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

ORGANIZATION OF AMERICAN STATES
Av. Marechal Floriano, 196 - 3º andar - Palácio Itamaraty – Centro - Rio de Janeiro– RJ 20080-002 - Brazil
Telephone: (55-21) 2206-9903; Fax (55-21) 2203-2090
e-mail: cjioea.trp@terra.com.br

Rio de Janeiro, February 1st, 2008

CJI/O/01/2008

Excellency:

I have the honor to address Your Excellency to request 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/VII.38 CJI/doc.286/07), regarding the activities of the Committee in 2007.

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

Jean-Paul Hubert
Chairman
Inter-American Juridical Committee

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

ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

IAJC

71st REGULAR SESSION
July 30th to August 10th, 2007
Rio de Janeiro, Brazil

OEA/Ser.Q/VII.38
CJI/doc.286/07
10 August 2007
Original: Spanish

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

2007

EXPLANATORY NOTE

Until 1990, the OAS General Secretariat published the “Final Acts” 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 (now the Office of International Law of the Department of International Legal Affairs) of the OAS General Secretariat began to publish those documents under the title “Annual Report of the Inter-American Juridical Committee to the General Assembly”.

According to 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).

TABLE OF CONTENTS

Page

EXPLANATORY NOTE..... i
RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE iv
DOCUMENTS INCLUDED IN THIS ANNUAL REPORT..... v
INTRODUCTION..... 1
CHAPTER 5
1. The Inter-American Juridical Committee: its origin, legal bases, structure and purposes..... 7
2. Period covered in this Annual Report of the Inter-American Juridical Committee..... 7
A. 70th regular session..... 7
B. 71st regular session..... 11
CHAPTER II..... 17
TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2007..... 19
1. The scope of the right to identity..... 21
2. International Criminal Court..... 31
3. Access to information and protection of personal data..... 45
4. Follow-up on the application of the Inter-American Democratic Charter..... 83
5. The struggle against discrimination and intolerance..... 107
6. Seventh Inter-American Specialized Conference on Private International Law - CIDIP-VII 113
7. Implementation of International Humanitarian Law in the OAS Member States..... 125
8. The legal *status* of migrant workers and their families in international law..... 127
9. Administration of Justice in the Americas: judicial ethics and access to justice..... 153
10. Inter-American Court of Justice..... 165
11. Juridical-institutional cooperation with the Republic of Haiti..... 185
12. Proposal to support the founding of an Official Latin American Regional Bulletin..... 203
CHAPTER III..... 209
OTHER ACTIVITIES..... 211
ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE IN 2007..... 211
A. Presentation of the Annual Report of the Inter-American Juridical Committee..... 211
B. Course on International law..... 212
C. Relations and forms of cooperation with other inter-American organizations and with similar regional or world organizations..... 219
INDEXES..... 247
ONOMASTIC INDEX..... 249
SUBJECT INDEX..... 251

RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE

		Page
CJI/RES.118 (LXX-O/07)	TRIBUTE TO THE MEMORY OF DR. RENATO IBEIRO……	8
CJI/RES.119 (LXX-O/07)	DATE AND VENUE OF THE SEVENTY-FIRST REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE	9
CJI/RES.113 (LXIX-O/06)	AGENDA FOR THE 70TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (RIO DE JANEIRO, MARCH 2007)……..	10
CJI/RES.120 (LXX-O/07)	GRATITUDE TO THE GOVERNMENT AND THE PEOPLE OF THE REPUBLIC OF EL SALVADOR……...	11
CJI/RES.138 (LXXI-O/07)	HOMAGE TO DR. EDUARDO VIO GROSSI……..	12
CJI/RES.128 (LXX-O/07)	AGENDA FOR THE 71ST REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (RIO DE JANEIRO, AUGUST 2007)……..	13
CJI/RES.135 (LXXI-O/07)	AGENDA FOR THE 72ND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (RIO DE JANEIRO, 3 TO 14 MARCH 2008)…….	14
CJI/RES.136 (LXXI-O/07)	DATE AND VENUE OF THE 72ND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE……	15
CJI/RES.129 (LXXI-O/07)	VOTE OF APPRECIATION OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO MR. JOSÉ MIGUEL INSULZA, SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES…….	15
CJI/RES.137 (LXXI-O/07)	THE SCOPE OF THE RIGHT TO IDENTITY……	23
CJI/RES.125 (LXX-O/07)	PROMOTION OF THE INTERNATIONAL CRIMINAL COURT…….	32
CJI/RES.123 (LXX-O/07)	RIGHT TO INFORMATION……	47
CJI/RES.130 (LXXI-O/07)	ACCESS TO INFORMATION AND PROTECTION OF PERSONAL DATA…	82
CJI/RES.132 (LXXI-O/07)	FOLLOW-UP ON THE APPLICATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER…	87
CJI/RES.124 (LXX-O/07)	THE STRUGGLE AGAINST DISCRIMINATION AND INTOLERANCE IN THE AMERICAS	109
CJI/RES.122 (LXX-O/07)	SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW (CIDIP-VII)……	123
CJI/RES.127 (LXX-O/07)	THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN THE INTERNATIONAL LAW……	129
CJI/RES.131 (LXXI-O/07)	THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL LAW…….	151
CJI/RES.126 (LXX-O/07)	ADMINISTRATION OF JUSTICE IN THE AMERICAS: JUDICIAL ETHICS AND ACCESS TO JUSTICE……	156
CJI/RES.121 (LXX-O/07)	SOME COMMENTS ON THE CHALLENGES OF THE INTER-AMERICAN JURIDICAL COMMITTEE OF OCCASION OF ITS CENTENARY……	169
CJI/RES.134 (LXXI-O/07)	INTER-AMERICAN COURT OF JUSTICE (IACJ)……	182
CJI/RES.133 (LXXI-O/07)	JURIDICAL-INSTITUTIONAL COOPERATION WITH THE REPUBLIC OF HAITI…….	185
CJI/RES.117 (LXX-O/07)	OFFICIAL LATIN AMERICAN REGIONAL BULLETIN (BOREAL)……	206

DOCUMENTS INCLUDED IN THIS ANNUAL REPORT

		Page
CJI/doc.285/07	Explanation of Dissenting Vote on the Scope of the Right to Identity Resolution (presented by Dr. Antonio Fidel Pérez)…….	24
CJI/doc.276/07 rev.1	Opinion Adopted by the Inter-American Juridical Committee on the Scope of the Right to Identity…….	27
CJI/doc.256/07 rev.1	Promotion of the International Criminal Court (presented by Dr. Mauricio Herdocia Sacasa)…….	33
CJI/doc.25/00 rev.2	Right to Information: Access to and Protection of Information and Personal Data in Electronic Form (Updated by the Office of International Law of the Department of International Legal Affairs of the Report Submitted by Dr. Jonathan T. Fried at the 57th Regular Session of the Inter-American Juridical Committee, CJI/doc.25/00 rev.1)…….	48
CJI/doc.239/07	Access to Information: Comment Regarding the Responses to the Questionnaire Sent by the Inter-American Juridical Committee to the OAS Member States (CJI/doc.232/06 rev.1, 17 August 2006) (presented by Dr. Jaime Aparicio) ……..80	
CJI/doc.281/07	Reasoned Vote: Follow-Up on the Application of the Inter-American Democratic Charter (CJI/doc.274/07 rev. 2) (presented by Dr. Eduardo Vio Grossi)…….	88
CJI/doc.284/07	Explanation of Dissenting Vote on the Follow-Up on the Application of the Inter-American Democratic Charter Resolution (presented by Dr. Antonio Fidel Pérez)…….	88
CJI/doc.264/07	Report Concerning the Report of the Secretary General of the Organization of American States on the Implementation of the Inter-American Democratic Charter (presented by Dr. Antonio Fidel Pérez)…….	89
CJI/doc.258/07	Inter-American Juridical Committee Report on the 'Preliminary Draft Inter-American Convention Against Racism and all Forms of Discrimination and Intolerance'..	111
CJI/doc.261/07	Explanation of Vote: the Struggle Against Discrimination and Intolerance in the Americas (presented by Dr. Jean- Paul Hubert)…….	112
CJI/doc.242/07	Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) (presented by Dr. Ana Elizabeth Villalta Vizcarra)……..	114
CJI/doc.243/07	Report on CIDIP-VII with Respect to the Negotiation of Legal Instruments Concerning Consumer Protection (presented by Dr. Antonio Fidel Pérez)…….	118
CJI/doc.266/07	The Legal Status of Migrant Workers and Their Families in International Law (presented by Dr. Jorge Palacios Treviño)……..	130
CJI/DOC.269/07	The Legal Status of Migrant Workers and their families in international law (presented by Dr. Ana Elizabeth Villalta Vizcarra)…….	143
CJI/doc.238/07	Principles of Judicial Ethics (presented by Dr. Ana Elizabeth Villalta Vizcarra)……..	156
CJI/doc.241/07	Inter-American Court of Justice (IACJ): Some Comments on the Challenges of the Inter-American Juridical Committee on Occasion of its Centenary (presented by Dr. Eduardo Vio Grossi)…….	170
CJI/doc.267/07	Inter-American Court of Justice (IACJ) (presented by Dr. Eduardo Vio Grossi)…….	176

CJI/doc.283/07	Reasoned Vote: Inter-American Court of Justice (presented by Dr. Eduardo Vio Grossi)……	183
CJI/doc.275/07	Keeping the Peace and the Lessons of Haiti: Collapse or Rebuilding of the State? (presented by Dr. Ricardo Seitenfus)……	186
CJI/doc.240/07	Official Latin American Regional Bulletin (presented by Dr. Eduardo Vio Grossi)……	204
CJI/doc.268/07 rev.1	Homage to Santiago Benadava: Inauguration of the 34TH Course on International Law of the Inter-American Juridical Committee of the Organization of American States (Rio de Janeiro, Brazil, July 30, 2007) (presented by Dr. Eduardo Vio Grossi)……	217
CJI/doc.263/07	Presentation of the 2006 Annual Report by the Chairman of the inter-american juridical committee to the Committee on Juridical and Political Affairs of the Organization of American States (Washington, D.C., March 22, 2007) (presented by Dr. Jean-Paul Hubert)….	220
CJI/doc.265/07	Presentation of the Annual Report of the Inter-American Juridical Committee to the General Assembly of the Organization of American States (Panama, 5 July 2007) (presented by Dr. Jaime Aparicio Otero, Vice-Chairman)	229
CJI/doc.270/07	Principles of International Law in the OAS: Charter Speech by Mr. Mauricio Herdocia Sacasa, Member of the Inter-American Juridical Committee, at the Special Meeting of the Committee on Juridical and Political Affairs (CAJP) of the Permanent Council Washington, March 22, 2007……	232

* * *

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 2007, 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 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), AG/RES. 2136 (XXXV-O/05), and AG/RES. 2197 (XXXVI-O/06), 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 scope of the right to identity; International Criminal Court; access to information and protecion of personal data; follow-up on the application of the Inter-American Democratic Charter; struggle against discrimination and intolerance in the Americas; the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII); implementation of international humanitarian law in OAS Member States; the legal status of migrant workers and their families in international law; the administration of justice in the Americas; judicial ethics and access to justice; the Inter-American Tribunal of Justice; legal-institutional cooperation with the Republic of Haiti; and the proposal to support the establishment of a Regional Official Bulletin for Latin America.

