re-establishment of representative democracy in the affected Member State.

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[61] Full text at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/consejo. As amended by the Protocol of Amendment to the *Charter of the Organization of American*, States, *Potocol of Buenos Aires*, signed on February 27, 1967, at the Third Special Inter-American Conference, by the Protocol of Amendment to the *Charter* of the Organization of American States, *Protocol of Cartagena de Indias*, adopted on December 5, 1985, at the Fourteenth Special Session of the General Assembly, by the Protocol of Amendment to the *Charter* of the Organization of American States, *Protocol of Washington*, approved on December 14, 1992, at the Sixteenth Special Session of the General Assembly, and by the Protocol of Amendment to the *Charter* of the Organization of American States, *Protocol of Managua*, adopted on June 10, 1993, at the Nineteenth Special Session of the General Assembly.

[62] Jean-Michel Arrighi, In: OEA (São Paulo: Manole, 2003).

Comment: → This simply confirms that "representative democracy" is the norm expected of members; sanctions can flow from interference with it, and its restoration and re-establishment are to be pursued in cases of interruption.

This article 9 was added to the *OAS Charter* by the *Protocol of Washington*, adopted in 1992, *i.e.* in the year immediately following the Santiago General Assembly where the *Santiago Commitment to Democracy* and Resolution 1080[63] had been adopted. The *Protocol of Washington* entered into force in 1997.

Social and Economic Development

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Text:

- *Art 2:* ***The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (…)***

f) To promote, by cooperative action, their economic, social, and cultural development;

Comment: → Thus, the *Charter* establishes the "essential purpose" of promoting "development", taken in a holistic way, right along that of promoting and consolidating representative democracy.[64]

Text:

- Art 17: ***Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality****.*

Comment: → While this Article deals mainly with the "freedom" with which development is to be pursued as a "right", that this must be achieved within the respect for "the rights of the individual" is worth noting.[65]

Text:

- Art. 30: ***The Member States, inspired by the principles of inter-American solidarity and cooperation, pledge themselves to a united effort to ensure international social justice in their relations and integral development for their peoples, as conditions essential to peace and security. Integral development encompasses the economic, social, educational, cultural, scientific, and technological fields through which the goals that each country sets for accomplishing it should be achieved.***

Comment: → That is the introductory Article of the long chapter[66] devoted to "Integral Development" in the *Charter*. As can be seen, its definition of "integral development" is very wide-ranging.

Text:

- Art. 31: ***Inter-American cooperation for integral development is the common and joint responsibility of the Member States, within the framework of the democratic principles and the institutions of the interAmerican system. It should include the economic, social, educational, cultural, scientific, and technological fields, support the achievement*** *of national objectives of the Member States, and respect the priorities established by each country in its development plans, without political ties or conditions.*

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63 On *Representative Democracy*.

64 See Art. 2 (b)

65 The "right to choose, without external interference, its political, economic, and social system" is also enshrined as a "principle" by the *Charter*: see Art. 3(e).

66 Art. 20 to 52.

Comment: → Besides a repeat of what "integrated development" encompasses, what is interesting here is the notion that Member States have a "common and joint responsibility" to cooperate in its achievement.

As for the reference to "within the framework of the democratic principles … of the Inter-American System", one might ask whether that is meant to say that such common and joint responsibility can only be fully exercised if undertaken by States placing themselves within the ambit of such "democratic principles" as are enunciated by the *Charter*.[67]

Text:

- Art. 33: ***Development is a* primary responsibility of each country *and should constitute an integral and continuous process for the establishment of a more just economic and social order that will make possible and contribute to the fulfillment of the individual.***

Comment: → While the *Charter* often refers to development as a common and shared responsibility of the Member States[68], this Article, interestingly, refers to it as "a primary responsibility of each country".

Text:

- Art. 39: ***The Member States, recognizing the close interdependence between foreign trade and economic and social development, should make individual and united efforts to bring about the following:***

a) Favorable conditions of access to world markets for the products of the developing countries of the region, particularly through the reduction or elimination, by importing countries, of tariff and nontariff barriers that affect the exports of the Member States of the Organization, except when such barriers are applied in order to diversify the economic structure, to speed up the development of the less developed Member States, and intensify their process of economic integration, or when they are related to national security or to the needs of economic balance; (…)

Comment: → The principle that economic and social development and foreign trade are closely linked is a long-recognized one. It raises the interesting question as to whether, to the extent that there is or may be a direct interrelationship between democracy and development, one can also bring in "foreign trade" conducted in fairness as a factor with a role to play *vis-à-vis* democracy.

Text:

- Art. 45: ***The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:***

a) All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security;

b) Work is a right and a social duty, it gives dignity to the one who performs it, and it should be performed under conditions, including a system of fair wages, that ensure life, health, and a decent standard of living for the worker and his family, both during his working years and in his old age, or when any circumstance deprives him of the possibility of working; c) Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations

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[67] See the comments below, at Art 3 (d) under the heading *Democracy and social development interrelated*.
[68] See for ex. Arts. 2 (f), 3 (f) and 31. And also Arts. 94 and 111.

and the protection of their freedom and independence, all in accordance with applicable laws; d) Fair and efficient systems and procedures for consultation and collaboration among the sectors of production, with due regard for safeguarding the interests of the entire society; e) The operation of systems of public administration, banking and credit, enterprise, and distribution and sales, in such a way, in harmony with the private sector, as to meet the requirements and interests of the community; f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. The encouragement of all efforts of popular promotion and cooperation that have as their purpose the development and progress of the community; g) Recognition of the importance of the contribution of organizations such as labor unions, cooperatives, and cultural, professional, business, neighbourhood, and community associations to the life of the society and to the development process;

h) Development of an efficient social security policy; and i) Adequate provision for all persons to have due legal aid in order to secure their rights.

Comment: → One could argue there is, here, an embryo of some form of a "social *Charter*", though in some limited aspects only.[69]

Text:

- Art. 94: ***The purpose of the Inter-American Council for Integral Development is to promote cooperation among the American States for the purpose of achieving integral development and, in particular, helping to eliminate extreme poverty, in accordance with the standards of the Charter, especially those set forth in Chapter VII with respect to the economic, social, educational, cultural, scientific, and technological fields.***

Comment: → Again we see here, where the purposes of the Inter-American Council for Integral Development are enunciated, a clear reference to "cooperation" as essential for the development of Member States.[70]

Text:

- Art. 111: ***The General Secretariat shall promote economic, social, juridical, educational, scientific, and cultural relations among all the Member States of the Organization, with special emphasis on cooperation for the elimination of extreme poverty, in keeping with the actions and policies decided upon by the General Assembly and with the pertinent decisions of the Councils.***

Comment: → Yet another reference on "cooperation" as a necessary instrument to achieve development.[71]

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69 Para. (f) of this Art. 45 has also been incorporated under the next development on "Democracy & Social and Democratic Development Interrelated".

70 That "Economic cooperation is essential to the common welfare and prosperity of the peoples of the continent" is recognized in Art. 3 (k) of the *Charter* as one of the principles of the OAS.

71 See above footnote.

Democracy & Social and Democratic Development Interrelated

Text:

• Preamble, 3rd para.: ***Convinced that representative democracy is an indispensable condition for the stability, peace and development of the region;***[72]

Comment: → "Democracy" is posited here as a "condition" of development. Most would want to argue that this formulation should be interpreted as meaning that the two concepts naturally go hand-in-hand, as opposed to putting forward a "development first" theory (*i.e.* that development must precede democracy, or even that only 'developed' countries can accede to 'representative democracy'). That same language was repeated in the very first paragraph of the preamble to the *Inter-American Democratic Charter*.

Text:

• Preamble, 4th para. ***Confident that the true significance of American solidarity and good neighbourliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man;***

Comment: → Again, the inference seems to be that the natural 'environment' for "individual liberty", "social justice" and "essential rights" to be consolidated is that of "democratic institutions".

• Art. 2: ***The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes: (…)***

g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; (…)

Comment: → Without positing that democracy is not possible as long as there is a serious lack of development, this nevertheless infers that "full" democracy is impeded by "extreme poverty"[73].

Text:

• Art. 3: ***The American States reaffirm the following principles: (…)***

d) ***The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy; (…)***

Comment: → This Art. 3.d already quoted above is repeated here because democracy is presented therein as a requirement for the achievement of all the "high aims" set out in the *Charter*, amongst which one finds development. It can also be argued that since, as seen before[74], development requires solidarity, democracy, by being a requirement for solidarity, is therefore also seen as a prerequisite for development.[75]

Unlike Article 2.b, which was added to the *Charter* in 1995, Article 3.d supra was part of the original 1948 text. As has been underlined[76], that language with regard to democracy as found in Article 3.d was a "first" in comparative international law.

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72 As will be seen later, one finds the same language in the *Declaration of Principles* adopted at the First Summit of the Americas (Miami, 1994), as well as in the preamble to the *Inter-American Democratic Charter* (Lima, 2001).

73 See also the comment under Preamble, 3rd para., above.

74 For ex., articles 2 (f), 30, 94, 111, …

75 On this subject, see Art 31 of the *Charter* and the comments made thereon, above, under the heading Social and Economic Development.

76 Arrighi, *op. cit.,* then goes on to mention that the 5th Consultative Meeting of Foreign Ministers of the OAS held in Santiago, Chile in 1995, adopted a *Declaration* proclaiming that *"the existence of anti-democratic regimes constitutes a violation of the principles on which the OAS is established".* (Translation).

Text:

• Art. 3: ***The American States reaffirm the following principles****: …*

f) <u>The elimination of extreme poverty is an essential part of the promotion and consolidation of representative democracy and is the common and shared responsibility of the American States</u>; (…)

Comment: → That follows directly from the "basic principle" enunciated in Art. 2 (g). But it goes further by making the elimination of poverty an "essential part" of the promotion and consolidation of democracy, thereby directly linking the two and making them inseparable.

Text:

• Art 34: ***The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development.*** **(…)**

Comment: → Though there is no direct mention of "democracy" as such here, the reference to "full participation in decisions (…)" can certainly be interpreted as establishing yet another link between development and democracy.

Text:

• Art. 45: ***The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms: (…)***

f) The incorporation and increasing participation of the marginal sectors of the population, in both rural and urban areas, in the economic, social, civic, cultural, and political life of the nation, in order to achieve the full integration of the national community, acceleration of the process of social mobility, and the consolidation of the democratic system. (…)

Comment: → Again, coming as it does in the long Chapter in the *Charter* devoted to "Integral Development", we find a clear reference to the linkage between economic development and the consolidation of the democratic system.

Text:

• Art. 47: ***The Member States will give primary importance within their development plans to the encouragement of education, science, technology, and culture, oriented toward the overall improvement of the individual, and as a foundation for democracy, social justice, and progress.***

Comment: → Same as above, under art. 45.

Annex 3

THE SANTIAGO COMMITMENT TO DEMOCRACY AND THE RENEWAL OF THE INTER-AMERICAN SYSTEM[77]

Adopted at the 21st regular session of the General Assembly

(Santiago, Chile, June 4, 1991)

REPRESENTATIVE DEMOCRACY[78]
Adopted at the 21st regular session of the General Assembly
(Santiago, Chile, June 5, 1991)

Democracy

Text:

• Commitment, preamble, 3rd para.*: **Bearing, in mind that the changes towards a more open and democratic international system are not completely established, and that therefore, cooperation must be encouraged and strengthened so that those favorable trends may continue (…)***

Comment: → Such a relatively "early" (1991) call within the Hemisphere for a more a more democratic "international system", or, as in the following (4th) paragraph, a "just and democratic order", is noteworthy.

Text:

● Commitment, preamble, 4th para.: ***Recognizing the need to advance decisively towards a just and democratic order based on full respect for international law, the peaceful settlement of disputes, solidarity, and the revitalization of multilateral diplomacy and of international organizations (…)***

● Commitment, preamble, 5th para.*: **Mindful that representative democracy is the form of government of the region and that its effective exercise, consolidation, and improvement are shared priorities (…)***

Comment: → This is a remarkably strong and unequivocal statement: "democracy is THE form of government …"

Text:

● Commitment, 1st resol. para.: ***DECLARE Their inescapable commitment to the defense and promotion of representative democracy and human rights in the region, within the framework of respect for the principles of self-determination and non-intervention;***

Comment: Some would argue that this linking together of democracy and human rights in fact interrelates democracy and development, especially in light of later pronouncements. For example, the *Millennium Declaration*[79], adopted as a Resolution by the United Nations General Assembly in 2000, mentions the "right to development". So did, later, the *Monterrey Consensus*.[80]

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77 **OEA/Ser.P AG/RES. (XXI-O/91). It will be referred to as "Commitment". Full text at http://www.upd.oas.org/lab/Documents/general_assembly/ag_res_santiago_xxi_O_91_eng.pdf**

78 OEA/Ser.P AG/RES. 1080 (XXI-O/91), most commonly called "Resolution 1080". In the present review, it will be referred to as "Resol. 1080". Full text at: http://www.upd.oas.org/lab/Documents/general_assembly/ag_res_1080_xxi_O_91_eng.pdf

79 See below, in the sub-chapter devoted to that *Declaration*, notably its paras 11 and 24.

80 See below, in the sub-chapter devoted to that *Consensus*, notably its para. 11.

Text:

• Commitment, 3rd resol. para.: ***DECLARE* (…) *Their determination to continue to prepare and develop a relevant agenda for the Organization, in order to respond appropriately to the new challenges and demands in the world and in the region, and their decision to assign special priority on that agenda, during the present decade, to the following actions: (…)***

b. Strengthening representative democracy as an expression of the legitimate and free manifestation of the will of the people, always respecting the sovereignty and independence of member states; (…)

Text:

• Commitment, 3rd resol. para.: ***DECLARE* (…) *Their determination to continue to prepare and develop a relevant agenda for the Organization, in order to respond appropriately to the new challenges and demands in the world and in the region, and their decision to assign special priority on that agenda, during the present decade, to the following actions: (…)***

i. Increasing technical cooperation and encouraging a transfer of technology to enhance the capabilities for economic growth of the countries in the region.

Text:

• Commitment, 5th resol. para.: ***DECLARE (…) Their decision to adopt efficacious, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, in keeping with the Charter of the Organization of American States.***

Text:

• Resol. 1080, preamble, 2nd para.: ***WHEREAS (…) Under the provisions of the Charter, one of the basic purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of non-intervention (…)***

Text:

• Resol. 1080, preamble, 2nd para.: ***WHEREAS (…) In view of the widespread existence of democratic governments in the Hemisphere, the principle, enshrined in the Charter, that the solidarity of the American states and the high aims which it pursues require the political organization of those states to be based on effective exercise of representative democracy must be made operative. (…)***

Comment: → We have here an interesting proposal to the effect that operative representative democracy is an important factor if 'solidarity' is to be achieved.

Text:

• Resol. 1080. ***The General Assembly RESOLVES 1.To instruct the Secretary General to call for the immediate convocation of a meeting of the Permanent Council in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states, in order, within the framework of the Charter, to examine the situation, decide on and convene and ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period. 2. To state that the purpose of the ad hoc meeting of Ministers of Foreign Affairs or the special session of the General Assembly shall be to look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law. 3. To instruct the Permanent Council to devise a set of proposals that will serve as incentives to preserve and strengthen democratic systems, based on international***

solidarity and cooperation, and to appraise the General Assembly thereof at its twenty-second regular session.

Comment: → Though limited and rather vague in practical terms, this setting in motion, at the initiative of the OAS Secretary General, of regional mechanisms to consider and deal with a *"sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states"*, could be seen as a logical, as well as an immediate and direct result of the Santiago *Commitment* adopted at the same occasion.

Social and Economic Development

Text:

• Commitment, preamble, 7th para.: ***Recognizing that cooperation to guarantee the peace and security of the hemisphere is one of the essential purposes consecrated in the Charter of the Organization of American States (OAS), and that the proliferation of arms adversely affects international security and takes resources away from the economic and social development of the peoples of the member states;***

Text:

• Commitment, 3rd resol. para.: ***DECLARE* (…) *Their determination to continue to prepare and develop a relevant agenda for the Organization, in order to respond appropriately to the new challenges and demands in the world and in the region, and their decision to assign special priority on that agenda, during the present decade, to the following actions: (…)***

c. ***Promoting the observance and defense of human rights in accordance with the inter-American instruments in force and through the specific existing agencies; and ensuring that no form of discrimination becomes an obstacle to political participation by undervalued or minority ethnic groups;***

Text:

• Commitment, 4th resol. para.: ***DECLARE (…) Their decision to initiate a process of consultation on hemispheric security in light of the new conditions in the region and the world, from an updated and comprehensive perspective of security and disarmament, including the subject of all forms of proliferation of weapons and instruments of mass destruction, so that the largest possible volume of resources may be devoted to the economic and social development of the member states; and an appeal to other competent organizations in the world to join in the efforts of the OAS.***

Democracy & Social and Democratic Development Interrelated

Text:

• Commitment, preamble, 6th para.: ***Reaffirming that the principles enshrined in the OAS Charter and the ideals of peace, democracy, social justice, comprehensive development and solidarity are the permanent foundation of the inter-American system;***

Comment: → That democracy and development be proclaimed together as part of the "permanent foundation" of the Hemispheric system speaks for itself.