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 2007 and contains 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, as well as thematic and keyword indexes to help the reader locate documents in this Report.

Dr. Jean-Paul Hubert, Chair 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, with 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 20 years later, in 1967, the Third Special Inter-American Conference convened in Buenos Aires, Argentina, 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 Inter-American Juridical Committee is in Rio de Janeiro, in special cases it may meet elsewhere that may be appointed after consulting the member State concerned. The Juridical Committee consists of eleven jurists who are nationals of the Member States of the Organization. Together, those jurists represent all the States. The Juridical Committee also enjoys as much technical autonomy as possible.

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

A. 70th regular session

The Inter-American Juridical Committee held its 70th regular session in the city of San Salvador, El Salvador, from February 26 to March 9, 2007. The opening session at the Sheraton Hotel's Convention Center was attended by Ms. Ana Vilma Albanés de Escobar,

Acting President of the Republic of El Salvador, Dr. Agustín García Calderón, President of the Judiciary and of the Supreme Court of Justice, and Mr. Eduardo Cálix, Vice Minister of Foreign Affairs.

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".

Eduardo Vio Grossi
Hyacinth Evadne Lindsay
Ana Elizabeth Villalta Vizcarra
Mauricio Herdocia Sacasa
Ricardo Seitenfus
Jaime Aparicio (Vice-Chair)
Jorge Palacios Treviño
Freddy Castillo Castellanos
Galo Leoro Franco
Jean-Paul Hubert (Chair)
Antonio Fidel Pérez

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, from the Office of International Law, Dante M. Negro, Director, and Manoel Tolomei Moletta, Principal Legal Officer. The rapporteur was Ms. Maria Helena Lopes.

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

He also welcomed Drs. Jorge Palacios Treviño (Mexico), Hyacinth Evadne Lindsay (Jamaica), and Ricardo Seitenfus (Brazil), who had recently been elected as members by the General Assembly, at its thirty-sixth regular session, held in Santo Domingo, Dominican Republic, in June 2006. He also welcomed Dr. Freddy Castillo Castellanos (Venezuela), who had been elected a member of the Juridical Committee by the Permanent Council on October 12, 2006.

At this regular session, the Inter-American Juridical Committee also adopted resolution CJI/RES.118 (LXX-O/07), "Tribute to the memory of Dr. Renato Ribeiro", who had passed away. Dr. Ribeiro had been a staff member of the OAS for 45 years, serving on the Inter-American Juridical Committee from 1959 to 1994.

CJI/RES.118 (LXX-O/07)

TRIBUTE TO THE MEMORY OF DR. RENATO RIBEIRO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO CONSIDERATION the regrettable death of Dr. Renato Ribeiro occurred on September 29, 2006, in Rio de Janeiro, Brazil;

BECAUSE Dr. Ribeiro was a distinguished official of the Organization of American States for more than 45 years;

CONSIDERING that from 1959 to 1973 Dr. Ribeiro acted as Assistant-Secretary of this inter-American organ and from 1974 to May 8, 1994, acted as Secretary thereof;

RECOGNIZING the important contribution that in the exercise of the aforesaid positions, Dr. Renato Ribeiro made so generously to the Inter-American Juridical Committee, to the Organization of American States and to the development of Law in the Americas; and

RECALLING the relevant human attributes that distinguished Dr. Ribeiro, and particularly, the dedication and commitment of great part of his life to the service of the Committee,

RESOLVES:

1. Present its highest and most sincere tribute and recognition to the memory of Dr. Renato Ribeiro.

2. Present a copy of this resolution, as an expression of our condolences, to the family of Dr. Renato Ribeiro.

This resolution was adopted unanimously at the session held on March 1st, 2007, in the presence of the following members: Drs Eduardo Vío Grossi, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, Jean Paul Hubert, and Antonio Fidel Pérez.

Lastly, the Inter-American Juridical Committee decided to adopt resolution CJI/RES.119 (LXX-O/07), "Date and venue of the seventh first regular session of the Inter-American Juridical Committee", whereby it resolved to hold the 71st regular session at its seat, in Rio de Janeiro, from July 30, 2007, authorizing its Chair to decide on the date of its conclusion according to the circumstances.

CJI/RES.119 (LXX-O/07)

DATE AND VENUE OF THE SEVENTY-FIRST REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statute provides for holding regular annual sessions;

BEARING IN MIND that article 14 of its Statute provides that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro,

RESOLVES to hold the 71st regular session in the offices of the Inter-American Juridical Committee in the city of Rio de Janeiro, starting on July 30th, 2007, and authorizing its Chairman to determine the closing date based on the circumstances.

This resolution was adopted unanimously at the session held on March 2nd, 2007, in the presence of the following members: Drs. Eduardo Vio Grossi, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, Jean Paul Hubert, and Antonio Fidel Pérez.

During this session, the Inter-American Juridical Committee had before it the following agenda, adopted by resolution CJI/RES.113 (LXIX-O/06), "Agenda for the 70th regular session of the Inter-American Juridical Committee":

CJI/RES.113 (LXIX-O/06)

AGENDA FOR THE 70TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Rio de Janeiro, March 2007)

A. Topics under consideration

1. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez
2. Consideration on the task of codifying and unifying international law in the Americas
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, João Grandino Rodas and Antonio Fidel Pérez
3. Right to information: access to and protection of information and personal data
   Rapporteurs: Drs. Alonso Gómez Robledo, Antonio Fidel Pérez and Jaime Aparicio
4. Principles of Judicial Ethics
   Rapporteur: Dra. Ana Elizabeth Villalta Vizcarra
5. International Criminal Court
   Rapporteur: Dr. Mauricio Herdocia Sacasa
6. Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance
   Rapporteur: Dr. Jaime Aparicio
7. Thoughts on the challenges of the Inter-American Juridical Committee
   Rapporteur: Dr. Eduardo Vio Grossi

B. Topics for follow-up

1. Legal aspects of the interdependence between democracy and economic and social development
   Rapporteur: Dr. Jean-Paul Hubert
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. Follow-up on the application of the Inter-American Democratic Charter
   Rapporteur: Drs. Eduardo Vio Grossi and Antonio Fidel Pérez

This resolution was adopted unanimously at the session held on August 18th, 2006 in the presence of the following members: Drs. Jean-Paul Hubert, Eduardo Vio Grossi, João Grandino Rodas, Jaime Aparicio, Ana Elizabeth Villalta Vizcarra, Galo Leoro Franco, Mauricio Herdocia Sacasa and Antonio Fidel Pérez.

At this regular session the members of the Juridical Committee and staff members of the General Secretariat gave several talks on topics related to public and private international law at the Diplomatic Academy of El Salvador, at the Alberto Masferrer Salvadoran University, and at the Dr. José Matías Delgado University.

Finally, the Inter-American Juridical Committee adopted resolution CJI/RES.120/07 (LXX-O/07), “Gratitude to the Government and people of the Republic El Salvador” for their warm and generous welcome and underscoring, in particular, the important work of Dr. Ana Elizabeth Villalta and the dedicated team that helped organize the session.

CJI/RES.120 (LXX-O/07)

GRATITUDE TO THE GOVERNMENT AND THE PEOPLE OF THE REPUBLIC OF EL SALVADOR

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING ACCEPTED the kind invitation of the Government of the Republic of El Salvador to hold its 70th regular session in San Salvador, El Salvador, from February 26th to March 9th, 2007;

RECOGNIZING the efforts made by the Government of El Salvador for the successful organization and holding of the regular session of the Juridical Committee,

RESOLVES:

1. To express its most sincere gratitude to the Government and the people of El Salvador for their warm and generous welcoming, and particularly, to highlight the exceptional effort of Dr. Ana Elizabeth Villalta Vizcarra and the dedicated team that worked in the organization of the event.

2. To express the importance for the Inter-American Juridical Committee of holding its 70th regular session in this Country.

3. To emphasize the opportunity that the members of the Inter-American Juridical Committee had to meet with the Acting President of the Republic of El Salvador, Lic. Ana Vilma Albanés de Escobar, the President of the Legislative Assembly, Prof. Rubén Orellana, the President and Magistrates of the Supreme Court of Justice, the members of the Foreign Affairs Commission for Central American Integration and Salvadorans Abroad of the Legislative Assembly, the Vice-Minister of Foreign Affairs in charge of Office, Eduardo Cálix López, the Vice-Minister of Foreign Affairs for Salvadorans Abroad, Ambassador Margarita Escobar, the President of the Consumer Defense Agency as President of the Ibero-American Forum of Consumer Protection Agencies, Dr. Evelyn Jacir de Lovo and other important personalities.

4. To transmit the present resolution as an expression of our gratitude to the Government and the people of El Salvador, to the President of the Republic, Elías Antonio Saca González and to the Minister of Foreign Affairs, Lic. Francisco Esteban Laínez Rivas.

The present resolution was adopted unanimously at the session held on March 2nd, 2007, in the presence of the following members: Drs. Eduardo Vío Grossi, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, Jean Paul Hubert and Antonio Fidel Pérez.

B. 71st regular session

The 71st regular session of the Inter-American Juridical Committee was held from July 30 to August 10, 2007, 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".

Jean-Paul Hubert (Chair)
Hyacinth Evadne Lindsay
Eduardo Vio Grossi
Galo Leoro Franco
Ricardo Seitenfus
Freddy Castillo Castellanos
Jorge Palacios Treviño
Antonio Fidel Pérez
Mauricio Herdocia Sacasa
Jaime Aparicio (Vice-Chair)
Ana Elizabeth Villalta Vizcarra

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, from the Office of International Law, Dante M. Negro, Director, Manoel Tolomei Moletta, Principal Legal Officer, and Luis Toro, Legal Officer. The rapporteur was Ms. Maria Helena Lopes.