Text:

• Commitment, 3rd resol. para.: ***DECLARE* (…) *Their determination to continue to prepare and develop a relevant agenda for the Organization, in order to respond appropriately to the new challenges and demands in the world and in the region, and their decision to assign special priority on that agenda, during the present decade, to the following actions:***

a. Intensifying the common struggle and cooperative action against extreme poverty to help reduce economic and social inequalities in the hemisphere, and thereby strengthen the promotion and consolidation of democracy in the region; (…)

Comment: → We have here a clear equation between reducing economic inequalities, and the promotion and consolidation and democracy.

Text:

• Commitment, 6th and final resol. para**.: *Consequently, the Ministers of Foreign Affairs and the Heads of Delegation of the member states of the OAS, in the name of their peoples, declare their firm political commitment to the promotion and protection of human rights and representative democracy, as indispensable conditions for the stability, peace, and development of the region, and for the success of the changes and renewal that the inter-American system will require at the threshold of the twenty-first century***.

Comment: → It is interesting to compare this language here with that found in paragraph 3.a (*supra*) of the *Commitment*. Indeed, while in paragraph 3.a the implication seems to be that development reinforces democracy, here the implication is that without democracy there cannot be development. Again, those two different approaches can be seen as being primarily political in nature, rather than legal.

Text:

• Resol. 1080, preamble, 1st para.: ***WHEREAS The Preamble of the Charter of the OAS establishes that representative democracy is an indispensable condition for the stability, peace, and development of the region; (…)***

Comment: → So, no democracy = no development. And …..

Text:

• Resol. 1080, preamble, 5th para.: ***WHEREAS (…) The region still faces serious political, social, and economic problems that may threaten the stability of democratic governments, (…)***

Comment: → …. economic shortcomings = threat to stable democracy.

Annex 4

FIRST SUMMIT OF THE AMERICAS
Miami, Florida December 9-11, 1994
Declaration of Principles[81]

Democracy

Text:

- *Nil*

Social and Economic Development

Text:

- 2nd Ch, Heading: ***To Promote Prosperity Through Economic Integration and Free Trade***

Comment: → The *Declaration of Principles* of Miami, while otherwise extensively dealing with development issues and concerns in general, devotes the entirety of one – the 2nd - of its four chapters to the promotion of prosperity.

Democracy & Social and Democratic Development Interrelated

Text:

- Subtitle of Declaration: ***Partnership for Development and Prosperity: Democracy, Free Trade and Sustainable Development in the Americas***.

Comment: → That, in their very first Summit, the political leaders of the inter-American family would place their *Declaration of Principles* under a general heading where the notions and concepts of Development, Prosperity and Democracy are all bundled together, and that their attainment or achievement be sought in "partnership", is but a reflection of what had been long proclaimed in the *OAS Charter* itself.

Text:

- Initial para.: *The elected Heads of State and Government of the Americas are committed to advance the prosperity, democratic values and institutions, and security of our Hemisphere.*

Comment: → That very first phrase of the substantive part of the *Declaration* follows naturally from its subtitle and again places the advancement of prosperity (or economic development) and the development of democracy side-by-side in the Leaders' general quest and endeavor.

Text:

- 1st Ch.[82], 1st para.: ***The Charter of the OAS establishes that representative democracy is indispensable for the stability, peace and development of the region. It is the sole political system that guarantees respect for human rights and the rule of law; it safeguards cultural diversity, pluralism, respect for the rights of minorities, and peace within and among nations. Democracy is based, among other fundamentals, on free and transparent elections and includes the right of all citizens to participate in government. Democracy and development reinforce one another***.

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81 http://www.summit-americas.org/miamidec.htm
82 Under the heading *To preserve and strengthen the community of democracies of the Americas*.

Comment: → One might be tempted argue that the initial part of that statement, drawn from the *OAS Charter*[83], seems to establish 'democracy' as a pre-condition of development, by advancing that the former is impossible without the latter. But that the two "reinforce one another" certainly is not in doubt.

Text:

• 1st Ch., 2nd para.: ***We reaffirm our commitment to preserve and strengthen our democratic systems for the benefit of all people of the Hemisphere. We will work through the appropriate bodies of the OAS to strengthen democratic institutions and promote and defend constitutional democratic rule, in accordance with the OAS Charter. We endorse OAS efforts to enhance peace and the democratic, social, and economic stability of the region.***

Comment: → Again we have, in the same breadth, commitments to both the strengthening of democracy and greater economic 'stability'.

Text:

• 1st Ch., 4th para.: ***Effective democracy requires a comprehensive attack on corruption as a factor of social disintegration and distortion of the economic system that undermines the legitimacy of political institutions***.

Comment: → In the context of the present report, one can advance that what this language is saying is that anything that damages the economy, thus hindering development, adversely affects democracy and makes it less effective.

Text:

• 3rd Ch.[84], 1st para.: ***It is politically intolerable and morally unacceptable that some segments of our populations are marginalized and do not share fully in the benefits of growth. With an aim of attaining greater social justice for all our people, we pledge to work individually and collectively to improve access to quality education and primary health care and to eradicate extreme poverty and illiteracy. The fruits of democratic stability and economic growth must be accessible to all, without discrimination by race, gender, national origin or religious affiliation.***

Comment: → In a general fashion this kind of language considers both democratic stability and economic growth as essential factors in the eradication of poverty.

Text:

• 3rd Ch., 3rd para.: ***Aware that widely shared prosperity contributes to hemispheric stability, lasting peace and democracy, (…)***

Comment: → Again, democracy and economic development are presented here as going hand-in-hand. This does not say that prosperity leads to democracy, that it must come first if there is to be democracy; but that it "contributes" to it, that without it democracy is hindered or diminished.

Text:

• Ch. 4[85], last para.: ***Our thirty-four nations share a fervent commitment to democratic practices, economic integration, and social justice. (…)***

Comment: → Yet another reaffirmation of a concurrent commitment to values and goals that are constantly portrayed as inseparable.

Annex 5

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83 See, notably, the 3rd para. of the preamble to the *OAS Charter*. One finds the same language in the 1st para. of the preamble to the *Inter-American Democratic Charter*.

84 Under the heading *To eradicate poverty and discrimination in our hemisphere*.

85 Under the heading *To guarantee sustainable development and conserve our natural environment for future generations*.

FIRST SUMMIT OF THE AMERICAS
Miami, Florida, December 9-11,
Plan of Action[86]

Democracy

Text:

• Ch. I, Part 1[87], 1st para: ***The strengthening, effective exercise and consolidation of democracy constitute the central political priority of the Americas. (…)***

Comment: → Such an affirmation to the effect that strengthening democracy in the Americas is a "political" priority was no doubt to be expected, coming as it does at a Summit which is, by essence, political by its very nature[88].

Text:

• Ch. I, Part 1, 1st para.: ***(…) The Organization of American States (OAS) is the principal hemispheric body for the defense of democratic values and institutions; among its essential purposes is to promote and consolidate representative democracy, with due respect to the principle of non-intervention. (…)***

Comment: → A simple reaffirmation of the *OAS Charter*.[89]

Social and Economic Development

Text:

• Ch II, Title: <u>*Promoting Prosperity Through Economic Integration and Free Trade*</u>.

Comment: → The Miami *Plan of Action* has an entire chapter devoted specifically, as *per* its very title, to the "promotion of economic prosperity". But is does so from an angle, "Economic Integration and Free Trade", which is not treated in any direct relation to 'democracy'.

Text:

• Ch. II, para. 5: ***As we work to achieve the "Free Trade Area of the Americas," opportunities such as technical assistance will be provided to facilitate the integration of the smaller economies and increase their level of development.***

Comment: → Though the focus of this Chapter II is on "Free Trade" as a vehicle for prosperity, the recognition in the above language of a duty to provide technical assistance for the purpose of "increasing … development" is nothing new in inter-American documents.[90]

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86 http://www.summit-americas.org/miamiplan.htm#1 This *Plan of Action*, as stated in its preamble, represents a "commitment" on the part of the Heads of State and Government; it is, like many documents of the same nature, the expression of a political will and not, strictly speaking, a legally binding one. That paragraph reads in part: "*The heads of state and government participating in the 1994 Summit of the Americas in Miami, Florida, (…) mindful of the need for practical progress on the vital tasks of enhancing democracy, promoting development, achieving economic integration and free trade, improving the lives of their people, and protecting the natural environment for future generations, affirm their commitment to this Plan of Action".* Worthy of note, the affirmation, in the Appendix to this *Plan of Action*, that *"The primary responsibility for implementing this Plan of Action falls to governments, individually and collectively, with participation of all elements of our civil societies".*

87 Chapter I of the Miami Summit *Plan of Action* deals with the overall theme of "Preserving and Strengthening the Community of Democracies of the Americas"; its Part 1 is devoted to "Strengthening Democracy".

88 See footnote 1.

89 See art. 2 (b) of the *OAS Charter*.

90 See, *inter alia*, art. 2 (f), 31 and 111 of the *OAS Charter*.

Text:

• Ch. III, Title: ***Eradicating Poverty and Discrimination in Our Hemisphere***

Comment: → As was the case for Ch. II above, the plans put forward here to contribute to the "eradication of poverty" do not relate directly to 'democracy'. Yet, certainly elements of 'democracy' are at least present, for example in the language devoted to "universal literacy and access to education at all levels"[91]. The same can be argued in relation to the sub-chapter on "The strengthening of the role of women in society"[92].

Text:

• Ch. III, 1st para.: *In pursuit of these objectives, we reaffirm our support for the strategies contained within the "Commitment on a Partnership for Development and Struggle to Overcome Extreme Poverty" adopted by the OAS General Assembly.*

Comment: → Yet another reaffirmation of the need to cooperate and associate with a view to development.

Democracy & Social and Democratic Development Interrelated

Text:

• **Preamble.:** ***The heads of state and government participating in the 1994 Summit of the Americas in Miami, Florida, desirous of furthering the broad objectives set forth in their Declaration of Principles and mindful of the need for practical progress on the vital tasks of enhancing democracy, promoting development, achieving economic integration and free trade, improving the lives of their people, and protecting the natural environment for future generations, affirm their commitment to this Plan of Action.***

Comments: → As can be noted, "democracy" and "development" are immediately juxtaposed, quite naturally, given the many references in OAS texts and instruments in which those two concepts are interrelated.

Text:

• Ch. I, Part 1, 1st para.: ***(…) The OAS has adopted multilateral procedures to address the problems created when democratic order has been interrupted unconstitutionally. In order to prevent such crises, the OAS needs to direct more effort toward the promotion of democratic values and practices and to the social and economic strengthening of already-established democratic regimes. (…)***

Comment: → By implication, this language, found in a Chapter - the first one - devoted to "Strengthening Democracy", acknowledges that to prevent crises to democracy, efforts need be directed not only to the promotion of democratic values, but also to the strengthening social and economic life in democracies. This can be seen as yet other recognition that democracy and economic development go hand in hand, that one must accompany the other. As if to say that promoting democratic values and practices without looking after economic and social development will not be enough to prevent interruptions of democracy and solve the problems that come with such interruptions.

Text:

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91 See 1st subpara. of para. 16, where those are referred to as "an indispensable basis for sustainable social and cultural development, economic growth and democratic stability".

92 See 1st subpara. of para. 18, which reads in part: "It is essential to strengthen policies and programs that improve and broaden the participation of women in all spheres of political, social, and economic life and that improve their access to the basic resources needed for the full exercise of their fundamental rights. Attending to the needs of women means, to a great extent, contributing to the reduction of poverty and social inequalities". See also 4th subpara. Of same, where Governments undertake to "Promote the participation of women in the decision-making process in all spheres of political, social and economic life".

• Ch. I, Part 2, 1st para.[93]: **(…)** ***There must also be universal access to justice and effective means to enforce basic rights. A democracy is judged by the rights enjoyed by its least influential members. (…)***

Comment: → In other words, a democracy without respect to human rights cannot be a democracy. And to the extent that various inter-American instruments devoted to human rights deal with social and economic development, then one again we see here an expression, in another form, of the interrelation between democracy and development.

Text:

• Ch. I, Part 5, 1st para.[94]: ***(…) Corruption in both the public and private sectors weakens democracy and undermines the legitimacy of governments and institutions. (…). All aspects of public administration in a democracy must be transparent and open to public scrutiny. (…)***

Comment: → One can certainly argue that to the extent that corruption is seen and recognized as taking funds away from economic development, we have here an indirect admission that what impedes or curtails economic development stands in the way of an effective democracy.

Text:

• Ch. I, Part 8, 1st para.[95]: ***The expansion and consolidation of democracy in the Americas provide an opportunity to build upon the peaceful traditions and the cooperative relationships that have prevailed among the countries of the Western Hemisphere. Our aim is to strengthen the mutual confidence that contributes to the economic and social integration of our peoples.***

Comment: → This is not the place to debate whether economic 'development' requires economic 'integration'. But since the Miami Summit *Plan of Action* devotes its entire Chapter II to "Promoting Prosperity Through Economic Integration and Free Trade", its authors, Heads of States and of Governments, obviously linked the two. Hence the unambiguous relationship proclaimed in this *Plan of Action* between democracy and economic integration as a tool for development.

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93 Chapter I of the Miami Summit *Plan of Action* deals with the overall theme of "Preserving and Strengthening the Community of Democracies of the Americas"; its Part 2 is devoted to "Promoting and Protecting Human Rights".

94 Part 5 of Ch.I is devoted to "Combating Corruption".

95 Part 8 of Ch. I is devoted to "Building Mutual Confidence".

Annex 6

SECOND SUMMIT OF THE AMERICAS
Santiago, Chile, April 18-10, 1998

Declaration of Principles[96]

Democracy

Text:

• 12 para.: **The strength and meaning of representative democracy lie in the active participation of individuals at all levels of civic life. The democratic culture must encompass our entire population**.

Social and Economic Development

Text:

• 4th para.: ***Hemispheric integration is a necessary complement to national policies aimed at overcoming lingering problems and obtaining a higher level of development. (…)***

Comment: → Considering integration as a "*necessary complement to national policies"* in the pursuit of development is a simple restatement of an oft-repeated theme in the Hemisphere.

Text:

• 10th para.: *The FTAA negotiating process will be transparent, and take into account the* ***differences in the levels of development*** *and size of the economies in the Americas, in order to create the opportunities for the* ***full participation by all countries***[97] *(....)*

Comment: → This acknowledgement of the need to take such differences into account in actions or programs aimed at promoting development also appears in many hemispheric documents. (Note also the appeal for 'democracy' as applied between states ….).

Text:

• 16th para.: *Overcoming poverty continues to be the greatest challenge confronted by our Hemisphere. We are conscious that the positive growth shown in the Americas in past years has yet to resolve the problems of inequity and social exclusion*.

Comment: → A clear admission that there remains much to be done on that front, and, indirectly – given the inter-relationships between democracy and social and economic development - in the area of the strengthening of democracy.

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96 Full text at http://www.summit-americas.org/chiledec.htm

97 An interesting reference to the principle of 'democracy' extended to international organizations or associations of countries.

Democracy & Social and Democratic Development Interrelated

Text:

• 2nd para.: ***The strengthening of democracy, political dialogue, economic stability, progress towards social justice, the extent to which our trade liberalization policies coincide, and the will to expedite a process of ongoing Hemispheric integration have made our relations more mature. We will redouble our efforts to continue reforms designed to improve the living conditions of the peoples of the Americas and to achieve a mutually supportive community. (…)***

Comment: → Again we have here a repeat of the proposition that better democracy, economic stability and more social justice are all closely associated in the pursuit and achievement of improved living conditions, *i.e.* development.

Text:

• 6th para.: ***Education is the determining factor for the political, social, cultural, and economic development of our peoples.***

Comment: → As expressed in the *Declaration*'s 2nd paragraph, the Santiago Summit placed a particular emphasis on education *"a key theme and is of particular importance in our deliberations".*

Text:

• 14th para.: ***Confident that an independent, efficient, and effective administration of justice plays an essential role in the process of consolidating democracy, strengthens its institutions, guarantees the equality of all its citizens, and contributes to economic development, we will enhance our policies relating to justice and encourage the reforms necessary to promote legal and judicial cooperation. (…)***

Comment: → Associating an "*independent, efficient, and effective administration of justice"* to furthering democracy and economic development is a recurring theme in many official Hemispheric texts. For example, in the *Declaration of Principles* adopted at the First Summit of the Americas in 1994, one reads[98] that "… *it* [*i.e.* representative democracy] *is the sole political system which guarantees (…) the rule of law*".