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 IAJC reported that the General Assembly, at its thirty-seventh regular session (Panama, June 2007), had elected as a new member of the Juridical Committee Dr. Guillermo Fernández de Soto (Colombia) and re-elected Dr. Mauricio Herdocia Sacasa (Nicaragua). The terms of these two members begin on January 1, 2008, and last four years.

The Inter-American Juridical Committee also adopted resolution CJI/RES.138 (LXXI-O/07), "Homage to Dr. Eduardo Vio Grossi" whereby it expressed appreciation for the work performed by Dr. Eduardo Vio in his capacity as a Committee member. Dr. Vio's term expires on December 31, 2007.

CJI/RES.138 (LXXI-O/07)

HOMAGE TO DR. EDUARDO VIO GROSSI

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the term of office of Dr. Eduardo Vio Grossi as member of this Committee ended on December 31st, to which he was elected during the twenty-second regular session of the General Assembly in Santiago, Chile, in June 1991, and remained on the Committee for sixteen years;

BEARING IN MIND that on August 12, 1996, Dr. Vio Grossi was elected Chair of the Juridical Committee for a two-year office which he held with dynamism and skill;

IN VIEW of the active work done by Dr. Vio Grossi in major studies undertaken by the Juridical Committee, on proposing groundbreaking topics such as Democracy in the Inter-American System, which acted as a basis for the draft Inter-American Democratic Charter; on the topic of Legal aspects of hemispheric security; his contributions to the Legal Opinion on the sentence of the Supreme Court of Justice of the United States of America (Alvarez-Machain case); on the topic of Freedom of trade and investment in the hemisphere (Helms-Burton case); and in the inter-American convention drafts against corruption and all form of discrimination against disability;

RECALLING that, in virtue of the nature of his views on juridical investigation, Dr. Vio Grossi did important work, such as the Joint Meetings with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, when the Committee had the opportunity to exchange ideas about topics that was of the utmost interest to legal advisors; the Seminar on Democracy in the Inter-American System in Washington, D.C. and the publication of the book on the Centennial of the Inter-American Juridical Committee;

WISHING TO RECORD that during Dr. Vio Grossi's term of office, due to his vast legal knowledge and major contributions to the topics under study, he gained the respect and admiration of the members of the Inter-American Juridical Committee and of the General Secretariat of the OAS,

RESOLVES:

1. To express its most sincere gratitude for his very efficient work done as member and Chair of the Inter-American Juridical Committee.

2. To wish Dr. Eduardo Vio Grossi supreme success in the new challenges that he will tackle in the future, in the hope that he will continue to collaborate with the Juridical Committee if necessary.

3. To send this resolution to Dr. Eduardo Vio Grossi.

This resolution was adopted unanimously at the session on August 8th, 2007, by the following members: Drs. Jean-Paul Hubert, Jaime Aparicio, Hyacinth Evadne Lindsay, Galo Leoro Franco, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa and Ana Elizabeth Villalta Vizcarra.

During its 71st session, the Inter-American Juridical Committee had before it the following agenda, adopted by resolution CJI/RES.128 (LXX-O/07), "Agenda for the 71st regular session of the Inter-American Juridical Committee".

CJI/RES.128 (LXX-O/07)

AGENDA FOR THE 71ST REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Rio de Janeiro, August 2007)

A. Topics under consideration

1. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Antonio Fidel Pérez
2. Right to information
   Rapporteurs: Drs. Jaime Aparicio, Mauricio Herdocia Sacasa and Hyacinth Evadne Lindsay
3. Administration of justice in the Americas: Judicial Ethics and Access to Justice
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, Freddy Castillo Castellanos and Ricardo Seitenfus
4. International Criminal Court
   Rapporteur: Dr. Mauricio Herdocia Sacasa
5. The struggle against discrimination and intolerance in the Americas
   Rapporteurs: Drs. Jaime Aparicio, Ricardo Seitenfus and Hyacinth Evadne Lindsay
6. Thoughts on the challenges of the Inter-American Juridical Committee
   Rapporteurs: Drs. Eduardo Vio Grossi and Ricardo Seitenfus
   a) Inter-American Court of Justice
   b) Juridical cooperation with Haiti in the matters
7. Proposal to support the creation of an "Official Latin American Regional Bulletin"
   Rapporteur: Dr. Eduardo Vio Grossi
8. Status of migrant workers and their families in international law
   Rapporteurs: Drs. Jorge Palacios Treviño, Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra and Galo Leoro Franco

B. Topics for follow-up

1. Follow-up on the application of the Inter-American Democratic Charter
   Rapporteurs: Drs. Eduardo Vio Grossi, Antonio Fidel Pérez, Ricardo Seitenfus and Jaime Aparicio

This resolution was adopted unanimously at the regular session held on March 7, 2007, in the presence of the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco and Jean-Paul Hubert.

During this session, the IAJC also adopted resolution CJI/RES.135 (LXXI-O/07), "Agenda for the 72nd regular session of the Inter-American Juridical Committee", and it decided, by way of resolution CJI/RES.136 (LXXI-O/07), "Date and venue of the 70th regular session of the Inter-American Juridical Committee", to hold that session at its headquarters, in Rio de Janeiro, from March 3 to 14, 2008.

CJI/RES.135 (LXXI-O/07)

AGENDA FOR THE 72ND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Rio de Janeiro, 3 to 14 March 2008)

A. Topics under consideration

1. Seventh Inter-American Specialized Conference on Private International Law - CIDIP-VII
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Antonio Fidel Pérez
2. Access to Information and protection of personal data
   Rapporteurs: Drs. Jaime Aparicio, Mauricio Herdocia Sacasa and Hyacinth Evadne Lindsay
3. Administration of justice in the Americas: judicial ethics and access to justice
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, Freddy Castillo Castellanos, Ricardo Seitenfus and Hyacinth Evadne Lindsay
4. International Criminal Court
   Rapporteur: Dr. Mauricio Herdocia Sacasa
5. The struggle against discrimination and intolerance in the Americas
   Rapporteurs: Drs. Jaime Aparicio, Ricardo Seitenfus and Hyacinth Evadne Lindsay
6. Inter-American Court of Justice
   Rapporteur: Dr. Eduardo Vio Grossi
7. Juridical-Institutional cooperation with the Republic of Haiti
   Rapporteurs: Drs. Ricardo Seitenfus and Freddy Castillo Castellanos
8. Proposal for support the creation of an “Official Latin American Regional Bulletin”
   Rapporteur: Dr. Eduardo Vio Grossi
9. The legal status of migrant workers and members of their families in international law
   Rapporteurs: Drs. Jorge Palacios Treviño, Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra and Galo Leoro Franco
10. Follow-up on the application of the Inter-American Democratic Charter
    Rapporteurs: Drs. Eduardo Vio Grossi, Ricardo Seitenfus, Jaime Aparicio, Mauricio Herdocia Sacasa, Ana Elizabeth Villalta Vizcarra, Jean-Paul Hubert and Freddy Castillo Castellanos
11. The scope of the right to identity
    Rapporteurs: Drs. Mauricio Herdocia and Hyacinth Evadne Lindsay
12. Implementation of international humanitarian law in OAS Member States
    Rapporteurs: Drs. Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra and Jorge Palacios Treviño

This resolution was adopted unanimously at the session held on August 9, 2007, by the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Galo Leoro Franco, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

CJI/RES.136 (LXXI-O/07)

DATE AND VENUE OF THE 72ND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statutes provides for two regular sessions annually;

BEARING IN MIND that article 14 of its Statutes states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro,

RESOLVES to hold its 72nd regular session at its headquarters in the city of Rio de Janeiro, Brazil, from March 3 to 14, 2008.

The resolution herein was unanimously approved at the session held on August 9, 2007, in the presence of the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Galo Leoro Franco, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

Finally, at this regular session, the Inter-American Juridical Committee adopted resolution CJI/RES.129/07, "Vote of appreciation of the Inter-American Juridical Committee to Mr. José Miguel Insulza, Secretary General of the Organization of American States", for his visit to this organ of the OAS.

CJI/RES.129 (LXXI-O/07)

VOTE OF APPRECIATION OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO MR. JOSÉ MIGUEL INSULZA, SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the Inter-American Juridical Committee held its 71st regular session between July 30 and August 10, 2007, in Rio de Janeiro, Brazil;

TAKING INTO ACCOUNT the official visit of the Secretary General of the Organization of American States, His Excellence José Miguel Insulza, to the Inter-American Juridical Committee in Itamaraty Palace and the celebration of a working meeting with its members;

RECOGNIZING that within the framework of this visit to the Juridical Committee, the OAS Secretary General presented the keynote address within the framework of the 34th Course on International Law,

RESOLVES:

1. To express its appreciation to His Excellence José Miguel Insulza, Secretary General of the Organization of American States, for his participating in its working session, held on August 3, 2007 and in the Course on International Law.

2. To stress the importance of the treatment of, among other topics, the Inter-American Democratic Charter, during the meeting between the Secretary General and the members of the Inter-American Juridical Committee, in the light of the report of the Secretary General The Inter-American Democratic Charter – (OEA/Ser.G CP/doc.4184/07, dated April 4, 2007).

3. To reiterate its entire disposition to continue and intensify the fruitful dialogue with the Secretary General.

This resolution was adopted unanimously at the session held on August 9, 2007, by the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vío Grossi, Galo Leoro Franco, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio, and Ana Elizabeth Villalta Vizcarra.

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2007

During 2007 the Inter-American Juridical Committee held two regular sessions. The Juridical Committee had the following topics on its agenda for those two meetings: the scope of the right to identity; the International Criminal Court; access to information and protection of personal data; follow-up on the application of the Inter-American Democratic Charter; struggle against discrimination and intolerance in the Americas; the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII); implementation of international humanitarian law in OAS Member States; the legal status of migrant workers and their families under international law; the administration of justice in the Americas; judicial ethics and access to justice; the Inter-American Tribunal of Justice; legal-institutional cooperation with the Republic of Haiti; and the proposal to support the establishment of a Regional Official Bulletin for Latin America.

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. The scope of the right to identity

Resolution

CJI/RES.137 (LXXI-O/07) - The scope of the right to identity

Annexes:

CJI/doc.285/07	Explanation of dissenting vote on the scope of the right to identity resolution (presented by doctor Antonio Fidel Pérez)
CJI/doc.276/07 rev.1	Opinion adopted by the Inter-American Juridical Committee on the scope of the right to identity

During the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007), Dr. Dante Negro, Director of the Office of International Law, reported that on March 15, the Chairlady of the Permanent Council had sent a note to the Chair of the Inter-American Juridical Committee in which, based on an exchange of views that had occurred at a Permanent Council meeting, she requested that the Committee study the scope of the right to identity. The Office of International Law sent the members of the Juridical Committee the Final Report of that special meeting, a transcript of the minutes of the meeting, and document ODI/doc.04/07 titled "Inter-American Program for a Universal Civil Registry and the Right to Identity". Dr. Negro said that these three documents should provide the Inter-American Juridical Committee with the basic elements necessary to begin its study of this topic.

The Chairman of the Inter-American Juridical Committee, Dr. Jean-Paul Hubert, underscored certain issues that seemed to him to be important and that had evoked discussion of the right to identity as an autonomous right, as a right prescribed in instruments dealing with human rights, or as an instrumental right, i.e., one essential for the exercise of other rights, such as the right to cultural identity and even the economic and social rights. Dr. Hubert observed that the instruments made provision for the more formal dimension of the right to identity, beginning with registration of birth, and expanding to include the individual's right to nationality and, by extension, the right to vote and to exercise one's civic rights.

Dr. Mauricio Herdocia Sacasa, for his part, said that the Juridical Committee's mandate was to try to define the scope and nature of the so-called right to identity. He explained that the question was being raised because some believed that the right to identity was only instrumental in nature, i.e., a vehicle enabling effective exercise of other rights, such as the right to nationality, the right to a name, and the right to a family. Dr. Herdocia Sacasa said that others regarded the right to identity as the actual registration of this information, thereby boiling it down to one of the human rights already recognized in the "American Convention on Human Rights". He went on to say that this was why the essential scope of that right had to be determined.

Dr. Herdocia shared his view on the matter. He explained what he considered to be the three facets of the right to identity. He said on the one hand that the right to identity was a right in and of itself and was therefore autonomous in nature. On the other hand, he explained, the right to identity had an instrumental value, as it was essential for the exercise of civil, political, economic and social rights. He went on to say that the right to identity had yet a third dimension, since it was a combination of different rights, because identity was not just the right to a name nor was it the right to a name and the right to nationality, plus the right to a family; instead, the right to identity was a set of interlinking rights that made every individual unique. Therefore, he reasoned, the right to identity was associated with values and principles inherent in human dignity, life in society, citizen participation, and exercise of human rights. The right to identity is, therefore, multidimensional, and not just a matter of birth registration or nationality; instead, the right to identity includes all those rights that shape identity and personality. It is, therefore, a right *erga omnes,* i.e., a universal right and *jus cogens.* It is such an essential right that without it other fundamental rights could not be exercised. The right to identity fits into the category of rights that, under the American Convention, are not subject to derogation or suspension, no matter what the circumstance.

In his view, the Inter-American Juridical Committee should go on record to assert that the right to identity is not confined to registration of birth; instead, full observance of the right to identity also requires issuance of an identity document, because without an identity document the individual cannot even exercise the right to vote. Another issue that should be emphasized, in Dr. Herdocia Sacasa's opinion, is the denial of this right to identity, or the gaps in domestic laws that need to be filled to enable effective exercise of this right. Denial of the right to identity condemns the individual to a kind of civil death, to legal insecurity, to isolation and social exclusion. In closing, he remarked that the various facets of the right to identity tied in with other rights, but left the specificity of those rights intact.

Dr. Jorge Palacios Treviño concurred with Dr. Herdocia, and added that the right to identity was a right recognized in international human rights instruments, that it was legally protected under the rules of *jus cogens.* Therefore, it was a right that the States were required to observe. Its implementation, however, depended on each State's organization and resources.

Dr. Jean-Paul Hubert said that the views expressed notwithstanding, it seemed to him that international law did not require a State to grant nationality to a child born within its territory.

Dr. Ana Elizabeth Villalta Vizcarra expressed the view that the Inter-American Juridical Committee should present a report and approve a resolution for the Permanent Council on this subject. In her view, the right to identity is not regulated in the international instruments. She observed that the "American Convention on Human Rights" contained a provision on the right to a name but not one on the right to identity. If the Juridical Committee's position is that the right to identity is a human right, the Committee would be endowing it with a dimension and a character that it does not yet have under the law.

Dr. Hubert spoke to Dr. Villalta's proposal that the Committee present a report and a resolution. He said that what the Permanent Council had requested from the Committee was a legal opinion. Dr. Hubert also mentioned that another source of law, the United Nations "Convention on the Rights of the Child", ought not to be overlooked. Article 7 of that instrument provides that a child shall be registered immediately after birth and shall have the right from birth to a name and the right to acquire a nationality. Article 8 provides that States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Dr. Eduardo Vio Grossi said that the first matter to be established was the scope of the right to identity. He explained that determining the scope of something meant ascertaining its reach and and what it encompassed; this, he said, was precisely what the Permanent Council was requesting from the Juridical Committee. He observed that each of these rights existed *per se.* He went on to add that there were those who had no family, some had no nationality; there might even be those who have no name or change their name. Identity, then, is the recognition of a person's individuality, and is a combination of registration, nationality and family. Dr. Vio Grossi also mentioned the international instruments –both global and regional- that could be invoked to support the assertion that the right to identity was an autonomous right. One of these is Article 6 of the Universal Declaration of Human Rights, which reads as follows: "Everyone has the right to recognition everywhere as a person before the law," without specifying what the expression 'person before the law' encompasses. Article 8 of the "Convention on the Rights of the Child" provides that every child has the right to preserve his or her identity. Therefore, Dr. Vio Grossi reasoned, there was a presumption that the right to identity was recognized, in general terms, in these provisions, irrespective of registration, name and family. This, Dr. Vio Grossi explained, was the first dimension: i.e., the right to identity exists separate and apart from these other rights. He therefore believed that the topic had to be confined to what distinguished this right from other rights, even though it tied in with other issues.

Dr. Antonio Fidel Pérez expressed the view that to the extent that the Rights of the Child Convention formed the textual basis for a generalized right to identity, the language of that provision provided no basis for a generalized right to identity. He observed that the right to identity "included" an enumeration of elements. Ordinary principles of treaty interpretation suggest that, while the right to identity contemplated by this treaty may include elements other than those enumerated, the list of un-enumerated elements must be of the same character as the list of enumerated elements.

Dr. Freddy Castillo Castellanos expressed the view that the Juridical Committee's response should be specific. The fact is that the region is facing a very serious social, political and cultural problem, because people are not even registered, they have no identity, and they are therefore excluded from society, cannot work, vote, or engage in activities conducive to their growth and development, such as education and exercise of their civic rights.

Drawing from the exchange of views among the members of the Committee, Dr. Mauricio Herdocia Sacasa summarized the consensus reached on 4 key issues: 1. – the Committee's opinion should focus on the nature and scope of the right to identity; 2. – the right to identity is a basic human right applicable *erga omnes,* and fits into the category of rights that the "American Convention on Human Rights" recognizes as not subject to derogation or suspension; 3. – it is an autonomous right recognized in international law; 4. – the right to identity has an instrumental value as it enables the exercise of other rights (civil, economic and cultural). He observed that the right to identity also included the right to a name, the right to legal personality, the right to nationality, the right to a family, to name just a few.

For her part, Dr. Ana Elizabeth Villalta Vizcarra recalled that in its case law, the Inter-American Court of Human Rights had recognized the right to identity as an autonomous right. She cited the case of the Serrano Cruz sisters.

Based on these discussions, the Juridical Committee had before it the document titled "Opinion on the scope of the right to identity" (CJI/doc.276/07 rev.1), prepared by Dr. Mauricio Herdocia Sacasa, who then gave a presentation on its contents.

With certain changes, revision 1 of the draft opinion was approved by a majority of the members present, with one dissenting vote. Dr. Pérez announced that he would present an explanation of his dissenting vote. On August 30, 2007, the Office of International Law sent the letter that the Chairman of the Inter-American Juridical Committee had prepared for the Chairman of the Permanent Council, to which was attached resolution CJI/RES.137 (LXXI-O/07), the aforementioned opinion and the explanation that Dr. Antonio Fidel Pérez presented of his dissenting vote on the resolution concerning the scope of the right to identity.

By resolution CJI/RES.137 (LXXI-O/07), "The scope of the right to identity", the Inter-American Juridical Committee decided to keep this topic on its agenda and to designate Drs. Mauricio Herdocia Sacasa and Hyacinth Evadne Lindsay as co-rapporteurs.

CJI/RES.137 (LXXI-O/07)

THE SCOPE OF THE RIGHT TO IDENTITY

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the note by which the Chair of the Permanent Council, Ambassador María del Luján Flores, dated March 15, 2007, requests that the Juridical Committee, based on article 100 of the OAS Charter, present an opinion concerning "the scope of the right to identity", taking into consideration the opinions expressed in the special session of the Council on the topic "Childhood, identity and citizenship";

NOTING that the General Assembly in its 37th regular session adopted resolution AG/RES. 2286 (XXXVII-O/07), "Inter-American Program for a Universal Civil Registry and the Right to Identity", by which it instructed the Permanent Council to create a working group on the topic, and take into consideration the report by the Permanent Council CP/doc. 4202/07 on the mentioned special session;

HAVING ALSO SEEN the document prepared by the Office of International Law ODI/doc.4/07 "Inter-American Program for a Universal Civil Registry and the Right to Identity", which provided substantive information to the Juridical Committee useful in complying with the mandate from the Permanent Council;

HAVING included in its agenda the topic "The scope of the right to identity" and designated rapporteur Dr. Mauricio Herdocia Sacasa, who presented a "Preliminary Draft Opinion" on the topic (CJI/doc.276/07);

HAVING MAINTAINED a broad exchange of opinions on the document at the present regular session, in light of the documents previously mentioned, and bearing in mind, among other international legal instruments, the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Protocol of San Salvador to said Convention, the Convention on the Rights of the Child, as well as the jurisprudence of the Inter-American Court of Human Rights and the opinions of the Inter-American Commission of Human Rights,

RESOLVES:

1. To thank the rapporteur Dr. Mauricio Herdocia Sacasa for his presentation of a "Draft Opinion", which has provided the Juridical Committee with a solid basis for the discussions.