Annex 7

SECOND SUMMIT OF THE AMERICAS
(Santiago, Chile, April 18-19, 1998)
Plan of Action[99]

Democracy

Text:

• Ch. II, 1st para.: ***The strengthening of democracy, justice and human rights is a vital hemispheric priority. In this Plan of Action, we endorse new initiatives designed to deepen our commitment to these important principles. Specifically, we will intensify our efforts to promote democratic reforms at the regional and local level (…). We further resolve to defend democracy against the serious threats of***

98 1st Ch, 1st para.
99 Full text at http://www.summit-americas.org/chileplan.htm

corruption, terrorism, and illegal narcotics, and to promote peace and security among our nations. Taken together, these measures consolidate our democratic gains, reaffirm our commitment to democratic institutions, and commit us to building a Hemisphere of shared values.

Comment: → That is the introductory language of the chapter on the Santiago *Plan of Action* entitled "Preserving and Strengthening Democracy, Justice and Human Rights". That chapter has an entire section specifically devoted to linkages between "Democracy and Human Rights"

Text:

● Ch. II, sub-ch. 1, 8th para.: ***Governments will also enhance cooperation with and support for the activities of the Organization of American States (OAS) in order to: (…) Support States that so request in the processes of promoting and consolidating democratic values, practices and institutions by strengthening the respective organs of the Organization, including the Unit for the Promotion of Democracy (UPD).***

Comment: → As often seen on previous documents, OAS member States are seen here as committing themselves to what is seen as a cooperative effort in support and defence of democracy.

Text:

● Ch. II, sub-ch. 1, 9th para.: ***Governments will also enhance cooperation with and support for the activities of the Organization of American States (OAS) in order to (…): Strengthen the exercise of and respect for all human rights and the consolidation of democracy, including the fundamental right to freedom of expression and thought, through support for the activities of the Inter-American Commission on Human Rights in this field, in particular the recently created Special Rapporteur for Freedom of Expression.***

Comment: → Again as often seen in earlier documents, we find an immediate juxtaposition of "democracy" and "human rights". Such juxtaposition would seem to reinforce the concept that "democracy" can be seen as an individual right and that its realization entails respect of, and compliance with, many basic human rights. As will be seen later, the *Inter-American Democratic Charter* adopted in 2001 proclaims in its very first article that: *"The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. (…)".*

Social and Economic Development

Text:

• Ch III[100], Section A, subsect. 4: ***Ensure that the negotiating process is transparent and takes into account the differences in the levels of development and size of the economies in the Americas, in order to create opportunities for the full participation of all countries, including the smaller economies.***

Comment: → Where we have here a simple recognition of the fact that the state or level of economic development amongst the countries of the Americas is dissimilar, and that such differences must be taken into account in any process aimed at fostering greater economic integration[101].

[100] Chapter III is devoted to "Economic Integration and Free Trade.

[101] Similar language would appear later in the 15th para. of the III Summit Declaration (Quebec City): *"We attach great importance to the design of an Agreement [FTAA] that takes into account the differences in the size and levels of development of participating economies".* It is also found in many other Hemispheric documents.

Democracy & Social and Democratic Development Interrelated

Text:

• Introductory para.: ***We, the democratically elected Heads of State and Government of the Americas, recognizing the need to make a collective effort that complements the actions being developed and executed at the national level to improve the economic well-being and the quality of life of our peoples, mindful of our commitment to the continued implementation of the Miami Plan of Action, affirm our resolute determination to carry out this Plan of Action, which constitutes a body of concrete initiatives intended to promote the overall development of the countries of the Hemisphere and ensure access to and improve the quality of education, promote and strengthen democracy and the respect for human rights, deepen economic integration and free trade and eradicate poverty and discrimination. We have adopted this Plan of Action conscious that all the initiatives are inter-related and equally important to the attainment of our common endeavour.***

Comment: → It would be difficult to imagine language describing in a more emphatic way the inter-relationship between democracy and development. It is also worthy of note that the "commitment" referred to, political rather than, strictly speaking, legal, is presented as in direct continuity to the *Plan of Action* of the previous, *i.e.* Miami, summit.

Text:

● Ch. IV, Introductory para.: ***Extreme poverty and discrimination continue to afflict the lives of many of our families and impede their potential contribution to our nations' progress. To move toward a prosperous future for all, (…) We will seek to enhance the quality of life of all people of the Americas through efforts that ensure access to adequate health services, to improved health technologies, to clean water and proper nutrition. Taken together, these measures will facilitate the inclusion of all inhabitants, without exception, in the economic and democratic transformation of the Hemisphere***.

Comment: → This language, again linking economic development and democracy, heads the chapter of the Santiago *Plan of Action* entitled "Eradication of Poverty and Discrimination".

Annex 8

UNITED NATIONS MILLENNIUM DECLARATION[102]

Resolution adopted by the United Nations General Assembly 8 September 2000

Introductory Note: The entire "sense" or purpose of this *Declaration* can be found in is two initial paragraphs: "*1. We, heads of State and Government, have gathered at United Nations Headquarters in New York from 6 to 8 September 2000, at the dawn of a new millennium, to reaffirm our faith in the Organization and* ***its Charter as indispensable foundations of a more peaceful, prosperous and just world.*** *2. We recognize that, in addition to our separate responsibilities to our individual societies, we* ***have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level****. As leaders we have a duty therefore to all the world's people, especially the most vulnerable and, in particular, the children of the world, to whom the future belongs".*

[102] Full text at http://www.un.org/millennium/declaration/ares552e.htm and at http://www.un.org/millennium/declaration/ares552e.pdf

Democracy

Text:

- *Nil.*

Comment: → Quite possibly some parts or excerpts of the paragraphs from the *Millennium Declaration* treated below under «Democracy & Social and Democratic Development Interrelated» could have been included in the above section. But for reasons that will be evident, it was considered better not to separate such references to «democracy», and therefore to incorporate them only in the immediate context where they were found below, and which also dealt with development.

Social and Economic Development

Text:

- Part I[103], para. 4: ***(…) We rededicate ourselves to (…) respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion and international cooperation in solving international problems of an economic, social, cultural or humanitarian character.***

Text:

- Part 1, para 5: **We believe that the central challenge we face today is to ensure that globalization becomes a positive force for all the world's people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed. We recognize that developing countries and countries with economies in transition face special difficulties in responding to this central challenge. Thus, only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable. These efforts must include policies and measures, at the global level, which correspond to the needs of developing countries and economies in transition and are formulated and implemented with their effective participation**.

Comment: → A succinct description of the challenges that globalization poses to development[104]. (And again, an appeal to 'democracy' as applies amongst all States).

Text:

- Part I, para. 6: ***We consider certain fundamental values to be essential to international relations in the twenty-first century. These include: (…) Equality. No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured (…)***

Comment: → This language is logically reflected further down in paragraphs 11 and 24 of the *Millennium Declaration*, which, as will be seen *infra*, refer to development as a right included in the general notion of human rights.

Text:

- Part I, para. 6: ***We consider certain fundamental values to be essential to international relations in the twenty-first century. These include: (…) Shared responsibility. Responsibility for managing worldwide economic and social***

[103] Entitled *Values and principles*.

[104] Can be read in conjunction with part of para. 6 in Part I: "*Solidarity. Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most".*

development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.

Comment: → The notion of a "shared responsibility" for development also appears quite regularly in hemispheric documents.

Text:

- Part III[105], para. 11: ***We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.***[106]

Comment: → Note the reference to a "right to development". See also the text in Part V, para. 24, quoted below.

Text:

- Part III, para. 13: *We also undertake to address the* ***special needs of the least developed countries. (…)***

Text:

- Part VIII, para. 29: ***We will spare no effort to make the United Nations a more effective instrument for pursuing all of these priorities: the fight for development for all the peoples of the world, the fight against poverty, ignorance and disease; the fight against injustice; the fight against violence, terror and crime; and the fight against the degradation and destruction of our common home.***

[105] Entitled *Development and poverty eradication.*
[106] See paras. 6 and 24, as well as comments thereto.

Democracy & Social and Democratic Development Interrelated

Text:

• Part I[107], para. 6: ***We consider certain fundamental values to be essential to international relations in the twenty-first century. These include: (…) Freedom. Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights. (…)***

Comment: → Such a direct relationship between what we could call 'social rights' and development is more and more often seen in UN Documents. This text stops short of establishing that a democratic system of government is an essential prerequisite for such rights; but it does say that it is the «best» one.

Text:

• Part III, paras. 12 & 13: *12.* ***We resolve therefore to create an environment – at the national and global levels alike – which is conducive to development and to the elimination of poverty. 13. Success in meeting these objectives depends, inter alia, on good governance within each country. It also depends on good governance at the international level and on transparency in the financial, monetary and trading systems. We are committed to an open, equitable, rule-based, predictable and non-discriminatory multilateral trading and financial system.***

Comment: → To say that the success of creating an environment conducive to development depends in part on "good governance" refers us back to the proposal that democratic systems are generally recognized as those best suited to the achievement of such good governance: see paragraph 6 (see *supra*) of the *Millennium Declaration*. And therefore restates, albeit in a tacit way, the relationship between democracy and development which is so often established in many Hemispheric documents

Text:

• Part V[108], para. 24***: We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development***.

Comment: → The commitment to promote 'democracy' and 'development' is not expressly put forward here in any interrelated fashion, but rather, and simply, as a parallel or side-by-side undertaking. It is also worth noting that 'development' is seen as a not only a "right", but as a right that is to be considered as included within the notions of "human rights and fundamental freedoms". See also the text in Part III, para. 11, quoted above.

The *Monterrey Consensus* adopted later at the International Conference on Financing for Development[109] (18-22 March 2002), also referred to development as a "right" which forms part of "human rights"; it also considered 'development' and 'democracy, to be "mutually reinforcing".[110]

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107 Entitled *Values and principles.*

108 Entitled *Human rights, democracy and good governance.*

109 Held in Monterrey, N.L., Mexico.

110 Para. 11 of the *Monterrey Consensus* reads: *"Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation. Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing".*

In contrast, Art. 1 of the *Inter-American Democratic Charter*, adopted by the OAS General Assembly in Lima, Peru, on September 11, 2001, *i.e.* one year after the adoption by the UN General Assembly of this *Millennium Declaration*, speaks of a "right to democracy".[111]

Whereas here in the *Millennium Declaration* we only find a commitment to « promote » democracy, the *Inter-American Democratic Charter* will go further and add the notion of "defending" it.[112] But see the comment below the next article.

Text:

- Part V, para. 25: ***We resolve therefore***

To respect fully and uphold the Universal Declaration of Human Rights.

To strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights for all.

To strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights. (…)

To work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.

Comment: → Given, as indicated earlier in relation to paragraph 24, that in the *Millennium Declaration* the «right to development» is seen as part of «human rights», one can say that the 'resolve' expressed in this Article 25 addresses in a simultaneous but not expressly related fashion both 'more development' and 'better democracy'.

Given what was said in the immediately preceding comment about the *Inter-American Democratic Charter* going further that the *Millennium Declaration* by adding the notion of «defending» democracy, as opposed to merely « promoting » it, one might want to reassess such a judgement by looking at the above expression of a resolve "*to strive for the full protection and promotion in all our countries of civil, political, economic, social and cultural rights".*

Text:

- Part VIII[113], para. 30: ***We further resolve therefore (…) To strengthen further cooperation between the United Nations and national parliaments through their world organization, the Inter-Parliamentary Union, in various fields, including peace and security, economic and social development, international law and human rights and democracy and gender issues***.

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[111] Art. 1 of the *Inter-American Democratic Charter* reads: "T*he peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. (…)".*

[112] Seen footnote 72, *supra.* As can be seen in the review of the entire text of the *Inter-American Democratic Charter,* that particular part of Art. 1 of that *Charter* can be said to be at the very center of what one might refer to as the Inter-American Democracy 'architecture'. The emphatic recognition of the existence of such a right is at the heart of the entire instrumentation that the OAS and its members have developed over time in order to fulfill the 'obligation' to promote and defend democracy.

[113] Entitled *Strengthening the United Nations.*

Annex 9

THIRD SUMMIT OF THE AMERICAS
Quebec City, Canada, April 20-22, 2001
Declaration of Principles[114]

Democracy

Text:

- 5th para.: ***We acknowledge that the values and practices of democracy are fundamental to the advancement of all our objectives. The maintenance and strengthening of the rule of law and strict respect for the democratic system are, at the same time, a goal and a shared commitment and are an essential condition of our presence at this and future Summits. (…)***

Comment: → A clear enunciation of the principle that the practice of, and respect for, democracy is a cornerstone of the Americas[115]. Note that if 'democracy' is a condition for participation at Summits, 'development' is not ….

Text:

- 6th para.: ***Threats to democracy today take many forms. To enhance our ability to respond to these threats, we instruct our Foreign Ministers to prepare, in the framework of the next General Assembly of the OAS, an Inter-American Democratic Charter to reinforce OAS instruments for the active defense of representative democracy[116].***

Comment: → Such a *Charter* would be adopted by the General Assembly at its special session held in Lima, Peru, on September 11, 2001, its adoption being declared "in keeping with express instructions from the Heads of State and Government gathered at the Third Summit of the Americas, in Quebec City".

Social and Economic Development

Text:

- 4th para.: ***We have made progress in implementing the collective undertakings made at Miami in 1994 and continued at Santiago in 1998. We recognize the necessity to continue addressing weaknesses in our development processes and increasing human security. We are aware that there is still much to be achieved if the Summit of the Americas process is to be relevant to the daily lives of our people and contribute to their well-being.***

Comment: → A recognition that much remains to be done on the "economic development" side of the democracy/development equation enunciated elsewhere in the *Declaration*.[117]

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[114] The full text of that Declaration can be found at http://www.summit-americas.org/Documents%20for%20Quebec%20City%20Summit/Quebec/Declaration%20of%20Quebec%20City%20(final).htm

[115] Not surprisingly, then, that same paragraph goes on to say: *"Consequently, any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the Americas process. Having due regard for existing hemispheric, regional and sub-regional mechanisms, we agree to conduct consultations in the event of a disruption of the democratic system of a country that participates in the Summit process".*

[116] The *Declaration* has a footnote at this point, stating: "*Venezuela reserves its position (…)".*

[117] Almost identical language can be seen in the 16th para. of the *Declaration of Principles* of the Second Summit of the Americas (Santiago, 1998).

Democracy & Social and Democratic Development Interrelated

Text:

- Initial para.: ***We, the democratically elected Heads of State and Government of the Americas, have met in Quebec City at our Third Summit, to renew our commitment to hemispheric integration and national and collective responsibility for improving the economic well-being and security of our people. We have adopted a Plan of Action to strengthen representative democracy, promote good governance and protect human rights and fundamental freedoms.[118] We seek to create greater prosperity and expand economic opportunities while fostering social justice and the realization of human potential.***

Comment: → As was done at the Miami and Santiago summits, this initial statement by the Heads of States and Heads of Governments links together the notions of 'democracy' and greater 'prosperity', the latter being, in some ways, synonymous with 'economic development'.

Text:

- 3rd para.: ***Our rich and varied traditions provide unparalleled opportunities for growth and to share experiences and knowledge and to build a hemispheric family on the basis of a more just and democratic international order. We must meet the challenges inherent in the differences in size and levels[119] of social, economic and institutional development in our countries and our region***.

Comment: → That the international order being sought must be not only "more democratic", but also "more just", is another recognition, albeit less explicit, that democracy and economic development for all go hand in hand.

Text:

- 9th para.: ***(…) Acknowledging that corruption undermines core democratic values, challenges political stability and economic growth and thus threatens vital interests in our Hemisphere, we pledge to reinvigorate our fight against corruption, we pledge (…)***

Comment: → Again we see the notions of democracy and economic growth being lumped together as similarly and simultaneously affected by a same factor (this time, corruption).

Text:

- 19th para.: ***Democracy and economic and social development are interdependent and mutually reinforcing as fundamental conditions to combat poverty and inequality. (…)***

Comment: → Yet another reflection, stated in a clear an unequivocal way, of the immediate relationship and interdependence seen between democracy and development.

Text:

- 23rd para.: ***Progress towards more democratic societies, growing economies and social equity relies on an educated citizenry (…)***

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[118] The *Declaration* has a footnote at this point, stating: "*Venezuela reserves its position (…)".*

[119] See also para. 15 of the same *Declaration*, with regard to a proposed FTAA: *"We attach great importance to the design of an Agreement that takes into account the differences in the size and levels of development of participating economies".*

Comment: → Another indication that the pursuit of democracy and economic development entails the achievement of common realizations.