2. To adopt document CJI/doc.276/07 rev.1, "Opinion adopted by the Inter-American Juridical Committee on the scope of the right to identity".

3. To forward said document with the present resolution to the OAS Permanent Council in fulfillment of the mandate assigned to the Inter-American Juridical Committee.

4. To keep the topic in its agenda under the title "The scope of the right to identity", with Drs. Mauricio Herdocia Sacasa and Hyacinth Evadne Lindsay as co-rapporteurs.

The present resolution was adopted at the session held on August 10, 2007 by the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

Dr. Antonio Fidel Pérez presented an explanation of dissenting vote (CJI/doc.285/07).

Annexes: CJI/doc.285/07 - Explanation of dissenting vote on the scope of the Right to identity resolution
(presented by Dr. Antonio Fidel Pérez)
CJI/doc.276/07 rev.1 - Opinion adopted by the Inter-American Juridical Committee on the scope of the right to identity

CJI/doc.285/07

**EXPLANATION OF DISSENTING VOTE ON
THE SCOPE OF THE RIGHT TO IDENTITY RESOLUTION**

(presented by Dr. Antonio Fidel Pérez)

I regret that I cannot join the majority of the Inter-American Juridical Committee (IAJC) in its response to the request by the Permanent Council for an opinion on the "scope of the right of identity in light of the exchange of opinions held during the special session of the Permanent Council on March 9, 2007." See CP/doc.4202/07 (12 April 2007). I dissent from the IAJC's conclusions for the following reasons.

First, the IAJC should decline to respond to this request, at least at this time. Article 106 of the OAS Charter provides that the Inter-American Commission shall have as its principal function "... to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters". It is clear, therefore, that the OAS organ with primary jurisdiction to serve as a consultative body to the political organs of the OAS, such as the Permanent Council, on legal questions relating to human rights is the Inter-American Commission on Human Rights (IACHR). Moreover, even if the IAJC has authority to address questions of this kind, it lacks the special expertise in the area of human rights possessed by the IACHR. At a minimum, the IAJC should consult first with the IACHR

to request both its concurrence to this intrusion into its jurisdiction and, assuming the IACHR does not object, its advice as to the parameters for the IAJC's own inquiry into the legal questions raised by the Permanent Council's request. As the interpreter of its own powers and place in the OAS system, the IAJC should take into account principles of international organization law, which provide for self-restraint in the exercise of its own powers, deference to coordinate organs, and prudent judgment as to the relative technical capacities of the various organs of the OAS. The governing principle of international organization law is the principle of "speciality" – as articulated by the International Court of Justice in its refusal to respond to the World Health Organization request for an advisory opinion regarding the legal consequences of the use or threat of use of nuclear weapons, because another organ of the United Nations (in that case, the General Assembly of the United Nations) was more competent to make such a request. See Legality of the Use of Nuclear Weapons in Armed Conflict, International Court of Justice (I.C.J.), General List, No. 93 (July 8, 1996), paras. 25-26. This principle is as applicable to the internal governance of the OAS as it is to the distribution of powers among the organs of the United Nations and, by parity of reasoning, would call for this request to be addressed to the organ in the Inter-American system with special responsibility for human rights questions, namely, the Inter-American Commission on Human Rights.

Second, even if the IAJC could reach the question posed by the Permanent Council for a legal analysis of the "scope" of the right of identity, the question has been posed in a manner that gives little guidance as to the precise object of the inquiry. A review of the exchange of opinions held during the special session of the Permanent Council does little to resolve this vagueness, since it does not identify the conventional or customary law bases the members of the Permanent Council believed might form the basis for such a right. A document subsequently prepared by the Executive Secretariat for Integral Development, entitled "Preliminary Thoughts on Universal Civil Registry and the Right of Identity", CP/CAJP-2482/07 (16 April 2007) [the "Preliminary Thoughts Document"], does identify certain conventional sources for a possible right to identity, but it does not provide an analysis of state practice. The IAJC has not itself conducted a review of state practice, either as a matter of treaty implementation or separately as a potential source of emerging customary international law. In short, the conclusions asserted in the IAJC's resolution require far more analysis than has been presented.

Third, the IAJC's analysis of the so-called right to identity also reaches questions that are unrelated to the inquiry, such as the characterization of this "right" as nonderogable *jus cogens* norm that is also of an *erga omnes* character. Even if the "nature" of the right to identity were part of the question posed by the Permanent Council, the application of the much debated theories of *jus cogens* and *erga omnes* to an emerging, generalized right to identity would hardly seem to be warranted by the question posed, which merely relates to the "scope" of the right. The criteria for employing the *jus cogens* and *erga omnes* characterizations, moreover, have been regarded, even by those advocating the use of those concepts, to impose a demanding set of requirements, which have, thus far, been satisfied only by the most extreme violations of human rights. To say that an emerging generalized right to identity may not be superseded by later treaty or custom, i.e., *jus cogens*, and interposable by any third state in relation to conduct and persons not within its jurisdiction or control, i.e., *erga omnes*, is, to say the least, premature.

Fourth, the Inter-American Juridical Committee misinterprets existing conventional law and makes no compelling argument that a generalized right to identity exists as a matter of customary international law. The widespread adoption of treaties using the term "right to identity" address primarily specific elements that are said to be comprised in this generalized right. To the extent that Article 8 of the Rights of the Child Convention forms the textual basis for a generalized right to identity, as suggested in the "Preliminary Thoughts" document and by the IAJC, the language of that provision provides no basis for a generalized right to identity. Rather, the language of Article 7 provides that a "the child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents," and Article 8 provides that a child's right to identity "... including nationality, name and family relations as recognized by law …." Ordinary principles of treaty interpretation suggest that, while the right to identity contemplated by this treaty may include elements other than those enumerated, the list of un-enumerated elements must be of the same character as the list of enumerated elements. Accordingly, the enumeration of "nationality, name and family relations" – which clearly operate as legal predicates for the

exercise of civil, political and economic rights, particularly in civil law systems – suggests that the right to identity is, if anything, functional in character and does not have any additional substantive content. Certainly, reliance on *the* Rights of the Child Convention to draw the conclusions contained in the IAJC majority's opinion would require a much more exhaustive review of the treaty materials than has been conducted thus far.

Fifth, the IAJC's response does not need to address the question of the existence of a generalized right to identity in order to provide the OAS Member States with adequate guidance in implementing the critical aspects of any such right to identity in a way that reinforces the enjoyment of individual human rights in the Member States. In the exercise of whatever discretion is available to the IAJC in determining how to respond to the Permanent Council's request, even if it were proper to respond at all, the IAJC should focus instead on the actual scope of the particular rights comprised in the so-called right to identity because these are clearly the elements given most attention in the actual treaties, of greatest concern to the Permanent Council, and least likely to do harm to the development of Inter-American human rights law.

At first glance, a review of the actual treaties makes clear that it is the specific elements of a right to identity that have been the object of attention within the context of the Inter-American system. Indeed, it is noteworthy that the "right to recognition" in Article 6 of the Universal Declaration of Human Rights, the rights of all persons to legal recognition and the rights of children to registration and to acquire nationality under Articles 16 and 24 of the Covenant on Civil and Political Rights, as well as the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights, all contain obligations that could form the basis of special requirements governing the Inter-American system alone. In that connection, upon further analysis, I might find it plausible to conclude that the specific elements identified in the Rights of the Child Convention, together with provisions in the other global and regional instruments identified in the "Preliminary Thoughts" document, could form the basis of customary international law binding on all OAS States in respect of the duty to register all persons born within a state's jurisdiction, afford an opportunity to receive a name and acquire a nationality in the country of their birth (particularly when they would otherwise be stateless), and take any other measures necessary within the context of their legal systems to respect the legal personality of all persons subject to their jurisdiction and control, including adults whose rights in these areas have not previously been respected by their governments.

Moreover, given the underlying purpose of the Permanent Council's inquiry, it is precisely a clear statement concerning the scope of these rights, rather than an analysis of the possible existence of a generalized right to identity, that will enable Member States to understand fully their duties, clarify the circumstances in which their conduct will justly be held to be in violation of their duties, and thereby afford individuals with unimpeachable grounds for asserting their rights, both domestically and internationally. Nothing in the request by the Permanent Council requires the IAJC to go beyond the question of the existence of the specific obligations that clarify the generally-accepted content of the right to identity.

Finally, if it chooses to open a Pandora's Box of legal questions, it seems to me that the IAJC would be obligated to provide a more complete analysis and resolve the doubts its ambitious conclusions will engender. It should be noted that the ambitious conclusions offered by the IAJC fail to make any effort to take account of possibly important limitations or qualifications in the application of a generalized right to identity. To give only one example, the right to know the identity of one's parents contemplated in Article 7 of the Rights of the Child Convention as part of a generalized right to identity might go well beyond the circumstances contemplated by that treaty, eviscerating legitimate rights to privacy that might be incident to both domestic and international adoptions that otherwise satisfy the internationally-recognized rights of the child. If anything, the IAJC's overbroad analysis will make it more likely that any States that doubt the existence of the broader, generalized right to identity and are concerned by its potentially unforeseeable applications, will resist becoming parties to the treaties the IAJC believes form the basis for the existence of such a right, which will certainly reduce the likelihood of universal acceptance of these instruments and may even give rise to resistance that could inject doubt about the more limited elements in the right to identity that are clearly provided for in these treaties.

In sum, to come full circle, I believe that the nature of the response given by the IAJC to Permanent Council's question provides further evidence that the better part of valor would

have been for the Inter-American Juridical Committee to refer this question to those with greater institutional and technical competence on human rights issues. National courts may have the institutional capacity and technical competence to articulate and subsequently apply generalized norms, such as a generalized right of identity (although the costs to democracy of allocating this quasi-legislative function to courts is often substantial and unacceptable in some legal systems). Certainly international courts are less likely to exhibit the requisite institutional capacity and technical competence. While similar questions might even be raised about the Inter-American Commission on Human Rights, at least it is the body specially created within the OAS system for this purpose; a body such as the IAJC would seem to be unquestionably inappropriate for the purpose of articulating and applying generalized norms in international human rights. For the reasons stated above, I respectfully decline to join in the IAJC's effort to do so.