Text:

• 26th para.: ***(…) We are committed (…) to achieving the full participation of all persons in the political, economic, social and cultural life of our countries***.

Comment: → This commitment to achieving "full participation" in those interrelated aspects of national life acknowledges in a way that democracy remains central to a country's overall development.

Text:

• Final para.: ***(…) We are united in our determination to leave to future generations a Hemisphere that is democratic and prosperous, more just and generous, a Hemisphere where no one is left behind. (…)***

Comment: → A final restatement of what the *Declaration* has enunciated in several fashions before. It is also worth underlining that better democracy and greater prosperity are seen in parallel with more justice and increased solidarity.

Annex 10

THIRD SUMMIT OF THE AMERICAS
Quebec City, Canada, April 20-22, 2001
Plan of Action[120]

Introductory Note: it is not insignificant that the very first words of that long *Plan of Action* are: "***To strengthen democracy, create prosperity and realize human potential, our Governments will: (….).*** Moreover, the first of the *Plan*'s 18 chapters is entitled "**Making Democracy Work Better",** and begins with "*Recognizing* ***the relationship among democracy, sustainable development".*** Whereas the 12th, which is devoted to **"Growth With Equity",** begins with "*Recognizing* ***that economic growth is fundamental to overcoming economic disparities and strengthening democracy*** *in the Hemisphere (…)".*

Democracy

Text:

• Introd. to 2nd section of Ch. 1: ***Recognizing that good governance requires effective, representative, transparent and accountable government institutions at all levels, public participation, effective checks and balances, and the separation of powers, as well as noting the role of information and communications technologies in achieving these aims****: (…)*

Comment: → Those requirements for "good governance" all fall within what are often understood as essential parts or attributes of democracy.

Text: • Introd. para. to 5th section[121] of Ch. 1[122]: ***Recognizing that citizen participation and appropriate political representation are the foundation of democracy, and that local governments are closest to the daily lives of citizens.***

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120 The full text of that *Declaration* can be found at http://www.summit-americas.org/chileplan.htm
121 Dealing with *Empowering Local Governments*.
122 See footnote 3, *supra*.

Text:

• 4th para. of 1st section[123] of Ch. 2[124]: ***(…) stressing that political platforms based on racism, xenophobia or doctrines of racial superiority must be condemned as incompatible with democracy and transparent and accountable governance.***

Comment: → Another way of saying that non-respect for human rights is incompatible with democracy, or *vice versa.*

Text:

• Introd. para. to Ch. 4[125]: ***(…) and noting that the constitutional subordination of armed forces and security forces to the legally constituted authorities of our states is fundamental to democracy: (…)***

Comment: → Here, as in the previous texts, we can find references to some of the elements considered essential to the notion of democracy.

Social and Economic Development

Text:

• 3rd para. of 1st section**[126]** of Ch. 6**[127]**: ***Ensure full participation of all our countries in the FTAA, taking into consideration the differences in the levels of development and size of the economies of the Hemisphere, in order to create opportunities for the full participation of the smaller economies and to increase their level of development;***

Comment: → A seen already, this acknowledgement of the need to take into account the differences in the levels of development of the countries of the hemisphere can be found in many hemispheric declarations, plans of action etc.

Text:

• 1st para. of 2nd section[128] of Ch. 6[129]: ***Welcome and support the work of our Ministers of Finance (…) to promote financial and economic stability as well as strong and sustainable growth, as fundamental preconditions for accelerated development and poverty reduction, and to ensure that the benefits of globalization are broadly and equitably distributed to all our people;***

Comment: → The insertion down in the next sub-section, *infra*, of this reference to 'financial and economic stability' as a precondition to accelerated development, would have been warranted, as it can be easily argued that democracy favours and breeds stability.

Text:

• 1st para. to 3rd section[130] of Ch. 6[131] : ***Recognizing the central role that businesses of all sizes play in the creation of prosperity and the flow and maintenance of trade and investment in the Hemisphere, and, noting that businesses can make an important contribution to sustainable development and increasing access to opportunities, including the reduction of inequalities in the communities in which they operate, and taking into consideration the increasing expectations of our***

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123 Dealing with *Implementation of International Obligations and Respect for International Standards.*
124 Entitled *Human Rights and Fundamental Freedoms.*
125 Entitled *Hemispheric Security*.
126 Dealing with *Trade and Investment*.
127 Entitled *Trade, Investment and Financial Stability.*
128 Dealing with *Economic and Financial Stability.*
129 Entitled *Trade, Investment and Financial Stability.*
130 Dealing with *Corporate Social Responsibility.*
131 Entitled *Trade, Investment and Financial Stability.*

citizens and civil society organizations that businesses carry out their operations in a manner consistent with their social and environmental responsibilities.

Comment: → Such a reference to the role and responsibilities of the business world in the creation of prosperity, hence development, if of course not new.

Text:

• Introd. para. to 1st section[132] of Ch. 9[133]: *Recognizing that the protection of the environment and the sustainable use of natural resources are essential to prosperity and to the sustainability of our economies, as well as the quality of life and health for present and future generations; (…)*

Comment: → Some would argue that the more democratic a government the more sensitive it would normally be to the need to protect the environment. In that context, the linkage made here between development and the environment could possibly be construed as indirectly linking environment and democracy.

Text:

• Introd. para. to 3rd section[134] of Ch. 12[135]: ***Recognizing the positive aspects and benefits of orderly migration in countries of origin, transit and destination as a factor contributing to economic growth and national and regional development***:

Comment: → Here again we can see a linkage – orderly migration and economic growth – that is not without relevance to the concept of 'democracy', given the widely acknowledged interrelationship between democracy and economic development, and the incidence between on one part economic development or the lack thereof, and on another part migration and whether it takes place in an orderly fashion or not[136].

Text

• 8th para. of 1st section[137] of Ch. 9[138]: ***Consult and coordinate domestically and regionally, as appropriate, with the aim of ensuring that economic, social and environmental policies are mutually supportive and contribute to sustainable development, building on existing initiatives undertaken by relevant regional and international organizations.***

Comment: → "Domestic" consultation and coordination to better attain development can certainly be seen as more susceptible of realization within democratic systems.

Text:

• Introd. para. to Ch.11[139]: ***(…) noting the importance of promoting employment security consistent with economic growth and developing mechanisms to assist workers with periods of unemployment, as well as of strengthening cooperation and social dialogue on labor matters among workers, their organizations, employers and governments.***

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132 Dealing with *Environment and Natural Resources Management.*
133 Entitled *Environmental Foundation for Sustainable Development.*
134 Dealing with *Migration.*
135 Entitled *Growth With Equity.*
136 That seems to be directly reflected in the 4th para. of the same section, which reads in part*: "Support programs of cooperation in immigration procedures for cross-border labor markets and the migration of workers, both in countries of origin and destination, as a means to enhance economic growth in full cognizance of the role that cooperation in education and training can play in mitigating any adverse consequences of the movement of human capital from smaller and less developed states".*
137 Dealing with *Environment and Natural Resources Management.*
138 Entitled: *Environmental Foundation for Sustainable Development.*
139 Entitled *Labor and Employment.*

Comment: → Here again, as in the immediately preceding text, achieving social dialogue amongst all concerned in a sector – labour - so intimately related to growth and development, can be seen as more susceptible of realization within democratic systems.

Democracy & Social and Democratic Development Interrelated

Text:

• Very first words of the Plan of Action**: *"To strengthen democracy, create prosperity and realize human potential, our Governments will: (….).***

Comment: → See the Introductory Note, *supra*. Those words announce the entire purpose of the *Plan of Action*, thus summarizing the will of the Heads of States and Governments to devise actions aimed at simultaneously promoting democracy and development as two inseparable concepts.

Text:

• Introd. para. to the 1st section[140] of Ch 1[141]: ***Recognizing the relationship among democracy, sustainable development, (…)***[142]

• Introd. para. to the 4th section[143]of Ch. 1: ***Recognizing that corruption gravely affects democratic political institutions and the private sector, weakens economic growth and jeopardizes the basic needs and interests of a country's most underprivileged groups (…).***

Comment: → This kind of language can be found in several other previous hemispheric documents, incl. at the previous Summits. It restates that some evils, such as – here – corruption[144], equally and simultaneously affects democracy and economic development.

Text:

• 3rd para. of 5th section[145] of Ch. 1[146]: ***Promote the development, autonomy and institutional strengthening of local government in order to promote favorable conditions for the sustainable economic and social development of their communities; (…)***

Comment: → An interesting affirmation that democracy at all levels, incl. local ones, creates conditions favourable to development.

Text:

• Introd. para. to Ch.2[147]: **Recognizing *that the universal protection and promotion of human rights, including civil, cultural, economic, political and social rights, as well as respect for the norms and principles of international humanitarian law based on the principles of universality, indivisibility and interdependence are fundamental to the functioning of democratic society, (…)***

Comment: → This assertion that for democracy to function there must be respect for human rights, and that amongst those must be included '*civil, cultural, economic, political*

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140 Dealing with *Electoral Processes and Procedures.*
141 Entitled *Making Democracy Work Better.*
142 See the Introductory Note, *supra,* at the beginning of the present section of this Report.
143 Dealing with *Fight against Corruption, under the chapter on "Making Democracy Work Better".*
144 The same is said about "violence and crime" in the 6th section, on *Prevention of Violence* in Ch. 3 ("*Justice, Rule of Law and Security of the Individual").* But also of such areas as "education" in the introductory para. of Ch. 13 "*Education")*; "health" in the introductory para. of Ch. 14 *(Health");* "women's empowerment" in the introductory para. of Ch. 15 *(Gender Equality);* the *"inclusion"* of indigenous peoples in the introductory para. of Ch. 16 *(Indigenous Peoples;* respect for "cultural diversity*"* in the introductory para. to Ch. 17 (*Cultural Diversity).*
145 Dealing with *Empowering Local Governments.*
146 Entitled *Making Democracy Work Better.*
147 Entitled *Human Rights and Fundamental Freedoms.*

and social rights', is not new either. Should one come to the conclusion that the "right to democracy" as proclaimed in the subsequent *Inter-American Democratic Charter* and *Declaration of Nuevo Leon* can be considered as a 'political' right, then this paragraph would in fact proclaim that the right to democracy is included in the notion of "human rights" on the same footing as 'economic' and 'social' rights.

Text:

• Introd. para. to Ch.3[148]: ***Recognizing that equal access to independent, impartial and timely justice is a cornerstone of democracy and economic and social development, (…)***

Comment: → Again, democracy and development are intimately associated, this time as both closely related to the existence of an adequate justice system.

Text:

• Introd. para. to Ch. 4*[149]: **Recognizing that democracy is essential for peace, development and security in the Hemisphere which, in turn, are the best basis for furthering the welfare of our people, (…)***

Comment: → This familiar language once again indicates that there cannot be development if there is no democracy. It could be, and has been, argued by various scholars that such a statement would appear to proclaim that democracy is a prerequisite to development, that it must come first if there is to be development. Others have refuted that interpretation, limiting its purview to the assertion that development is not possible without democracy, that one cannot exist or endure and prosper without the other.

Text:

• Introd. para. to Ch. 5[150]: ***Recognizing the important role of participation by civil society in the consolidation of democracy and that this participation constitutes one of the vital elements for the success of development policies, (…)***

Comment: → Again, a consolidated, well-working democracy is considered as fundamental to development goals being achieved[151].

Text:

• Introd. para. to Ch. 12[152]: ***Recognizing that economic growth is fundamental to overcoming economic disparities and strengthening democracy in the Hemisphere, and that in order to achieve sustained economic growth and political and social stability, it is necessary to face the primary challenge that confronts the Hemisphere - the eradication of poverty and inequity – (…)***

Comment: → We have here an interesting variance: a strong democracy requires economic growth, but it is not possible to achieve it while poverty and iniquity persist; *ergo* achieving and maintaining a strong democracy requires the eradication of poverty and inequity.

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148 Entitled *Justice, Rule of Law and Security of the Individual.*

149 Entitled *Hemispheric Security.*

150 Entitled *Civil Society.*

151 That notion is further developed in the 2nd para. of the 1st section (*Strengthening Participation in Hemispheric and National Processes*) of the same chapter: "*Develop strategies at the national level and through the OAS, other multilateral organizations and MDBs to increase the capacity of civil society to participate more fully in the inter-American system, as well as in the political, economic and social development of their communities and countries, fostering representativeness and facilitating the participation of all sectors of society".*

152 Entitled *Growth and Equity.*»

Annex 11

INTER-AMERICAN DEMOCRATIC CHARTER[153]

Adopted by the General Assembly
at its special session held in Lima, Peru,
on September 11, 2001

Introductory Note: As stated in the 18th para. of the preamble to this *Declaration*, its adoption in Lima is "in keeping with express instructions from the Heads of State and Government gathered at the Third Summit of the Americas, in Quebec City". Furthermore, the 20th para. of the preamble states that it is being adopted "BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the *OAS Charter* and related basic instruments on the preservation and defense of democratic institutions, according to established practice".

In the *Declaration of Nuevo León* adopted at the Special Summit held in January 2004, it is stated that the *Inter-American Democratic Charter* "constitutes an element of regional identity, and, **projected internationally, is a hemispheric contribution to the community of nations".**

Such statements can be considered an interesting factor in the most interesting debate as to whether, or to what extent, evolving international law may harbour an "obligation to democracy".

Democracy

Text:

• Preamble, 1st para.: ***CONSIDERING that the Charter of the Organization of American States recognizes that representative democracy is indispensable for the stability, peace, and development of the region, and that one of the purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of non-intervention; …***

Comment: → This repeats language found in Art. 2 (b) of the *OAS Charter*.

Text:

• Preamble, 3rd para.: ***RECALLING that the Heads of State and Government of the Americas, gathered at the Third Summit of the Americas, held from April 20 to 22, 2001 in Quebec City, adopted a democracy clause which establishes that any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summits of the Americas process; (…)***

Comment: → This reference to democracy as a precondition for participation in the Summits of the Americas is no doubt directly inspired from Art. 9 of the *OAS Charter*, which asserts that "representative democracy" is the norm expected of members of the Organization.

Text:

• Preamble, 14th para.: ***TAKING INTO ACCOUNT that, in the Santiago Commitment to Democracy and the Renewal of the Inter-American System, the ministers of foreign affairs expressed their determination to adopt a series of effective, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, with due respect for the principle of non-intervention; and that resolution AG/RES.1080 (XXI-O/91) therefore established a mechanism for collective action in the case of a sudden or irregular interruption of the democratic***

[153] Full text at http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/consejo.

political institutional process or of the legitimate exercise of power by the democratically-elected government in any of the Organization's member states, thereby fulfilling a long-standing aspiration of the Hemisphere to be able to respond rapidly and collectively in defense of democracy; (…)

Comment: → Most students of the evolution of the Inter-American System consider the *Santiago Commitment to Democracy and the Renewal of the Inter-American System*[154] as a true landmark in the defense and promotion of democracy in the Americas, which would later lead to further developments by the OAS and the Summits of the Americas (notably the Quebec City Summit in 2001).[155] The whole Chapter IV of the *Inter-American Democratic Charter* is entirely devoted such a *"series of effective, timely, and expeditious procedures to ensure the promotion and defense of representative democracy, with due respect for the principle of non-intervention"*.[156]

Text:

• Chapter I, Title: ***Democracy and the Inter-American System***.[157]

Text:

• Art. 1: *The peoples of the Americas have a* ***right to democracy***[158] *and their governments have an obligation to promote and defend it. (…)*

Comment: → This clear affirmation that there is such a thing as a "right to democracy", that such a right belongs to "the peoples", and that the governments of the Americas have an "obligation" to promote and defend such a right, is of course of prime significance. Indeed, that part of Art. 1 of the *Inter-American Democratic Charter* has been said to be at the very center of what one might refer to as the inter-American democracy 'architecture'. The emphatic recognition of the existence of a "right to democracy" is at the heart of the entire instrumentation that the OAS and its members have developed over time in order to fulfill the 'obligation' to promote and defend democracy.[159]

Text:

• Art. 2: ***The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States. Representative democracy is strengthened and deepened by permanent, ethical, and responsible participation of the citizenry within a legal framework conforming to the respective constitutional order.***

Comment: → What is of potential significant relevance here is that democracy is considered to be "the basis for the rule of law". Since Art. 1 of the same *Charter* proclaims that democracy is essential to development, then it follows that the rule of law is also a requirement for development.

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154 Both adopted at the 1991 OAS General Assembly.

155 See also, in the same vein, the *Declaration of Nassau* [AG/DEC. 1 (XXII-O/92)], mentioned in the next (15th) para. of the preamble, not quoted here.