CJI/doc.276/07 rev.1

OPINION ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE SCOPE OF THE RIGHT TO IDENTITY

I. ORIGIN AND CONTENT OF THE REQUEST FOR OPINION

1. In a note on March 15, 2007, the current Chair of the Permanent Council, Ambassador María del Luján Flores, sent a message to the Chairman of the Inter-American Juridical Committee, Jean-Paul Hubert, requesting the Committee for an opinion on "the scope of right to identity" in the light of an exchange of opinions during an special session of the Permanent Council on the topic "Childhood, identity and citizenship", this request being based on the provision in article 100 of the OAS Charter. In a note on March 26, 2007, the Chairman of the Committee answered the aforementioned note indicating that he would immediately inform the members about the request and propose that the topic of the right to identity be added to the agenda of the next regular session on July 30 to be held in the Rio de Janeiro headquarters. The corresponding material was requested, received and then distributed among the members of the Committee, including the topic "The scope of Right to Identity" in the agenda.

2. Resolution AG/RES. 2286 (XXXVII-O/07) Inter-American Program for a Universal Civil Registry and "The Right to Identity", dated June 5, 2007, the following preamble was considered: "TAKING NOTE of the special meeting of the Permanent Council held on March 9, 2007, on 'childhood, the right of identity, and citizenship', and the report thereon (CP/doc.4202/07); and recalling that, at this stage, it was agreed to request of the Inter-American Juridical Committee (IAJC) an opinion on the scope of the right of identity".

II. POWERS OF THE INTER-AMERICAN JURIDICAL COMMITTEE

3. Pursuant to article 100 of the Charter of the Organization of American States, the Committee will undertake the studies and preparatory work entrusted to it, among others by the Councils of the Organization, at this request of the Permanent Council of the Organization in its full powers. On this matter, in response to the written request the Committee will proceed to issue an opinion on the topic, taking into consideration the powers provided in both the Charter and Statutes of the Inter-American Juridical Committee, considering its role as an advisory body of the Organization, the technical autonomy granted it, the non-binding nature of its studies and independent service that its members provide that, in their collegiate role as a Committee, represent the overall membership of the Organization.

III. SPECIFICATION OF TOPIC

4. The Inter-American Juridical Committee was asked to give its opinion on the scope of right to identity. The Juridical Committee understands that the term "scope" means precisely to be able to specify, demarcate and examine the range of action of the topic of the right to identity and define – as far as possible – the extent of its peculiar contents , what are its most important legal consequences and implications and its relations with other international rights and obligations and those corresponding to the State's internal legislation. It must therefore be agreed, as a starting point, to the legal nature of the right to identity, described as a "right" both by the actual request of the Permanent Council and by the General Assembly.

5. The Juridical Committee examines the implications of the right to identity from the overall perspective of the human being, fully considering as far as possible the transcending topics and discussions in the Permanent Council relating to “Childhood, right to identify and citizenship”, contained in the current opinion.

IV. THE LEGAL SOURCES OF THE OPINION

6. Although it is true that identity has different axiological, political, psychological, socio-cultural and sociological components, the Juridical Committee will restrict itself to examining the implications of the “right”, that is, restricting it as far as possible to the legal aspects of the right, without detriment to other consequences that may derive from the broad concept of identity or of its later development. On doing so, the Juridical Committee bears in mind that the fact that a topic has different dimensions does not imply that the Juridical Committee cannot address it exclusively from the legal perspective in its charge, dispensing other elements that do not have a necessary relation with the right.

7. Given the general and global nature of the request for an opinion and bearing in mind the discussions in the Permanent Council, the Juridical Committee, on considering the sources, will not be restricted to the inter-American sphere or to the degree of legal links of the States with the treaties[1], but will consider as simple and direct a manner as possible – the existing jurisprudence[2], the international common law and the regional and universal principal instruments of conventions, including the Convention of the Rights of the Child, especially relevant to this opinion.

8. Bearing in mind the large number and variety of instruments, the Juridical Committee will only refer expressly to those regulations that more clearly show the rationale of the Juridical Committee in relation to the nature and scopes of the right, but it does not mean that other relevant sources will not be considered[3]. On this matter, it is worth considering, although without being restricted to, the following regulations of special relevance in the American Convention on Human Rights: article 1 (Obligation to Respect Rights); article 2 (Domestic Legal Effects); article 3 (Right to Juridical Personality); article 17 (Rights of the Family); article 18 (Right to a Name); article 19 (Rights of the Child); article 20 (Right to Nationality); article 24 (Right to Equal Protection); article 25 (Right to Juridical Protection) and article 27 (Suspension of Guarantees).

9. Considering that the right to identity is indissolubly linked to the individual as such and consequently to the recognition of its juridical personality, in all circumstances, as well as to holding rights and obligations inherent therein, it is important to consider, since the American Declaration of the Rights and Duties of Man, the provision in article XVII that “every person has the right to be recognized everywhere as a person having rights and obligations...”. Similar provisions were provided in the Universal Declaration of Human Rights (article 6), American Convention on Human Rights (article 3) and International Pact of Civil and Political Rights (article 16).

10. In turn, articles 7 and 8 of the Convention on the Rights of the Child, given the direct references to the right to identity, are fully transcribed as follows:

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

[1] There are 28 American States parties to the Convention on the Rights of the Child and 24 States that are not parties of the American Convention on Human Rights.

[2] For example: the Advisory Opinion OC-17/2002, Juridical Condition and Human Rights of the Child, dated August 28, 2002, requested by the Inter-American Commission of Human Rights.

[3] See for example: Universal Declaration of Human Rights, 1948, arts.15 and 16; American Declaration of the Rights and Duties of Man, 1948, arts. VI, VII, VIII and XIX; Convention on the Reduction Statelessness, 1961, art. 1; International Covenant on Civil and Political Rights, 1966, art. 24; Convention on the Elimination of all forms of Discrimination against Women, 1979, art. 9.; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, 1990, art. 29, and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, and so on.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

11. The following is clearly seen from the above transcribed texts:

11.1 That the Convention on the Rights of the Child expressly provides a right of the child to preserve its identity, which is equal to the right that obviously accompanies the person throughout his or her life.

11.2 That the American Convention on Human Rights, although it does not establish the right to identity expressly under this name, it dos include, as mentioned earlier, the right to a name, the right to nationality and the rights to family protection. It also includes the rights of the child.

11.3 Moreover, it is clear that the American Convention not only obliges the recognition and respect for such rights, but also imposes the commitment to adopt legislative and other measures that were required to guarantee and effect such rights and liberties, which evidently implies the right to register the child immediately after its birth and the existence of an appropriate accessible, effective and secure registration and identity system within the framework of the domestic laws.

V. NATURE OF THE RIGHT TO IDENTITY

12. The right to identity is consubstantial to the attributes and human dignity. Consequently it is an enforceable basic human right *erga omnes* as an expression of a collective interest of the overall international community that does not admit derogation or suspension in cases provided in the American Convention on Human Rights.

13. Name, nationality, family relations and registration do not give rise to the right to identify, a right that pre-exists as an indissoluble part of the original dignity of people, subject and fully entitled to basic rights and liberties, whose exercise the States are obliged to guarantee.

VI. COMMENTS

14. Considering how important it is for the opinion to be issued by the Juridical Committee to outline the field covering the right to identity, it is considered convenient to refer to apparently basic questions:

14.1 The right to identity cannot be mistaken for only one of its elements. In this matter such a right cannot be reduced to any other right included in it. Of course the name, for example, is part of the right to identity, but not the only one.

14.2 Nor can the right to identity be reduced to the mere sum of certain rights included in the Convention on the Right of the Child, therefore many elements may be considered, for example, by internal legislation, as required in this case to give expression to the particular and unique aspects and characteristics of each State and its populations, as well as to effect the rights to whoever is juridically bound and obligated.

14.3 The text of the Convention on the Rights of the Child does not necessarily imply that the elements mentioned therein all correspond to the right to identity. The phrase “including nationality, name and family relations …” expressly mentions certain rights that must be included, but do not necessarily close the circle of the universe of rights, or much less be associated and closely related to other essential rights, such as the right to juridical personality and equality. The right of the child to be registered immediately after birth is an inseparable part of the rights expressly stated in the Convention on the Rights of the Child.

14.4 Exercising the right to identify cannot be dissociated from registration and an effective national system, accessible and universal, that enables people to materially provide documents that contain the data relating to their identity, bearing in mind particularly that the right to identity is both a right in itself and an essential right as a means to exercise other cultural, economic, political and social rights. Consequences of the Right to identity are the right to registration after birth and a duty of the State to take the necessary measures for this purpose. Registering the birth is a primary instrument and starting point to exercise the juridical personality before the State and individuals, and acting in equal conditions before the law.

VII. IMPLICATIONS AND SCOPE

15. The Juridical Committee considers that the right to identity is, among its most relevant implications and scope, to constitute an autonomous right that is based on the regulations of international law and those that derive from the actual cultural elements considered in the domestic legal systems of the States, in order therefore to satisfy the specificity of the individual, with his or her rights that are unique, singular and identifiable.

16. The right to identity, in turn, has an instrumental value for exercising certain civil, cultural, economic, political and social rights so that they fully prevail to reinforce democracy and the exercise of basic rights and liberties. Consequently, it is a means to exercise rights in a democratic society, committed to the effective practice of citizenship and the values of representative democracy, thereby facilitating social inclusion, citizen participation and equal opportunities.

17. Depriving the right to identity or legal deficiencies in domestic legislation for its effective practice puts people in situations that hinder or prevent the enjoyment or access to basic rights, thus creating different treatments and opportunities that affect the principles of equality before the law and of non-discrimination[4] and obstructing everyone's right that to fully recognize their juridical personality.

VIII. OPINION

18. Based on the above contributions and discussions, the Inter-American Juridical Committee gives the following Opinion:

18.1 The right to identity can be classified as a human right of such a fundamental and basic character and content that it can be enforced erga omnes and does not admit derogation or suspension.

18.2 In its actual practice it is subject to overall legislative measures and other internal legal systems of the States, but within the restraints imposed by international law.

18.3 Its implications are reflected as follows:

18.3.1 It is an autonomous right[5], whose existence is not subordinate to any other right, but is a right in itself.

18.3.2 It is a right that, in addition to having its own value and content, is instrumental to other rights for their full achievement and practice, and

18.3.3 The right to identity has a core of clearly identifiable elements that include the right to a name, the right to nationality and the right to family relations, all of which are accompanied by the State's obligation to recognize and guarantee them, in conjunction with those other rights deriving from national laws or the obligations contracted as a result of the relevant international instruments. This essence is necessarily accompanied by the right to register the child after birth and the corresponding issue and delivery of the corresponding identity document.

18.3.4 The Juridical Committee points out, in the framework of this opinion, that although it is true that the right to identity implies other human rights, none of them loses any of their specific and special elements.

18.3.5 The Juridical Committee emphasizes the importance of especially assuring the child's right to identity, reducing therefore its vulnerability in possible abuses and also acting under the principles of "special protection" and "supreme interest" of the child[6].

18.3.6 An accessible, efficient, reliable and universal registration is a basic guarantee to consolidate the right to identity.

---

[4] The Inter-American Court of Human Rights stated that in the current stage of developing international law, the fundamental principle of equality and non-discrimination is now in the domain of *jus cogens*. Advisory Opinion – OC-18/2003. Juridical condition and rights of migrants without identity papers.

[5] In turn, the Inter-American Commission on Human Rights also alluded to the right to identity. Thus, in the Case of the Serrano Cruz Sisters v. El Salvador (2004), the Commission maintained that the right to identity "was recognized by the jurisprudence and doctrine both as an autonomous right and an expression of other rights or as an element constituting them", and that it "is closely associated with the right to recognition of the juridical personality, the right to have a name, nationality, family and to maintain family relations". Inter-American Court of Human Rights. Case of the Serrano Cruz Sisters v. El Salvador – Decision dated March 1, 2005.

[6] Child must be understood as boy, girl and adolescent.

2. International Criminal Court

	Resolution
CJI/RES.125 (LXX-O/07)	Promotion of the International Criminal Court
	Document
CJI/doc.256/07 rev.1	Promotion of the International Criminal Court (presented by Dr. Mauricio Herdocia Sacasa)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Herdocia Sacasa presented report CJI/doc.256/07 rev.1, "Promotion of the International Criminal Court", which updates his previous report. His overview of the report offered a detailed view of how it is organized and what it contains. In conclusion he underscored the significance of responses to the questionnaire as they provide information on how countries have adopted norms on cooperation with the ICC and how they have implemented the Statute. He emphasized that countries that have not answered the questionnaire should be urged to do so, and that countries that have enacted new law or modified existing law should submit updated information.

The rapporteur ended his presentation by recommending that Member States and the OAS increase cooperation with the and be more active in discussion forums and the General Assembly of States Parties of the Court.

The Inter-American Juridical Committee approved resolution CJI/RES.125 (LXX-O/07), "Promotion of the International Criminal Court", which highlights the preliminary recommendations put forward in the report. The resolution also states the IAJCI's decision to submit the report to the Permanent Council, and reiterates the request that all Member States that have not yet responded to the questionnaire do so, and that States Parties to the "Statute of the International Criminal Court" having passed enacting legislation submit the pertinent information to the Inter-American Juridical Committee. The resolution once again asks States that have passed legislation incorporating, modifying or adding criminal offenses defined by the Rome Statute to submit up-to-date information to the Inter-American Juridical Committee. Lastly, the resolution requests the rapporteur to use all new information received from States to draft a report outlining progress made in this area, bringing the situation up to date, and if appropriate, further developing the ideas and preliminary recommendations put forward in earlier reports.

On 21 March 2007, the Office of International Law sent the Permanent Council the Inter-American Juridical Committee resolution along with the rapporteur's report, which were classified as document CP/doc.4194/07, "Note from the Inter-American Juridical Committee transmitting resolution CJI/RES.125 (LXX-O/07), Promotion of the International Criminal Court*",* attaching report CJI/doc.256/07 rev.1.

At its 37th regular session (Panama, June 2007), the OAS General Assembly approved resolution AG/RES. 2279 (XXXVII-O/07), "Promotion of the International Criminal Court", wherein it requested the Inter-American Juridical Committee, on the basis of the information received from and updated by the Member States, the recommendations contained in report CP/doc.4194/07, and existing cooperation law, to prepare a model law on cooperation between States and the International Criminal Court, taking into account the hemisphere's different legal systems, and to submit it to the General Assembly at its 38th regular session.

During the Inter-American Juridical Committee's 71st session (Rio de Janeiro, August 2007), the General Secretariat was asked to compile the existing laws in the hemisphere so that the Committee might present a draft model law that is responsive to civil law and common law countries.

CJI/RES.125 (LXX-O/07)

PROMOTION OF THE INTERNATIONAL CRIMINAL COURT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that the General Assembly of the Organization of American States, through resolution AG/RES.2072 (XXXV-O/05), "Promotion of the International Criminal Cour"t, resolved: "To request the Inter-American 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";

BEARING IN MIND that during its 67th regular session in August 2005, the Inter-American Juridical Committee approved the inclusion in its agenda of the subject "Promotion of the International Criminal Court" and that the final document of the "Questionnaire on the Criminal Court" (CJI/doc.198/05 rev.1) was approved by resolution CJI/RES.98 (LXVII-O/05) in attention to the mandate issued by the General Assembly;

TAKING INTO ACCOUNT that the Questionnaire was answered by 17 countries, and that based on this information, the rapporteur presented document CJI/doc.211/06 corr.1 of March 27, 2006, which was approved by resolution CJI/RES.105 (LXVIII-O/06) of March 28, 2006;

WHEREAS through resolution AG/RES.2218 (XXXVI-O/06), "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee", of June 6, 2006, note was taken of the Report of the IAJC on the topic "International Criminal Court";

CONSIDERING that the OAS General Assembly, through resolution AG/RES. 2176 (XXXVI-O/06), "Promotion of the International Criminal Court", resolved: "To request the Inter-American Juridical Committee to prepare, on the basis of the results of the report presented (CP/doc.4111/06), a document of recommendations to the OAS Member States on how to strengthen cooperation with the International Criminal Court, as well as on progress made in that regard, and to present it to the Permanent Council, so that it may in turn submit it to the General Assembly of the Organization at its thirty-seventh regular session";

CONSIDERING the report presented by the rapporteur CJI/doc.256/07 rev.1, "Promotion of the Criminal Court", which contemplates important considerations and preliminary recommendations on the topic,

RESOLVES:

1. To thank doctor Mauricio Herdocia Sacasa for the presentation of document CJI/doc.256/07 rev.1 of March 7, 2007, titled "Promotion of the International Criminal Court".

2. To receive such report and highlight the work carried out by the rapporteur in the various scopes of cooperation with the International Criminal Court regarding the investigation and prosecution of crimes falling under its competence.

3. To emphasize, in particular, the part of report CJI/doc.256/07 rev.1 referring to the preliminary recommendations prepared by the rapporteur based on the information received.

4. To forward such report to the Permanent Council so that in turn it will transmit it to the thirty-seventh regular session of the General Assembly.

5. To reiterate the request to the Members States of the OAS that have not answered yet the questionnaire prepared by the Juridical Committee, to complete said questionnaire, and to those States Parties to the Statute of the International Criminal Court that undertook the law approval process to implement parts IX and X of the Statute, to send such information to the Inter-American Juridical Committee.

6. Also, to reiterate the request to the States that completed the law approval process of including, modifying or adding the types of crime stated in the Statute of Rome, to provide the Inter-American Juridical Committee with that updated information.

7. To request the rapporteur on this topic, Dr. Mauricio Herdocia Sacasa, that, based on the new information received by the States, prepare a report that includes the progress and update, and as the case may be, develop the preliminary recommendations therein contained.

This resolution was adopted unanimously at the session held on March 6, 2007, in the presence of the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, and Jean-Paul Hubert.

CJI/doc.256/07 rev.1

PROMOTION OF THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Mauricio Herdocia Sacasa)

I. MANDATE AND ORIGIN OF THE REPORT

The General Assembly of the Organization of American States, through resolution AG/RES. 2072 (XXXV-O/05), "Promotion of the International Criminal Court", of June 7, 2005[1], resolved:

> 6. To request the Inter-American 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.

During its 67th regular session in August 2005, the Inter-American Juridical Committee approved the inclusion in its agenda of the subject "Promotion of the International Criminal Court".

The final document of the Questionnaire on the International Criminal Court is CJI/doc.198/05 rev.1, approved by resolution CJI/RES.98 (LXVII-O/05), in accordance with the mandate issued by the General Assembly. This Questionnaire covered both States Parties and those that are not party of the Rome Statute.

The Questionnaire was answered by 17 countries[2], 11 of which are Parties to the Rome Statute and 6 are not. Based on this information, the rapporteur presented document CJI/doc.211/06 of March 27, 2006, which was approved by resolution CJI/RES.105 (LXVIII-O/06) of March 28, 2006. The following was resolved in this resolution:

> 3. To request the Member States of the OAS through the General Secretariat that have not yet answered the questionnaire prepared by the Inter-American Juridical Committee to complete said questionnaire, and to those States Parties to the Statute of the International Criminal Court that undertook the law approval process to implement parts IX and X of the Statute, to send such information to the Inter-American Juridical Committee.
>
> 4. Also to request the States that completed the law approval process of including, modifying or adding the types of crime stated in the Rome Statute, to provide the Inter-American Juridical Committee with that updated information.
>
> 6. To keep on their agenda among the topics under study the subject of the "Promotion of the International Criminal Court", and to request the rapporteur of the topic, Dr. Mauricio Herdocia Sacasa, as new information is received by the OAS Member States in relation to points 3, 4 and 5 herein, to present an updated report at the next regular session of the Inter-American Juridical Committee.

Through resolution AG/RES. 2218 (XXXVI-O/06), Observations and Recommendations to the Annual Report of the Inter-American Juridical Committee, of June 6, 2006, note was taken with great satisfaction of the Report of the IAJC on the topic "International Criminal Court" (CJI/doc.211/06) which was sent in due time to the Permanent Council in compliance with resolution AG/RES. 2072 (XXXV-O/05), which in turn will present

[1] The United States of America made a reservation that expresses, among other issues that "…will continue to firmly defend the principle of responsibility for war crimes, genocide and crimes against humanity, but cannot endorse the International Criminal Court because it considers that it has serious deficiencies …¨

[2] Canada, Argentina, Ecuador, Bolivia, Colombia, Mexico, Uruguay, Dominican Republic, Costa Rica, Brazil, Paraguay, Surinam, El Salvador, Nicaragua, Chile, Guatemala and the United States of America.

it at the Thirty-Sixth Regular Session of the General Assembly with a request to continue addressing the topic.