156 See also Art. 9 of the *OAS Charter*.

157 This Chapter in the *Inter-American Democratic Charter* encompasses its first 6 Articles, all of which could be expanded upon in this part of the study of the said *Charter*. But the author will limit himself to only those found to be of more immediate relevance for the purposes of this report. Articles 3 to 6 are useful tools to arrive at a description of what would be a description of 'democracy'.

158 This "right to democracy" will be reaffirmed later in *the Declaration of Nuevo León* adopted at the 2004 Special Summit of the Americas in Monterrey, Mexico.

159 It is noteworthy, and - as some would argue - significant, that the above-quoted text is not, though, the only basic statement or affirmation made in this important initial article of the *Charter*. Indeed, the next phrase in this same Article reads: *"Democracy is essential for the social, political, and economic development of the peoples of the Americas"*. For more on this, see, below, "Text: Art. 1" in the "Democracy & Social and Democratic Development Interrelated" sub-chapter of this report.

Text:

- Chapter IV, Title: ***Strengthening and Preservation of Democratic Institutions***

Comment: → This Chapter (Arts 17-22) is of course a key part of this *Charter*. The author sees no need to develop it further within the purview of this report. Some would say it is its "teeth". It enunciates specific action which member States or the OAS itself are empowered to take and implement in the promotion, defense and restoration of democracy in the Americas. It would seem that it is the lack of any similar, or, more appropriately, parallel avenues in the promotion of that 'social and economic development' which is otherwise so closely and so often linked to democracy, that has lead to the request for the present report to be undertaken.

In that context, Article 17 raises an interesting question.

Found at the very beginning of Chapter IV it reads: *"When the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system".* The questions that arise are: (a) In light of the broadly recognized and often proclaimed interdependence between democracy and economic and social development, does this article open the door for a member State which would consider its lack of economic and social development to put at risk its "democratic political institutional process" or "its legitimate exercise of power" to request assistance from the Secretary General or the Permanent Council? And if so, what would be the measures expected from those? And of the member States? Or (b), in light of the remainder of the language in Chapter IV of the *Inter-American Democratic Charter,* could one argue that Article 17 was not, and is not, meant to offer the remedy to such a situation, and that the answer to such a situation is to be found in other instruments of the OAS?

Social and Economic Development

Text:

- Nil.

Democracy & Social and Democratic Development Interrelated

Text:

- Preamble, 1st para.: ***CONSIDERING that the Charter of the Organization of American States recognizes that representative democracy is indispensable for the stability, peace, and development of the region, (…)***[160]

Comment: → That language is taken directly from the 3rd paragraph of the preamble to the *OAS Charter*. 'Democracy' is posited here as a going hand-in-hand with 'development'.[161] Some would resist the argument that this formulation means that one is a pre-condition to the other in the sense that 'democracy' must come first if there is to be 'development'. A debate which probably can be considered as without any *raison d'être* ….

[160] The full text of that paragraph reads: *"CONSIDERING that the Charter of the Organization of American States recognizes that representative democracy is indispensable for the stability, peace, and development of the region, and that one of the purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of non-intervention; …".* Note that the *Inter-American Democratic Charter* devotes an entire chapter to the subject *of* "Democracy, Integral Development, and Combating Poverty" (Arts .11-16); more below.

[161] Using pretty much the same language, the *Declaration of Principles* adopted at the Miami Summit earlier in 1994 adds: *"Democracy and development reinforce one another"* (see 1st para. of initial chapter, on "To Preserve and Strengthen the Community of Democracies of the Americas").

Text:

• Preamble, 5th para.: ***REAFFIRMING that the participatory nature of democracy in our countries in different aspects of public life contributes to the consolidation of democratic values and to freedom and solidarity in the Hemisphere*;**

Comment: → To the extent that it can be argued that development in the Americas requires solidarity, considering participatory democracy as a source of solidarity is yet another way of linking the two concepts. The above language directly flows from the *OAS Charter*.[162]

Text:

• Preamble, 6th para.: ***CONSIDERING that solidarity among and cooperation between American states require the political organization of those states based on the effective exercise of representative democracy, and that economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing****;*

Comment: → There cannot be any clearer statement of the interdependence between democracy and development.

Text:

• Preamble, 7th para.*:* ***REAFFIRMING that the fight against poverty, and especially the elimination of extreme poverty, is essential to the promotion and consolidation of democracy and constitutes a common and shared responsibility of the American States;***

Comment: → Taken directly from Art. 3 (f) of the *OAS Charter*.

Text:

• Preamble, 8th and 9th paras: ***BEARING IN MIND that the American Declaration on the Rights and Duties of Man* and the *American Convention on Human Rights contain the values and principles of liberty, equality, and social justice that are intrinsic to democracy; REAFFIRMING that the promotion and protection of human rights is a basic prerequisite for the existence of a democratic society, and recognizing the importance of the continuous development and strengthening of the inter-American human rights system for the consolidation of democracy;***

Comment: → Given this relationship between "social justice" and human rights, and since social justice requires development, it could easily be argued that the obligation to promote and respects Human Rights as enshrined both in the *American Declaration on the Rights and Duties of Man* and the *American Convention on Human Rights*, equally applies to the promotion of democracy.

Text:

• Preamble, 12th para*.: **BEARING IN MIND that the Protocol of San Salvador on Economic, Social, and Cultural Rights emphasizes the great importance of the reaffirmation, development, improvement, and protection of those rights in order to consolidate the system of representative democratic government,*[163]

Comment: → Again, a direct linkage between economic and social rights and democracy.

Text:

• Preamble, 16th para.: *BEARING IN MIND that, in* ***the Declaration of Managua for the Promotion of Democracy and Development*** *[AG/DEC.4 (XXIII-O/93)], the member States expressed their firm belief that* ***democracy, peace, and development are inseparable and indivisible parts of a renewed and integral vision of solidarity*** *in*

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[162] Notably from the 3rd para. of the preamble to the *Charter*, and its Art. 3 (d).
[163] Adopted in 1988.

the Americas; and that the ***ability of the Organization to help preserve and strengthen democratic structures in the region will depend on the implementation of a strategy based on the interdependence and complementarity of those values;***

Comment: → Same basic principles as those enunciated in the 6th para. of the preamble, above.

Text:

• Preamble, 17th para.: ***CONSIDERING that, in the Declaration of Managua for the Promotion of Democracy and Development, the member states expressed their conviction that the Organization's mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government***

Comment: → There is a recognition here, directly borrowed from already the *Declaration of Managua,* that the OAS's 'mission' to defend democracy is accompanied by that of preventing and anticipating the 'causes' that affect democracy. It is generally recognized throughout many texts, Declarations and Resolutions adopted by the OAS, that amongst such causes one finds poverty, lack of development, corruption, etc.

Text:

• Art. 1: **(…)** ***Democracy is essential for the social, political, and economic development of the peoples of the Americas.***

Comment: → This renewed statement on the inter-relationship between democracy and development[164] is of course nothing new. But what draws one's attention here is that it comes in an article which, in its entirety, reads: "*The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it. Democracy is essential for the social, political, and economic development of the peoples of the Americas*."

What can be significant is that to the notion of a 'right to democracy' does not correspond, at least in this language here, a parallel notion of a 'right to development'. Some would thus argue that what this article seems to limit itself to say, is that while democracy is a right, development is not possible without it. The counterargument, and of course that is the essence of what this report endeavors to deal with, would be that if, on one hand, the peoples of the Americas have a 'right to democracy', and if, on the other hand, there cannot be democracy without social, political and economic development, then they also have a 'right to development'.

That brings us back to the comments, above[165], on the inter-relationship between democracy and the rule of law, the former being considered as the basis for the latter. If, as this *Charter* proclaims, democracy is "the basis for the rule of law", and if, as also proclaimed by the present *Charter*, democracy is essential to development, then it follows that the rule of law is also a pre-requisite to development. And that, irrespective of whether or not the right to democracy entails a right to development.

Text:

• Art. 3*:* ***Essential elements of representative democracy include, inter alia, respect for human rights and fundamental freedoms (…)***

Comment: → By making 'respect for human rights and fundamental freedoms' an essential element of 'representative democracy', this article would seem to proclaim that any system which does not respect such rights and freedoms could not be considered to be a true 'representative democracy'. By extrapolation, and to the extent that social and economic rights can be considered as included in the notion of human rights and

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164 See also under Art. 11, below.
165 Under Art. 2 in the Democracy sub-chapter, above.

fundamental freedoms, then a system which does not promote and implement social and economic rights likewise could not be considered to be a true 'representative democracy'.

Text:

• Art. 7: ***Democracy is indispensable for the effective exercise of fundamental freedoms and human rights in their universality, indivisibility and interdependence, embodied in the respective constitutions of states and in inter-American and international human rights instruments.***

Comment: → See the comment immediately above.

Text:

• Chapter III, Title: ***Democracy, Integral Development, and Combating Poverty***[166]

Text:

• Art. 11: ***Democracy and social and economic development are interdependent and are mutually reinforcing***.

Comment: → A simple repetition of what the Preamble announced. This interdependence between democracy and development permeates a vast number of OAS documents, as seen throughout this report.

This *Democratic Charter* proclaims a "right to democracy"[167], while at the same time repeatedly stating that democracy is essential to development[168], and that democracy and development are "interdependent", "mutually reinforcing"[169], …. On the other hand, fighting extreme poverty is also said to be "essential to the promotion and consolidation of democracy".[170]

So, again, proximate linkages are clearly established[171]. But the question as to whether there is a "legal" element in those linkages remains to be answered.

Text:

• Art. 12: ***Poverty, illiteracy, and low levels of human development are factors that adversely affect the consolidation of democracy. The OAS member states are committed to adopting and implementing all those actions required to (…) eradicate extreme poverty, taking into account the different economic realities and conditions of the countries of the Hemisphere. This shared commitment regarding the problems associated with development and poverty also underscores the importance of maintaining macroeconomic equilibria and the obligation to strengthen social cohesion and democracy.***

• Art. 13: ***The promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in the states of the Hemisphere***.

Comment: → More language linking democracy and development.

Text:

• Art. 26: ***The OAS will continue to carry out programs and activities designed to promote democratic principles and practices and strengthen a democratic culture in the Hemisphere, bearing in mind that democracy is a way of life based on liberty and enhancement of economic, social, and cultural conditions for the peoples of the Americas. The OAS will consult and cooperate on an ongoing basis with***

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166 This Chapter in the *Inter-American Democratic Charter* incorporates its Articles 11 to 16, all of which could be expanded upon in this part of the study of the said *Charter*. But the author will limit himself to only those found to be of more immediate relevance for the purposes of this report.

167 Art.1.

168 Art. 1.

169 Art .1.

170 7th para. of the preamble.

171 See also Arts.12 and 13.

member states and take into account the contributions of civil society organizations working in those fields.

Comment: → Coming as it does, together with Art. 27 below, within a short Chapter devoted to "Promotion of a Democratic Culture" that description of democracy as "*a way of life based on liberty and enhancement of economic, social, and cultural conditions for the peoples of the Americas"* is yet another form, rather novel, of expressing anew the relationship between democracy and development. OAS programs and activities aimed at promoting democracy are an indirect form of also promoting or enhancing, by the same token, economic development. That this could, and can, also be a "two-way street" should leave little doubt.

Text:

- Art 27: ***The objectives of the programs and activities will be to promote good governance, sound administration, democratic values, and the strengthening of political institutions and civil society organizations. Special attention shall be given to the development of programs and activities for the education of children and youth as a means of ensuring the continuance of democratic values, including liberty and social justice***[172]**.**

Annex 12

The MONTERREY CONSENSUS[173]

International Conference on Financing for Development,
18-22 March 2002, Monterrey, N.L., Mexico

Introductory Note: The opening paragraph of the *Monterrey Consensus* describes its content and purview: "1. We the heads of State and Government, gathered in Monterrey, Mexico, on 21 and 22 March 2002**, have resolved to address the challenges of financing for development around the world, particularly in developing countries**. **Our goal is to eradicate poverty, achieve sustained economic growth and promote sustainable development** as we advance to a fully inclusive and equitable global economic system".

Democracy

Text:

- *Nil.*

Comment: → The word «democracy» or derivatives thereof only appears tree times in this 73-paragraph U.N. document, but never in a "stand-alone" fashion: we find "democracy" in para. 9, and "democratic institutions" and "democratic societies" in para. 11. As stated earlier in this report, the *UN Charter* itself makes no direct mention of "democracy", though many have convincingly argued that the very concept of democracy permeates it[174].

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[172] See above comment, on Art. 26.

[173] Adopted on March 22, 2002. Full text can be found at: http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf and http://www.un.org/esa/ffd/aconf198-11.pdf

[174] See the review of the *UN Charter* earlier in this report.

Social and Ecomonic Development

General comment: → As clearly stated in the initial paragraph of the *Monterrey Consensus*, that document was meant to express and reflect the "*resolve*" of the high-level participants at that U.N. conference to *"address the challenges of financing for development around the world, particularly in developing countries"* and to affirm that their *"goal is to eradicate poverty, achieve sustained economic growth and promote sustainable development as we advance to a fully inclusive and equitable global economic system"*. Its clear and entire focus is therefore on "development". Hence its very numerous references to the notion of development in all of its forms, which need not be all quoted in this part of the present report. All the more so that, given the general purview of this report, "democracy" and "development" are mentioned together and in an inter-related fashion only twice in the document, as will be seen below. Only a few of the large number of mentions of "development" will appear immediately below.[175]

Text:

- Part I, para. 2 : *We note with concern current estimates of dramatic shortfalls in resources required to achieve the internationally agreed development goals, including those contained in the United Nations Millennium*

Text:

- Part I para. 3: ***Mobilizing and increasing the effective use of financial resources and achieving the national and international economic conditions needed to fulfill internationally agreed development goals, including those contained in the Millennium Declaration, to eliminate poverty, improve social conditions and raise living standards, and protect our environment, will be our first step to ensuring that the twenty-first century becomes the century of development for all.***

Text:

- Part I para. 4: ***Achieving the internationally agreed development goals, including those contained in the Millennium Declaration, demands a new partnership between developed and developing countries. We commit ourselves to sound policies, good governance at all levels and the rule of law*. (…)**

Comment: → Some would argue that by committing to "good governance" and "the rule of law''in the context of reaching development goals, the Heads of State and Government who approved that document were in fact committing to democratic rule. In that context, one can refer to Art. 2 of the *Inter-American Democratic Charter*, which reads in part: "*The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States".*

Text:

- Part 1, para. 6: ***Each country has primary responsibility for its own economic and social development, and the role of national policies and development strategies cannot be overemphasized. At the same time, domestic economies are now interwoven with the global economic system and, inter alia, the effective use of trade and investment opportunities can help countries to fight poverty. National development efforts need to be supported by an enabling international economic environment*.**

Comment: → Worthy of note: how the interdependence between domestic and world economies and the resulting need for a favourable international economic environment

[175] Necessarily chosen, the author will admit, on a somewhat subjective basis.

mitigates in a way the recognition that each country remains primarily responsible for its own development.

Text:

• Part I, para. 8: ***In the increasingly globalizing interdependent world economy, a holistic approach to the interconnected national, international and systemic challenges of financing for development — sustainable, gender-sensitive, people-centred development — in all parts of the globe is essential. Such an approach must open up opportunities for all and help to ensure that resources are created and used effectively and that strong, accountable institutions are established at all levels. To that end, collective and coherent action is needed in each interrelated area of our agenda, involving all stakeholders in active partnership.***

Comment: → Aiming for "people-centred development" and calling for "accountable institutions" could also be interpreted as a tacit acknowledgement that development can better flourish under democratic systems.

Text:

• Part II[176], section (A)[177], para. 10: **(…)** ***An enabling domestic environment is vital for mobilizing domestic resources, increasing productivity, reducing capital flight, encouraging the private sector, and attracting and making effective use of international investment and assistance. Efforts to create such an environment should be supported by the international community.***

Comment: → One could find here in this call for "enabling domestic environment" another argument in favour of a political environment governed under fair, just, predictable rules, in other words a 'democratic' one.

Text:

• Part II, section (A), para. 13: ***Fighting corruption at all levels is a priority. Corruption is a serious barrier to effective resource mobilization and allocation, and diverts resources away from activities that are vital for poverty eradication and economic and sustainable development.***

Comment: → As seen earlier, several texts adopted at high-level hemispheric gatherings have proclaimed that corruption equally and simultaneously affects democracy (not mentioned here) and economic development.[178]

Text:

• Part II, section (B)[179], para. 20: ***(…) A central challenge, therefore, is to create the necessary domestic and international conditions to facilitate direct investment flows, conducive to achieving national development priorities, to developing countries (…), least developed countries, small island developing States, and landlocked developing countries, and also to countries with economies in transition. (…)***[180]

Comment: → Same as under para. 10, *supra.*

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176 Part II is entitled *Leading actions.*

177 Dealing with *Mobilizing domestic financial resources for development.*

178 See for ex. Art.1 sec.4, Intro. para. of the *Plan of Action* adopted at the Quebec Summit, where it is said "*that corruption gravely affects democratic political institutions and the private sector, weakens economic growth and jeopardizes the basic needs and interests of a country's most underprivileged groups (…).*"

179 Dealing with *Mobilizing international resources for development: foreign direct investment and other private flow.*

180 See also para. 21 of the same section: *"To attract and enhance inflows of productive capital, countries need to continue their efforts to achieve a transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact*".

Text:

• Part II, section (B), para. 23: ***While Governments provide the framework for their operation, businesses, for their part, are expected to engage as reliable and consistent partners in the development process. We urge businesses to take into account not only the economic and financial but also the developmental, social, gender and environmental implications of their undertakings. (…). We welcome all efforts to encourage good corporate citizenship (…).***

Comment: → One can see here a reference to the concept of the "social responsibilities" of the corporate sector.

Text:

• Part II, section (C)[181], para. 26: ***A universal, rule-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can substantially stimulate development worldwide, benefiting countries at all stages of development.***

Comment: → This is seen by some as an appeal for democracy to also be instituted and respected within international organizations themselves, a very actual debate.[182]

Text:

• Part II, section (C), para. 27: *To benefit fully from trade, which in many cases is the single most important* ***external source of development financing****, the establishment or* ***enhancement of appropriate institutions and policies in developing countries****, as well as in countries with economies in transition, is needed. Meaningful trade liberalization is an important element in the sustainable development strategy of a country.*

Comment: → See under para.10, *supra.*

Text:

• Part II, section (D)[183], para. 39: ***Official development assistance (ODA) plays an essential role as a complement to other sources of financing for development, especially in those countries with the least capacity to attract private direct investment. (…). ODA can be critical for improving the environment for private sector activity and can thus pave the way for robust growth. ODA is also a crucial instrument for supporting education, health, public infrastructure development, agriculture and rural development, and to enhance food security. For many countries in Africa, least developed countries, small island developing States and landlocked developing countries, ODA is still the largest source of external financing and is critical to the achievement of the development goals and targets of the Millennium Declaration and other internationally agreed development targets.***

Comment: → To the extent that ODA promotes growth and development[184], and that development and democracy are recognized as interrelated and mutually supportive, then ODA can also be presented as supportive of democratic development.

Text:

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181 Dealing with *International trade as an engine for development.*

182 In the same vain, see para. 30: *"We also undertake to facilitate the accession of all developing countries, particularly the least developed countries, as well as countries with economies in transition, that apply for membership of the World Trade Organization".* And also para. 38: *"In support of the process launched in Doha, immediate attention should go to strengthening and ensuring the meaningful and full participation of developing countries, especially the least developed countries, in multilateral trade negotiations".*

183 Dealing with *Increasing international financial and technical cooperation for development.*

184 In that context, see also, in para. 40*: "The goals, targets and commitments of the Millennium Declaration and other internationally agreed development targets can help countries to set short- and medium-term national priorities as the foundation for building partnerships for external support".*

• Part II, section (D), para. 40: ***Effective partnerships among donors and recipients are based on the recognition of national leadership and ownership of development plans and, within that framework, sound policies and good governance at all levels are necessary to ensure ODA effectiveness.***

Comment: → See under para. 10, *supra.*

Text:

• Part II, section (D), para. 41: ***We recognize that a substantial increase in ODA and other resources will be required if developing countries are to achieve the internationally agreed development goals and objectives, including those contained in the Millennium Declaration. To build support for ODA, we will cooperate to, to enhance aid effectiveness, further improve policies and development strategies, both nationally and internationally.***

Comment: → This recognition of a need to improve national – as well as international – development strategies to render ODA more effective, brings us back to the comment under para. 39, *supra*.

Text:

• Part II, section (D), para. 46: ***We will ensure that the long-term resources at the disposal of the international financial system, including regional and subregional institutions and funds, allow them to adequately support sustained economic and social development, technical assistance for capacity-building, and social and environmental protection schemes.***

Text:

• Part II, section (E)[185], para. 48: ***External debt relief[186] can play a key role in liberating resources that can then be directed towards activities consistent with attaining sustainable growth and development, and therefore, debt relief measures should, where appropriate, be pursued vigorously and expeditiously, including within the Paris and London Clubs and other relevant forums.***

Text:

• Part II, section (F)[187], para. 52: ***In order to complement national development efforts, we recognize the urgent need to enhance coherence, governance, and consistency of the international monetary, financial and trading systems. To contribute to that end, we underline the importance of continuing to improve global economic governance and to strengthen the United Nations leadership role in promoting development. With the same purpose, efforts should be strengthened at the national level to enhance coordination among all relevant ministries and institutions***.

Text:

• Part II, section (F), para. 53: ***Important international efforts are under way to reform the international financial architecture. Those efforts need to be sustained with greater transparency and the effective participation of developing countries and countries with economies in transition. One major objective of the reform is to enhance financing for development and poverty eradication. We also underscore our commitment to sound domestic financial sectors, which make a vital contribution to national development efforts, as an important component of an international financial architecture that is supportive of development***.

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185 Dealing with *External debt.*

186 In that context, see also, in para. 51: *"(…) We encourage donor countries to take steps to ensure that resources provided for debt relief do not detract from ODA resources intended to be available for developing countries. (…)"*

187 Dealing with *Addressing systemic issues: enhancing the coherence and consistency of the international monetary, financial and trading systems in support of development.*

Comment: → Once more one can see in the above two paragraphs – as well as in the next one, *infra* - implicit calls and support for more 'democracy' at both national and international levels, all for the sake of better, and more effectively, satisfying development needs[188].

Text:

- Part II, section (F), para. 61: ***Good governance at all levels is also essential for sustained economic growth, poverty eradication and sustainable development worldwide. To better reflect the growth of interdependence and enhance legitimacy, economic governance needs to develop in two areas: broadening the base for decision-making on issues of development concern and filling organizational gaps. (…).***

Democracy & Social and Democratic Development Interrelated

Text:

- Part I[189], para. 9**: *Recognizing that peace and development are mutually reinforcing, we are determined to pursue our shared vision for a better future, through our individual efforts combined with vigorous multilateral action. Upholding the Charter of the United Nations and building upon the values of the Millennium Declaration, we commit ourselves to promoting national and global economic systems based on the principles of justice, equity, democracy, participation, transparency, accountability and inclusion.***

Comment: → What is noteworthy here is that in this - the first - mention of "democracy" in that U.N. consensus document, it is considered one amongst a series of 'principles' on the basis of which "national and global economic systems" are to be promoted. That being said, and looking closely at the principles enunciated above, could not one consider that "*justice, equity, democracy, participation, transparency, accountability and inclusion*" taken all together are one and the same thing? Or that they all add up to 'democracy' in its widest acceptation?

Unlike what is repeatedly proclaimed in Hemispheric documents, *i.e.* that democracy and development are mutually reinforcing, here «peace» replaces "democracy". But see immediately below.

Text:

- Part II[190], section (A), para. 11[191]: ***Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation. Freedom, peace and security, domestic stability, respect for human rights, including the right to development, and the rule of law, gender equality, market-oriented policies, and an overall commitment to just and democratic societies are also essential and mutually reinforcing.***

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188 In the same context, see also, in para. 57: *"It is essential to ensure the effective and equitable participation of developing countries in the formulation of financial standards and codes".* And, in para. 62, *"We stress the need to broaden and strengthen the participation of developing countries and countries with economies in transition in international economic decision-making and norm-setting".*

189 Part I is entitled *Confronting the challenges of financing for development: a global response*.

190 Entitled *Leading Actions.*

191 Dealing with *Mobilizing domestic financial resources for development.*

Comment: → Compared to the language above in para. 9, the notion of what is "mutually reinforcing" becomes much more holistic here. Of interest of course is the mention of "the right to development" as part of "human right"[192].

As one final note, it is worth quoting one more paragraph from the Monterrey Consensus, found its last Part (III) para. 68[193]: "To build a global alliance for development will require an unremitting effort. We thus commit ourselves to keeping fully engaged, nationally, regionally and internationally, to ensuring proper follow-up to the implementation of agreements and commitments reached at the present Conference, and to continuing to build bridges between development, finance, and trade organizations and initiatives, within the framework of the holistic agenda of the Conference".

Annex 13

DECLARATION OF MARGARITA[194]
Adopted at the High-Level Meeting on
Poverty, Equity, and Social Inclusion
ISLA DE MARGARITA, VENEZUELA, OCTOBER 8-10, 2003

Democracy

Text:

- *Nil.*

Comment: → There is no « stand alone » reference to democracy in the *Declaration of Margarita*.

Social and Economic Development

Text:

- Preamble, 4th para.: ***Considering that (…) The Millennium Declaration, in which Heads of State and Government of the world declared that they would "spare no efforts to liberate men, women, and children from the abject, dehumanizing conditions of extreme poverty", the Monterrey Consensus[195] on financing for development, as well as the commitments on sustainable development and other international agreements on social development issues agreed upon at the hemispheric level, the United Nations and other multilateral forums.***

Comment: → This, taken together with the following extract, clearly sets 'development' as the overall focus of the *Declaration of Margarita*.

Text:

- Para. 1: ***We declare (…) Our determination and our commitment to urgently combat the serious problems of poverty, social exclusion and inequity that affect,***

192 The *Millennium Declaration*, adopted in 2000, also mentions a "right to development"

193 Entitled *Staying Engaged.*

194 Full text at http://www.oas.org/documents/ConferenciaPobrezaVenezuela/Declaracion_Margarita_spa.pdf It was endorsed at the OAS General Assembly in Quito on June 8, 2004 by resolution AG/RES. 1983 (XXXIV-O/04) on *Poverty, Equity, and Social Inclusion*. That resolution resolved, amongst other things*: "1. To instruct the Permanent Council and the Inter-American Council for Integral Development (CIDI) to consider carefully the recommendations issued at the High-Level Meeting on Poverty, Equity, and Social Inclusion"*, and "*5. To endorse the proposal, made by the High-Level Meeting on Poverty, Equity, and Social Inclusion, to consider the need to deepen the commitments undertaken in the OAS Charter, the Inter-American Democratic Charter, and other international instruments on social matters in relation to the advancement and observance of economic, social, and cultural rights, and explore the possibility of having an instrument and mechanisms that respond to this aim; and to instruct the Permanent Council and CIDI to proceed accordingly".*

195 See the analysis on those two documents in earlier parts of this report.

in varying degrees, the countries of the hemisphere; and to face the causes that generate them and its consequences, and create favorable conditions for socio-economic development with equity to promote more just societies. [196]

Text:

- Para. 4: ***We declare (…) Our interest in advancing the development of an open and transparent international trade system through bilateral, regional and global negotiations, that promotes economic and social development that, contributes to the fight against poverty, improved living standards and enhanced trade opportunities for all. Accordingly, we call for a constructive dialogue within the appropriate fora on topics such as access to markets, subsidies and protectionism.***

Comment: → This is yet another restatement of the recognition that a better trade system would enhance and promote development.

Text:

- Para 5: ***We declare (…) That among other factors mentioned in the Monterrey Consensus, official development assistance*** [197] ***and external debt relief as appropriate may help to improve the capacities of some countries to promote social and economic development, and that this should be accompanied by sound domestic macro-economic policies. Therefore, it is necessary to keep working towards new financial and economic domestic and international policies, taking into account the social dimension and the principle of shared responsibility.***

Comment: → The reference to the need for "sound domestic macro-economic policies" to accompany the 'external' factors that development assistance and debt relief are, and hence to the "*principle of shared responsibility*" [198], is to be noted. It has often been argued that a true participatory democracy offers the best possibilities for the elaboration and application of such "sound domestic macro-economic policies".

Text:

- Para. 7: ***We declare (…) Our readiness to promote and strengthen cooperation initiatives in areas relating to poverty, social exclusion, and inequity, in support of national efforts based on the principle of partnership for development.*** **(…)**

Democracy & Social and Democratic Development Interrelated

Text:

- Preamble, 1st para.: ***Considering that the Charter of the Organization of American States establishes as one of it central purposes the eradication of critical poverty, which represents an obstacle to the full democratic development of the peoples of the hemisphere, commitment ratified by the Resolutions AG/RES.1854 (XXXII-O/02) AG/RES.1962 (XXXIII-O/03), priority that it is inspired in the principles of inter-American solidarity and cooperation in the search for equity and social justice and the integral development of its peoples.***

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196 That was summed up in the following manner up by the representative of the Government of Venezuela during the closing ceremony of the meeting*: "Without any doubt, we've given renewed impulse to the social issues on the inter-American agenda, and we have agreed on concrete and creative actions which we will be responsible for carrying out, in an environment of cooperation and continental solidarity and above all, with the conviction that poverty and social exclusion are threats that generate an endless list of problems and calamities that are linked together", (As quoted in an OAS Press Release dated Oct. 10, 2003: http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-197/03)*

197 See also para. 8 of the *Declaration*: "*We declare (…) That official development assistance plays an essential role as a complement to other sources of financing for development, especially in those low and middle income countries with the least capacity to attract private direct investmen"*».

198 Para. 7 of the *Declaration* speaks of *Partnership for development*.

Comment: → Certainly a most oft-repeated and key reference to the inter-relationship between democracy and development so very largely recognized in Hemispheric texts.

Text:

• Preamble, 2nd para.: ***Considering (…) That The Inter-American Democratic Charter reaffirms "that the fight against poverty, and especially the elimination of extreme poverty, is essential to the promotion and consolidation of democracy and constitutes a common and shared responsibility of the American states"; (…)"***

Comment: → Same as above.

Text:

• Preamble, 3rd para.**:** ***Considering (…) That The Declaration of Santiago on Democracy and Public Trust: A New commitment to good governance for the Americas states that Strengthening democratic governance calls for the elimination of poverty and social exclusion and the promotion of equitable economic growth by means of sound public polices and practices that promote equal opportunity, education health and full employment.***

Comment: → The texts found in the above two paragraphs and extracted from the preamble of the *Declaration* are simple restatements of the linkages between democracy and development found in the referenced documents[199].

Text

• Preamble, 6th para.**:** ***Considering (…) That The Special Summit of the Americas to be held in Mexico will address the issues of economic growth with equity, social development y democratic governance***.

Text:

• Para 2: ***We declare (…) Our commitment to strengthen the policies and programs intended to facilitate processes of social inclusion that allow the creation of integrated societies; as well as our special obligation towards people, families - as the nucleus of society –, communities, groups that live in poverty and those that are in a situation of vulnerability, disadvantage and marginalization***.

Comment: → The comment immediately below (para. 3) equally applies to this paragraph, in that social inclusion and the creation of integrated societies can be said to be much better facilitated and achieved under a democratic system of government.

Text:

• Para 3: ***We declare (…) Our commitment to promote greater cooperation and coordination between or among national sectors which have a role in determining economic and social policies, which must be mutually complementary***.

Comment: → Though there are no specific references here to democracy, it could possibly be argued such a reference is implied, a truly democratic system having often been recognized in hemispheric texts as offering the best guarantees for the hoped-for "greater cooperation and coordination between or among the national sectors".[200]

Text:

• Para. 6: ***We declare (…) Our commitment to strengthen our efforts at the national level, to work in conjunction with municipal and regional administrations, private sector and other actors of civil society, to achieve a more equitable distribution of income and increase economic opportunities of our people. Accordingly, we acknowledge the potential of local and regional economies as engines for growth.***

Comment: → The comment immediately above equally applies here.

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199 See the analysis made on those two documents in earlier parts of this report.

200 See also paras. 2 and 6 of the *Declaration*.

Text:

• Para. 9: ***We declare (…) That good governance, transparency and accountability are some of the essential elements to make an efficient use of official development assistance and other available resources***.

Comment: → We can see another link being made here between development and democracy, insofar as "good governance, transparency and accountability" are generally acknowledged as the attributes of an effective democracy.

Text:

• Paragraph 16: ***We declare (…) The need to deepen the commitments undertaken in the OAS Charter, the Inter-American Democratic Charter and other international commitments on social matters in relation to the advancement and observance of economic, social, and cultural rights. Accordingly, we propose that the Permanent Council and the Inter-American Council for Integral Development take up this matter, and explore the possibility of having and instrument and mechanisms that respond to this end.***

Comment: → Not surprisingly, the authors of the *Declaration of Margarita* have thus chosen to recall that commitments relating to development are to be found amongst those undertaken under the *Inter-American Democratic Charter*.

Annex 14

DECLARATION ON SECURITY IN THE AMERICAS [201]
Special Conference on Security, Mexico City, Mexico
(October 27-28, 2003)

Introductory Note: The opening paragraph (Preamble) of the *Declaration on Security* states the principal goal of the Conference: *"**We, the States** of the Americas represented at the Special Conference on Security, in Mexico City**, committed to promoting and strengthening peace and security** in the Hemisphere, (…)".*

Democracy

Text:

• Preamble, 3rd para.: ***Bearing in mind that the 1991 Santiago Commitment to Democracy and the Renewal of the Inter-American System decided to initiate a process of consultation on hemispheric security, from an updated and comprehensive perspective, in light of the new conditions in the region and the world.***

Comment: → That paragraph thus links 'democracy' and 'security'; this is of importance, especially in light of the evolving concept of security as amply developed in this

[201] Adopted on October 28, 2003. Full text at: http://www.oas.org/documents/eng/DeclaracionSecurity_102803.asp

Text:

• Para. 32, Ch. III[202]: ***We underscore the role of education for peace and the strengthening of democracy in our Hemisphere as a region where tolerance, dialogue, and mutual respect prevail as peaceful forms of coexistence. We recommend that both in each state and in the corresponding inter-American instances, particularly the Inter-American Education Committee, actions be taken to promote democratic culture in keeping with the provisions of the Inter-American Democratic Charter.***

Comment: → Note the reference to the *Inter-American Democratic Charter.*

Social and Ecomonic Development

Text:

• Para 4.g, Ch. II[203]: ***Social justice and human development are necessary for the stability of each state in the Hemisphere. Fostering friendly relations and inter-American cooperation for integral development strengthens security of the states of the Hemisphere.***

Text:

• Para 35, Ch. III[204]: ***We shall strengthen cooperation mechanisms and actions to address extreme poverty, inequality, and social exclusion on an urgent basis. Overcoming these unacceptable conditions is a primary task of the states of the Hemisphere, which requires continued commitment and actions to promote economic and social development, and education, and should be complemented with coordination, cooperation, and solidarity among states, and action by international financial institutions, including innovative financial mechanisms that emerge in the competent fora. We also reaffirm our commitment to combating extreme poverty within our states by adopting and implementing actions in accordance with the Millennium Development Goals, the Monterrey Consensus, and the Declaration of Margarita, inter alia, promoting development through economic cooperation of the Hemisphere, and fully utilizing national, regional, and international development agencies.***

Comment: → Note the references to the *Millennium Development Goals*, the *Monterrey Consensus*, and the *Declaration of Margarita*.

Democracy & Social and Democratic Development Interrelated

Text:

• Para 2, Ch. II[205]: ***Our new concept of security in the Hemisphere is multidimensional in scope, includes traditional and new threats, concerns, and other challenges to the security of the states of the Hemisphere, incorporates the priorities of each state, contributes to the consolidation of peace, integral development, and social justice, and is based on democratic values, respect for and promotion and defense of human rights, solidarity, cooperation, and respect for national sovereignty.***

Comment: → This paragraph and many of those that follow and are quoted below, develop a very holistic – one is tempted to add "modern" or "modernized" – approach to

202 Entitled *Commitments and Cooperation Measures*.
203 Entitled *Shared Values and Common Approaches*.
204 Entitled *Commitments and Cooperation Measures*.
205 Entitled *Shared Values and Common Approaches*.

peace, democracy, development, security etc, all seen as closely inter-related and mutually supportive.

Text:

• Para. 3, Ch II: ***Peace is a value and a principle in itself, based on democracy, justice, respect for human rights, solidarity, security, and respect for international law. Our security architecture will help preserve it through the strengthening of cooperation mechanisms among our states to address the traditional threats and the new threats, concerns, and other challenges facing our Hemisphere****.*

Comment: → We are quite far, here, from one of the traditional definitions of peace as "an absence of war". Seen as both a 'value' and a 'principle', it is presented as encompassing – some would say as necessitating or requiring – a series of self-supporting elements, amongst which one finds democracy, justice, and human rights (including development?).

Text:

• Para. 4.b, Ch. II: ***We affirm that our cooperation in addressing traditional threats and new threats, concerns, and other challenges to security is also based on shared values and common approaches recognized in the Hemisphere. Salient among them are: (…) representative democracy is an indispensable condition for the stability, peace, and development of the states of the Hemisphere. In particular, we reaffirm our commitment to the full observance of the Inter-American Democratic Charter and to its values, principles, and mechanisms. (…)***

Comment: → It is noteworthy that representative democracy not only is presented here as an "indispensable condition" for peace and development (an oft-repeated concept), but, and that is a somewhat newer formulation or earlier statements dating back to the *OAS Charter* itself, as one of "shared values" and "common approaches" recognized in the Americas.

Text:

• Para. 4.c, Ch. II: ***Respect for human rights and fundamental freedoms, and good governance are essential for the stability, peace, and political, economic, social development of the states of the Hemisphere****.*

Text:

• Para. 4.e, Ch. II: ***In our Hemisphere, as democratic states committed to the principles of the Charter of the United Nations and the OAS, we reaffirm that the basis and purpose of security is the protection of human beings. Security is strengthened when we deepen its human dimension. Conditions for human security are improved through full respect for people's dignity, human rights, and fundamental freedoms, as well as the promotion of social and economic development, social inclusion, and education and the fight against poverty, disease, and hunger****.*

Comment: → In other words, democracy breeds security in its new, broadened conception, and the conditions needed to achieve it.

Text:

• Para. 4.f, Ch. II: ***Education for peace and the promotion of a democratic culture play a key role in the development of states, the strengthening of stability, and the consolidation of our Hemisphere as a region where understanding and mutual respect, dialogue, and cooperation prevail.***

Text:

• Para. 4.k, Ch. II: ***The new threats, concerns, and other challenges are cross-cutting problems that require multifaceted responses by different national organizations and in some cases partnerships between governments, the private sector, and civil society all acting appropriately in accordance with democratic norms and principles, and constitutional provisions of each state***.

Comment: → It is interesting to see that democratic norms and principles are presented as some sort of safeguards when it comes to respond to today's "new threats".

Text:

• Para. 4.m, Ch. II: ***The security of states of the Hemisphere is affected, in different ways, by traditional threats and the following new threats, concerns, and other challenges of a diverse nature: (…) extreme poverty and social exclusion of broad sectors of the population, which also affect stability and democracy. Extreme poverty erodes social cohesion and undermines the security of states***.

Comment: → A very clear statement to the effect that extreme poverty (a consequence of lack of 'development') is to be considered as one of the "new threats" challenging today's societies, and as such, undermining democracy.

Text:

• Para 5, Ch. III[206]: ***We reaffirm that democracy is a right and an essential shared value that contributes to the stability, peace, and development of the states of the Hemisphere, and its full exercise is vital to enhancing the rule of law and the political, economic, and social development of peoples. We will promote and defend democracy through implementation of the OAS Charter and the Inter-American Democratic Charter and by strengthening the inter-American system for the protection of human rights.***

Comment: → A very all-encompassing description of 'democracy' as a "right" and an "essential shared value", and of its close relationship to such a wide range of objectives long-established in various hemispheric instruments of diverse legal hierarchy.

Text:

• Para. 33, Ch. III: ***We agree, in the context of our commitment to a democratic culture, to strengthen civil society participation in considering, developing, and implementing multidimensional approaches to security***.

Text:

• Para 36, Ch. III: *We affirm our decision to collaborate, at the request of the state that so requires, in the search for urgent solutions to financial crises that may affect* ***the political, economic, or social stability of the member state***.

Annex15

DECLARATION OF NUEVO LEÓN[207]
Special Summit of the Americas
Monterrey, Mexico, January 12-13, 2004

Here is the aim of that "Special Summit" as enunciated in the opening paragraph of the *Declaration of Nuevo León*: *"Our purpose is to advance implementation of measures* ***to combat poverty, to promote social development, to achieve economic growth with equity, and to strengthen governance*** *in our democracies. With a renewed and strengthened vision of cooperation, solidarity, and integration, we will confront the continuing and growing challenges in the Hemisphere."*

206 Entitled *Commitments and Cooperation Measures*.
207 Full text at http://www.summit-americas.org/SpecialSummit/declaration_monterrey-eng.htm

Democracy

Text:

• 2nd para. of 3rd Ch.[208]: ***We reiterate our commitment to the full application of the Inter-American Democratic Charter, which constitutes an element of regional identity, and, projected internationally, is a hemispheric contribution to the community of nations. We reaffirm our decision to coordinate immediate action whenever democracy is threatened in any of our countries. In addition, we will continue our efforts to strengthen mechanisms for the defense of democracy and to develop and promote a culture and education for democracy.***

Comment: → As shall be seen elsewhere in this report, this reference to the *Inter-American Democratic Charter* as an "*element of regional identity"* and, if projected internationally, a "*hemispheric contribution to the community of nations"* constitutes an interesting factor in the debate as to whether, or to what extent, evolving international law may harbor an "obligation to democracy".

Text:

• 8th para. of 3rd Ch.: *The Inter-American Democratic Charter states that the peoples of the Americas* ***have the right to democracy*** *and that* ***their governments have the obligation to promote and defend it,*** *and it establishes that transparency in government activities, probity, and responsibility in public management are key components of the exercise of democracy. (…)*

Comment: → As commented before under the review of the *Inter-American Democratic Charter*, this clear reaffirmation of a "right to democracy", that such a right belongs to "the peoples", and that their governments have an "obligation" to promote and defend it, is of prime significance. It can be said to be at the very center of what one might refer to as the Inter-American Democracy 'architecture'. The emphatic recognition of the existence of such a right is at the heart of the entire instrumentation that the OAS and its members have developed over time in order to fulfill the 'obligation' to promote and defend democracy.

Text:

• 14th para. of 3rd Ch.: ***We recognize that political pluralism and sound political parties are essential elements of democracy****.*

Social and Economic Development

Text:

• 7th para. of 1st Ch.[209]: *We recognize the important role that trade plays in promoting sustained growth and economic development. We affirm our commitment to advance the Doha Agenda in order to benefit all our economies, particularly developing economies, by promoting, among other measures, better access to markets and by eliminating export subsidies and by substantially reducing trade-distorting domestic support.*

Comment: → As stated in its first paragraph (see *supra*) the *Declaration of Nuevo León* is for a large part aimed at advancing the "implementation of measures to combat poverty, to promote social development, to achieve economic growth with equity".[210] So much of its content relating to development could have been repeated in this part of the present report. Only some of it has been retained. For example, the one above, making the traditional link between trade and development.

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208 Entitled *Democratic governance*.
209 Entitled *Economic Growth with Equity to Reduce Poverty.*
210 For ex. one of its 3 chapters, with 21 paras, is entirely devoted to *Social Development.*

Text:

• 14th para. of 1st Ch.: ***Moreover, we recognize the responsibility of each country for its own economic development, but also that there is a link of interdependence between domestic economies and the international economic system.***

Comment: → This is the same type of language as found, for example, in the *Declaration of Margarita*.

Text:

• 1st para. of 2nd Ch.[211]: ***We recognize that overcoming poverty, hunger, and social inequality are major challenges facing many countries of the Hemisphere in the twenty-first century. We are convinced that coordinated and integrated economic and social policies are a prerequisite for success in combating inequality of opportunity and marginalization.***

Comment: → See above comment.

Text:

• 3rd para. of 2nd Ch.: ***We recognize the urgency of strengthening the mechanisms of the Organization of American States for fighting poverty, such as the Inter-American Council for Integral Development, the Inter-American Committee on Social Development, and the Inter-American Program to Combat Poverty and Discrimination. We also recognize the importance of the promotion and observance of economic, social, and cultural rights. We urge the Organization of American States to carefully consider the recommendations approved at the High-Level Meeting on Poverty, Equity, and Social Inclusion, held on Isla de Margarita, Venezuela, to strengthen the hemispheric social agenda.***

Comment: → There would seem to be recognition in the above language that the OAS already disposes of the "mechanisms" needed "for fighting poverty", and that all that is required is to strengthen them. What remains too be seen, of course, is how to best reinforce such existing mechanisms as are identified above, and whether new texts and/or instruments are needed, and what form they should take.

Democracy & Social and Democratic Development Interrelated

Text:

• Preamble, 2nd para.*:* ***Guided by the need to work together to stimulate prosperity, promote social inclusion and a more equitable distribution of economic growth, eliminate hunger, raise living standards, generate new employment and investment opportunities, and promote decent work as well as confront the new threats to security, such as terrorism, organized crime, and illicit trafficking in arms, we reaffirm our commitment to the Inter-American Democratic Charter and we reiterate our firm intention to continue implementing the mandates of the Summits of the Americas, as well as the commitments made at the Millennium Summit, the International Conference on Financing for Development (the Monterrey Consensus) and the World Summit on Sustainable Development, held in Johannesburg***.

Comment: → In the overall context of the present *Declaration*, this reaffirmation of the commitment enunciated in the *Inter-American Democratic Charter* was to be expected, for it proclaims in its Art. 1 that "*Democracy is essential for the social, political, and economic development of the peoples of the Americas".*

Text:

[211] Entitled *Social development*.

- Preamble, 3rd para.: ***We affirm that the well-being of our people requires the achievement of three closely linked and interdependent objectives: economic growth with equity to reduce poverty, social development, and democratic governance.***

Comment: → As has been seen in relation to other Hemispheric documents, and as shall be seen further below, "democratic governance" and development are commonly associated. For example, see the immediately following comment.

Text:

- 2nd para. of 1st Ch.[212]: ***We reaffirm our commitment to the Monterrey Consensus, adopted at the International Conference on Financing for Development in 2002, that each country has primary responsibility for its own economic and social development through sound policies, good governance, and the rule of law. Fulfillment of this responsibility enables effective use of domestic and international resources for development, economic growth, and poverty reduction. In this context, we reaffirm the imperative for the international community to support national development efforts. In accordance with the recommendations of the Monterrey Consensus, we will seek to coordinate international efforts with a view to mobilizing resources for sustainable economic development and for combating poverty and hunger in all countries of the Hemisphere. In particular, we will continue our efforts with a view to identifying secure sources of financing to meet the needs of developing countries, and to opening markets for their products.***

Comment: → To the extent that one can recognize that "good governance" at its best implies participatory democracy[213], then this type of language closely links democracy and development.

Text:

- 10th para. of 1st Ch.: ***We will continue working to reform the international financial architecture with the following objectives, among others: to contribute to the prevention and rapid resolution of financial crises, which particularly harm developing countries in the region; to enhance financing for development; to combat poverty; and to strengthen democratic governance. (…)***

Comment: → It is noteworthy that better financing for development, fighting poverty and strengthening democratic governance find themselves grouped together as part of the same efforts undertaken by the Summit participants.

Text:

- 10th para. of 2nd Ch.[214]: ***Education is a decisive factor for human development, because of its impact on the political, social, cultural, economic, and democratic life of our societies. (…)***

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212 Entitled *Economic Growth with Equity to Reduce Poverty*.

213 In the 17th para. of the 3rd Ch. of the *Declaration*, which is devoted to *Democratic Governance*, one finds: "*We will encourage the modernization of the State as an important element for strengthening democratic and good governance".* And in the 22nd para. of the same Ch., one finds another association between "good governance" and development: "*The progress made in economic and social development and in attaining a higher standard of equity through good governance will contribute to the advancement of stability in the Hemisphere and deepen the human dimension of security".*

214 Entitled *Social development*.

Text:

• 1st para. of 3rd Ch.[215]: ***We express our support for the Declaration of Santiago on Democracy and Public Trust to define an agenda for good governance in the Hemisphere that enables us to address political, economic, and social challenges in order to foster credibility and public trust in democratic institutions***.

Comment: → This notion of a need for "public trust in democratic institutions" is important, the implication being that a 'democracy' in which there is no public trust would be condemned to disintegrate and disappear. Even more so the affirmation that for such a trust to develop, "political, economic, and social challenges" must be confronted, and that for such a challenge to be met there must be "good governance".

Text:

• 4th para. of 3rd Ch.: ***The strengthening of and respect for the rule of law, the defense of human rights and fundamental freedoms, economic progress, well-being and social justice, transparency and accountability in public affairs, the promotion of diverse forms of participation by our citizens, and the development of opportunities for all are fundamental to promote and consolidate representative democracy***.

Comment: → Once more, the close, even "fundamental" as it is called here, relationship between various factors immediately related to the general notion of development and representative democracy is reiterated and underlined.

Text:

• 5th para of 3rd Ch.: ***Democratic governance is strengthened through dialogue among all sectors of society. We will continue to foster a culture of democracy and development based on pluralism and the acceptance of social and cultural diversity*.**

Comment: → This joint fostering of a "culture of democracy" and of a "culture of development" is yet another illustration of the immediate association between the two concepts.

Text:

• 15th para. of 3rd Ch: ***We agree that, through citizen participation, civil society organizations should contribute to the design, implementation, and evaluation of public policies adopted by different orders or levels of government. We recognize the role of civil society and its contribution to sound public administration and we reaffirm the importance of continuing to forge new partnerships that will enable constructive ties to be built between governments, nongovernmental organizations, international organizations, and the diverse sectors of civil society to work in favor of development and democracy.***

Comment: → While the essential role of civil society in participatory democracy is often repeated, what is of particular interest here is that such a role goes hand-in-hand with the furthering of development.

Text:

• 19th para. of 3rd Ch.: ***We take note with satisfaction that governments in the Hemisphere are implementing the Monterrey Consensus by exploring innovative ways to mobilize financing for private and public investment and to strengthen debt management, by considering financial instruments, such as growth-indexed bonds and others, to promote macroeconomic stability and reduce financial vulnerability. The implementation of such measures would be aimed at accelerating growth, reducing poverty, and strengthening democratic governance.***

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[215] Entitled *Democratic governance*.

We also note the efforts of governments in the region to promote discussion in this area.

Comment: → That, again, is like saying "more growth = less poverty = stronger democracy".

Text:

• 21st para. of 3rd Ch.: ***Social justice and the reduction of poverty contribute to the stability, democracy, and security of our States and the region. We reiterate that among the principal causes of instability in the region are poverty, inequality, and social exclusion, which we must confront comprehensively and urgently.***

Comment: → A clear statement from Hemispheric leaders that stability, democracy and security, three most desired attributes for America's societies which we find increasingly interwoven in hemispheric documents, cannot be attained or retained unless accompanied by development.

Annex 16

Some relevant opinions on the *Inter-American Democratic Charter* in relation to democracy and economic and social development

Much of what follows is taken from a book entitled *Carta Democrática Interamericana: Documentos e Interpretaciones*", edited by Ambassador Humberto de la Calle, and available in full on-line[216]. We have focussed on (a) opinions expressed principally (with very few exceptions) by representatives of the member States[217], and (b) in relation to the interrelationship between democracy and economic and social development (again with a few exceptions).

Having reviewed the full reports of the five OAS meetings most closely associated with the discussions at the level of member States regarding the *Inter-American Democratic Charter*, namely the XXXI Regular Session of the General Assembly of June 2001[218], the Regular Session of the Permanent Council of September 6, 2001, the XXVIII Special Session of the General Assembly of 10-11 September 2001[219], the XXXII Regular Session of the General Assembly of June 2002[220], and the Protocolar Session of the Permanent Council of September 2002[221], de la Calle offers the following general overview of the *Charter*:

> The *Charter* is a landmark in the democratic history of the Hemisphere. First, from a political perspective it implies a serious commitment on the part of the leader's vis-à-vis democracy not any more from its minimalist electoral angle, but henceforth as a wide-ranging concept which touches upon all aspects of human dignity seen as the central focus of its content.(…) From a social angle, it expresses a profound reality: the peoples of the Americas feel

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216 Again, the full reference is: *Carta Democrática Interamericana: Documentos e Interpretaciones*; Consejo Permanente, Oganización de los Estados Americanos; Columbus Memorial Library, Washington; 2003; 347 p., to be found on-line at http://www.oas.org/OASpage/esp/Publicaciones/CartaDemocratica_spa.pdf . Note that all quotations that follow and that are not originally in English in that book, have been translated by the rapporteur, to the best of his capacity, and may therefore at times not perfectly reflect the precise meaning intended in the original language. For which the rapporteur apologizes in advance.

217 Again, what follows is but a sample of views expressed, as it has not been possible, without unduly prolonging the length of this report, to incorporate all those that could have been found as relevant.

218 More precisely, report of the 4th Plenary Session, June 5, 2001, in San José, Costa Rica.

219 More precisely, reports on its Inaugural, two Plenary, and Closing Sessions, 10-11 September 2001, in Lima, Peru, where the *Inter-American Democratic Charter* was adopted.

220 More precisely, transcription report of the Informal Dialogue of Heads of Delegations on the theme "Application and Development of the Democratic *Charter*," 4 June, 2002, in Bridgetown, Barbados.

221 Held in Washington on 16 September 2002, to commemorate the first anniversary of the adoption of the *Inter-American Democratic Charter*.

they have a right to democracy, though some believe that "their" democracy has yet to bring about a solution to the problems related to basic needs.[222]

Now, some relevant views as expressed in the documents identified above and transcribed by de la Calle.[223]

i. Venezuela at the 2001 Costa Rica General Assembly[224]:

> Representative democracy (…) encompasses inescapable principles and values without the compliance of which democracy would be a fiction: popular vote, alternatives, autonomy of public powers, political and cultural pluralism, and respect for human rights and fundamental freedoms". (…) A democracy which (…) does not satisfy the social demands of the populations is condemned, sooner or later, to meet with an irreversible crisis of legitimacy (…) or, and that would be equally deplorable, it would be condemned to discredit the very concept of representative democracy

ii. Costa Rica, at the September 2001 Regular Session of the Permanent Council[225]

> (…) the Inter-American Democratic Charter, which encompasses the many and various aspects essential to a democratic system (…) interrelating democracy and the Inter-American System; democracy and human rights; democracy, integral development and the fight against poverty; (…)[226]

iii. Colombia, at the September 2001 Regular Session of the Permanent Council

> The draft of the Democratic Charter (…) aims at converting itself into a guide for political action in the Hemisphere when it points out that the effective exercise of representative democracy (…) is essential for the social, political and economic development of our peoples.[227]

iv. Chile, at the September 2001 Regular Session of the Permanent Council

> (…) for the purpose of contributing to the history of (our) negotiations: in the course of our deliberations the theme of poverty and under-development repeatedly arose, i.e. of injustice on the national and international planes, as true breeding grounds for the menaces that can be faced by democracy and human rights.[228]

v. Panama, at the September 2001 Regular Session of the Permanent Council

> It was opportune that we incorporated in the Democratic Charter chapter III, which underlines the interdependence between democracy and development and poverty. We have there a magnificent starting point. The important thing is that we not be satisfied with the declaration, but that we act on it.[229]

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222 DE LA CALLE, p. viii; underlining provided.

223 It is possible that in the final version of the report this section of Part III be shortened considerably, or simply summarized.

224 Min. Luis Alfonso Dávila, Head of the Venezuelan delegation during the discussions on a draft of the *Democratic Charter*; DE LA CALLE, p. 38 and 40; underlining provided.

225 Which adopted the draft of the *Inter-American Democratic Charter* later to be submitted to final approval at the XXVIII Extraregular session of the General Assembly (Lima) only a few days later.

226 Amb. Hernán R. Castro, then President of the Permanent Council; in de la Calle, p. 62; underlining provided.

227 Amb. Humberto de la Calle Lombana, who presided the Working Group on he *Charter*, and editor of this book; at p. 54; underlining provided.

228 Amb. Esteban Tomic Errázuriz, in de la Calle, p. 60; underlining provided.

229 Amb. Juan Manuel Castulovich, in de la Calle, p. 62; underlining provided.

vi. Venezuela, at the September 2001 Regular Session of the Permanent Council

For democracy to be authentic it must guarantee not only civil and political rights, but also the economic, social and cultural ones. Hence the importance of the Democratic Charter, which encompasses those principle in their integrity. (…) Democracy without justice is no democracy. Democracy and poverty are at the opposite of each other.[230]

vii. Peru, at the September 2001 Regular session of the Permanent Council

(…) in its final version [the Charter] was right in recognizing emphatically the links that exist between democracy and poverty. Poverty and extreme poverty take viability away from democracy.[231]

viii. The Dominican Republic, at the September 2001 Regular session of the Permanent Council

In the Inter-American Democratic Charter (…) the fight against poverty, the strengthening of the human rights system, the preservation of the institution of democracy and the promotion of a democratic culture have been consecrated as essential for the consolidation of democracy. [232]

ix. Secretary General Cesar Gaviria at the XXVIII Special Session of the General Assembly of 10-11 September 2001

The Democratic Charter (...) incorporates the Protocol of Managua on Fight against Poverty (…) the provisions of which underline the close link between democracy and economic development (…). Without growth and prosperity democracies are incapable of providing the goods citizens are hoping for.[233]

x. Mexico, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

Mexico considers that the adoption of the Inter-American Democratic Charter represents a fundamental progress in the articulation of a new international architecture. (…) The OAS will have to insure that that document, which is in consonance with its essential aims, effectively contribute in the expansion of democracy (…) and the promotion of the integral development of our nations.[234]、

xi. Venezuela, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

The OAS has earned for itself a much more relevant space within the Hemispheric community. The Inter-American Democratic Charter (…) creates a clear symbiosis between democracy and human rights. The fight against poverty, especially extreme poverty, has now become a strategic and imperative objective of all the governments of the Hemisphere.[235]

xii. Colombia, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

The Charter enriches the concept [of democracy] with the principles that must guide governmental action towards the attainment of a just and

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230 Amb. Jorge Valero Briceño, in de la Calle, p. 68 and 69; underlining provided.
231 Amb. Manuel Rogriguez Cuadros, Vice-Minister and Secretary General for External Affairs, in de la Calle, p. 79; underlining provided.
232 Couns. José Elias Ramirez, in de la Calle, p. 84.
233 DE LA CALLE, p. 107; underlining provided.
234 Min. Jorge Castañeda, Secretary for External Relations, In: DE LA CALLE, pp. 127 and 138; underlining provided.
235 Min. Luis Alfonso Dávila, Foreign Minister; In: DE LA CALLE, p. 130; underlining provided.

sustainable economic and social development within the ambit of fight against poverty.[236]

xiii. Costa Rica, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

The Inter-American Democratic Charter is an instrument of utmost importance which put forwards an extremely complete definition of democracy: together with its traditional elements such as the rule of law and periodic elections, it incorporates new components such as fight against poverty, (…). Above all, that is most transcendental that the Charter dedicates entire chapters not only to human rights but also to integral development and the fight against poverty (…).[237]

xiv. Panama, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

(…)The chapters devoted to human rights and the elimination of all inequalities are important. We are particularly pleased with the way in which the Charter underlines the linkage between democracy, integral development and poverty. We all know that democracy is the form of government which offers the best possibilities to arrive at development. But if democratic regimes do not bring about results that devolve their hopes to those who until now have been mere bystanders to progress, its stability and consolidation could be at risk.[238]

xv. Ecuador, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

(…) we must (…), as accompanying measures, create the indispensable conditions for the peoples of our Hemisphere to receive the benefits of life under democracies, expressed not only in the form of increased opportunities for political liberty, but also in practical realities of progress and well-being.[239]

xvi. The Bahamas, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

The Charter addresses critical socioeconomic issues, such as poverty (….). The interconnection between such issues and democracy cannot and must not be ignored. (…) The prosperity and the viability of the countries of the Hemisphere require that all of us redouble our efforts to maintain and strengthen our existing democracy.[240]

xvii. El Salvador, at the XXVIII Special Session of the General Assembly of 10-11 September 2001

We must be clear about the fact that concrete actions will be required to accompany the integral development of our peoples, and for which we all have a common and shared responsibility. That is why the Democratic Charter consecrates democracy and economic and social development and interdependent and mutually reinforcing.[241]

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236 Min.Guillermo Fernández de Soto, Foreign Minister; In: DE LA CALLE, p. 135; underlining provided.
237 Min. Roberto Rojas, Foreign Minister; In: DE LA CALLE, p. 138; underlining provided.
238 Min. José Miguel Alemán, Foreign Minister; In: DE LA CALLE, p. 142; underlining provided.
239 Min. Heinz Moeller Freile, Foreign Minister; In: DE LA CALLE, p. 148; underling provided.
240 Min. Janet G. Bostwick, Foreign Minister; In: DE LA CALLE, p. 150; underling provided; underling provided.
241 Min. Maria Eugenia Brizuela de Àvila, Foreign Minister; In: DE LA CALLE, p. 154; underling provided.

xviii. Peru at the "Informal Dialogue", XXXII Ordinary Session of the General Assembly of 4 June 2002

The Democratic Charter affirms (…) that democracy and economic development are interdependent and mutually reinforcing. Extreme poverty constitutes a menace of a new order to Hemispheric and world stability, and for that reason it propagates instability in democracies.[242]

xix. Argentina at the "Informal Dialogue", XXXII Regular session of the General Assembly of 4 June 2002

(…) the Democratic Charter affirms that democracy is a way of life based on better economic and social conditions of the people.[243]

xx. Antigua and Barbuda at the "Informal Dialogue", XXXII Regular Session of the General Assembly of 4 June 2002

(…) the soul of the Inter-American Democratic Charter is not contained in its often-stated objective to promote and defend democracy (…) the soul of the Charter lies in its recognition that the consolidation of democracy in the Hemisphere is inextricably linked to the social and economic development of every man, woman, boy and girl (…).[244]

xxi. Saint Kitts and Nevis at the "Informal Dialogue", XXXII Regular Session of the General Assembly of 4 June 2002

Our call for the consolidation of democracies throughout the Hemisphere must be synchronous with a call for the reduction of poverty and the eradication of extreme poverty.[245]

xxii. Uruguay at the "Informal Dialogue", XXXII Regular Session of the General Assembly of 4 June 2002

Democracy does not, by itself, create economic recourses. (…) Democracy is only an instrument, a tool (…).[246]

xxiii. Bolivia at the "Informal Dialogue", XXXII Regular Session of the General Assembly of 4 June 2002

If that [i.e. defending democracy] is the region's first commitment, I believe it is fitting to also say that (…) democracy cannot sustain itself through internal support only (…). That is where this other undertaking found in the Democratic Charter (…) begins to make sense: the commitment by all Members States to adopt and execute the measures necessary for the reduction and eradication of poverty (…).[247]

xiv. Costa Rica at the "Informal Dialogue", XXXII Regular Session of the General Assembly of 4 June 2002

(…) in order to make maximum use of the potential of the Inter-American Democratic Charter, it would seem appropriate to establish an inter-connected axis in relation to the actuation of the OAS as well as of the States themselves, with three fundamental components: first, the constant strengthening of democracy and liberty (…) as fundamental pillars (…) to achieve the transformations and structural changes necessary to encourage economic progress (…) ; second, sustainable development and the fight against poverty, as an integral condition for the strengthening of

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242 Amb. Eduardo Ferrero Costa, Head of Delegation, In: DE LA CALLE, p. 190; underling provided.
243 Amb. Domingo Santiago Cullen, Head of Delegation, In: DE LA CALLE, p. 198; underling provided.
244 Min. Gaston Brown, Head of Delegation, In: DE LA CALLE, pp. 200-1; underling provided.
245 Dr. Hon. Timothy Harris, Head of Delegation, In: DE LA CALLE, p. 206; underling provided.
246 Min. Didier Opertti Badán, Head of Delegation, In: DE LA CALLE, p. 214; underling provided.
247 Min. Gustavo Fernández Saavedra, Head of Delegation In: DE LA CALLE, p. 217; underling provided.

democracy.(…) Third, Hemispheric security as an indication of commitment for the defence of the values of liberty (…).[248]

xxv. Peru (Pres. Alejandro Toledo) at the Protocolar Session of the Permanent Council of 16 September 2002

The Charter puts forwards a modern and integral concept of democracy, proclaimed to be a right. (…) The challenge which the Charter confronts the Hemisphere with: (…) good governance, (…) frontal attack on poverty, especially extreme poverty. (…). The Charter points out that democracy and economic and social development are interdependent and mutually reinforcing. In our view, that theme must constitute a fundamental axis in the process of political dialogue and consensus that the adoption of the Democratic Charter has generated within the OAS (…).[249]

xxvi. Uruguay at the Protocolar Session of the Permanent Council of 16 September 2002

Democracy will not defend itself alone, (…). Democracy will defend itself if we can obtain that our citizens perceive it as the most appropriate means for their necessities to be met, as the most adequate means to their demands to be looked after, (…).[250]

xxvii. Guyana at the Protocolar Session of the Permanent Council of 16 September 2002

The Inter-American Democratic Charter underlines the essence of the Organization of American States by incorporating, as it does, key elements of the nature and purpose of the OAS Charter in respect to (…): 1. Strengthening the peace and security of the continent. 2. Promoting and consolidating representative democracy (…); and 3. Eradicating extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the Hemisphere. [251]

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[248] Amb. Hernán R. Castro H., Head of Delegation, In: DE LA CALLE, p. 220-1; underling provided.
[249] In: DE LA CALLE, p. 229.
[250] See DE LA CALLE, p. 234; underlining provided. On that occasion, Minister Opertti, as we will see later, developed at length the idea that the *Inter-American Democratic Charter* must be seen within the general context of the progressive development of international law.
[251] Amb. M. A. Odeen Ishmael, in de la Calle 238, underlining provided.

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