In the same manner, on June 6, 2006, the General Assembly of the OAS, through resolution AG/RES. 2176 (XXXVI-O/06), Promotion of the International Criminal Court[3], resolved:

> 8. To request the Inter-American Juridical Committee to prepare, on the basis of the results of the report presented (CP/doc.4111/06), a document of recommendations to the OAS Member States on how to strengthen cooperation with the International Criminal Court, as well as on progress made in that regard, and to present it to the Permanent Council, so that it may in turn submit it to the General Assembly of the Organization at its thirty-seventh regular session.

II. GENERAL STATUS OF THE ROME STATUTE

The Rome Statute that establishes the International Criminal Court came into force on July 1st, 2002. It is the international judicial court that complements the efforts of the national jurisdictions to prosecute those responsible for crimes such as genocide, crimes against humanity and war crimes.

The Statute of the Court in its "Part IX, International Cooperation and Judicial Assistance", and "Part X, Enforcement", contemplates several measures aimed at that States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court (art. 86), and ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part (art. 88).

As of January 2007, there are 104[4] States Parties to the Rome Statute; this number increased by four States since rapporteur's report CJI/doc.211/06 of March 27, 2006. Of the 139 States that signed the Rome Statute, 27 belong to the Organization of American States (OAS).

The Agreement on Privileges and Immunities of the International Criminal Court (APIC) has been ratified or accepted by 48 countries in the world.

III. UPDATE TO THE RAPPORTEUR'S REPORT ON THE INTER-AMERICAN SYSTEM

After Rapporteur's report CJI/doc.211/06 of March 27, 2006, only the Permanent Mission of the Eastern Republic of Uruguay before the Organization of American States has presented information. It is an update of the material previously sent through note No. 010/06 of January 12, 2006. The new note includes copy of Law No. 18.026, Genocide, Crimes against Humanity, War Crimes and Cooperation with the International Criminal Court enacted on September 25, 2006, as well as copy of Law No. 18.013 enacted on September 11, 2006, approving the Agreement on Privileges and Immunities of the International Criminal Court.

In the same manner, in conformity with the contents of the referred Rapporteur's Report, Argentina -one of the countries that answered the questionnaire- has made progress in the approval of a Law for the Implementation of the Rome Statute of the International Criminal Court, according to publication of the Official Gazette of January 9, 2007.

According to document OEA/Sec.Gral. ODI/doc.02/07 of February 9, 2007, Peru has put into effect procedures that establish methods for cooperation and delivery.

Trinidad and Tobago on its part emitted the law International Criminal Court Act 2006.[5]

It should be pointed out as a significant update element the results of the work session of the Committee on Juridical and Political Affairs, with the support of the Office of International Law of the OAS, held at the headquarters of the Organization on February 2, 2007, which will be described below.

For the preparation of this report, the rapporteur has resorted to his previous report according to the mandate that he received by the General Assembly, to the information directly provided by the Governments, to the report derived from the meeting on February 2, 2007, and to the interventions carried out therein. Likewise, he resorted to the information

[3] With reserve of the United States of America.
[4] http://www.icc-cpi.int/asp/statesparties.html#S
[5] Legal Supplemental Part A to the Trinidad and Tobago Gazette, vol. 45, no. 32, 23rd. February, 2006.

contained on specialized web pages published by organizations devoted to the topic of the International Criminal Court.

It should be noted that the number of countries of the Inter-American system who already ratified the Rome Statute increased by one, making a total of 23 States Parties. St. Kitts and Nevis adhered to the Rome Statute on August 22, 2006, and the number of countries who have not ratified yet the Rome Statute is now 12.

The 23 countries of the Inter-American system that already ratified the Rome Statute are:

Antigua and Barbuda (June 18, 2001), **Argentina** (February 8, 2001), **Barbados** (December 10, 2002), **Belize** (April 5, 2000), **Bolivia** (June 27, 2002), **Brazil** (June 14, 2002), **Canada** (July 7, 2002), **Colombia** (August 5, 2002), **Costa Rica** (June 7, 2001), **Dominica** (February 12, 2001), **Dominican Republic** (May 12, 2005) **Ecuador** (February 5, 2002), **Guyana** (September 24, 2004), **Honduras** (July 1, 2002), **Mexico** (October 28, 2005), **Panama** (March 21, 2002), **Paraguay** (May 14, 2001), **Peru** (November 10, 2001), **Saint Kitts and Nevis** (August 22, 2006) **St. Vincent and The Grenadines** (December 3, 2002), **Trinidad and Tobago** (April 6, 1999), **Uruguay** (June 28, 2002), and **Venezuela** (June 7, 2000).

The 12 countries of the Inter-American System that have not ratified the Rome Statute are: **Bahamas, Chile, Cuba, Haiti, Jamaica, St. Lucia, United States of America, Grenade, Guatemala, Nicaragua, El Salvador, and Surinam.**

The Agreement on Privileges and Immunities of the International Criminal Court (APIC) has been ratified by 10 countries of the Inter-American System. These are[6]: **Argentina** (February 1, 2007), **Belize** (September 14, 2005), **Bolivia** (January 20, 2006), **Canada** (June 22, 2004), **Ecuador** (April 19, 2006), **Guyana** (November 16, 2005), **Panama** (August 16, 2004), **Paraguay** (July 19, 2005), **Trinidad and Tobago** (February 6, 2003), **Uruguay** (November 1, 2006). With regard to report CJI/doc.211/06, there are four additional countries that have ratified or accepted it: **Bolivia**, **Argentina, Uruguay and Ecuador.**

There are 7 countries that have not ratified but already signed the APIC. These are: **Bahamas** (June 30, 2004), **Brazil** (May 17, 2004), **Colombia** (December 18, 2003), **Costa Rica** (September 16, 2002), **Jamaica** (June 30, 2004), **Peru** (September 10, 2002), and **Venezuela** (July 16, 2003).

IV. CONTENT OF IAJC RAPPORTEUR'S REPORT CJI/doc.211/06

Given that resolution AG/RES. 2176 (XXXVI-O/06) requested that the results of the report presented by the Inter-American Juridical Committee serve as the basis for the preparation of a document of recommendations on the way to strengthen the cooperation with the Court and record the progress made, the Rapporteur has considered the relevance of making a general summary of the contents of document CJI/doc.211/06.

Such report addressed in first place, the general status of the Rome Statute with respect to the Inter-American System countries, emphasizing the items that may become conflictual in the face of a ratification or acceptance of the same in their relation with the national legislation of the countries. Apparently, the more problematic items are: Ne Bis In Idem; Irrelevance of Official Capacity; Duties and Powers of the Prosecutor with Respect to Investigations; Arrest Proceedings and Surrender of Persons to the Court; Life Imprisonment; and Pardons and Amnesties.

The main cooperation measures contained in the Rome Statute in its Parts IX and X regarding cooperation were mentioned.

Reference was made also to other reports issued prior to the mandate of the Inter-American Juridical Committee such as the report of the Inter-American Commission on Human Rights (OEA/Ser.L/V/II.102/doc.6 rev., of April 16, 1999) and its resolution No. 1/03 of October 24, 2003, on Prosecution of International Crimes, documents which urge the countries to adopt measures in favor of the application of the Statute.

The final report of the Inter-American Juridical Committee, was mentioned as well: CJI/doc.199/05 rev.1, of August 15, 2005, which addressed the topic "Legal Aspects of Compliance within the States with the Decisions of International Courts or Tribunals or other

[6] http://www.iccnow.org/documents/CICC_APIClist_current_sp.pdf

International Organs with Jurisdictional Functions", which included a series of responses provided by the Statutes relative to the topic of the International Criminal Court.

Also, the report of the Work Meeting on the International Criminal Court (CP/CAJP-2327/06 corr.1) held at the OAS headquarters on February 3, 2006, where a series of cooperation measures for consideration of the States are described, was also addressed, being among them:

- The exchange of information and documents between the States and the Court on the crimes falling under their jurisdiction.
- Logistical support such as transportation and lodging of investigators, witnesses or even victims of the cases presented to the Court.
- Possibility of providing detention facilities for persons convicted of international crime.
- Training to officials so that they manage ICC procedures accordingly, and support the participation of the civil society in the process for the promotion and consolidation of the ICC.
- Interruption of the amnesty law remedy for these crimes since they facilitate impunity and affect the policies of the Rome Statute and Court activities.

In the Conclusions of the IAJC rapporteur's report, the strong interest by the Member States of the Organization in the theme of cooperation with the International Criminal Court was emphasized, which is fully demonstrated by the fact the 17 States initially answered the IAJC questionnaire in a relatively short period of time, which showed certain tendencies and some valuable signs that are very useful for analyzing, albeit in general terms, the measuring of authorization of such national laws for cooperation with the Court, and arrive to some general considerations.

It was possible to see that most States have included in their legislation the crime of genocide and a smaller number of States have included war crimes. Crimes against humanity are the lowest number of provisions in the national legislation of the States that answered the questionnaire, which seems to indicate a more complex problem in the process of adapting the legislations in relation to the latter States.

It was indicated that in the case of war crimes and crimes against humanity, some of the definitions given by the States are often scattered in their laws and not necessarily cover the wide range of the Rome Statute.

It was emphasized that a large part of the States Parties to the Statute that answered the questionnaire said that they have regulations to implement the cooperation with the Court, since they have been specifically devised or because they consider that the prevailing law always permits them to cooperate with the Court. Emphasis was given to the fact that for some States Parties to the Statute, the lack of specific laws did not necessarily seem to prevent their capacity to attend the Court's requests for cooperation under the already existing legal system, while they undertake the corresponding reforms.

In the case of the States Parties to the Statute that did not yet have a specially created law to implement cooperation with the Court, they all said that they have processes underway to form the corresponding legislation at different states of progress.

To settle the problems that the Statute may cause relative to the Constitution and the internal legal framework, recourse was made to certain mechanisms worth considering for the case of the States that are not yet party to the Statute:

a) Global constitutional reform;
b) Report, declaration or opinion of the control agencies of constitutionality,
c) Studies and inquiries that permitted direct ratification or adhesion.

It was also suggested to request the OAS Member States to consider the possibility of completing the questionnaire prepared by the Inter-American Juridical Committee in the case of the States that have not answered it yet. Likewise, to the States Parties to the Statute that have completed the process of approving laws for implementation of Parts IX and X of the Statute, to provide the Inter-American Juridical Committee with such updated information.

Also suggested was that all States that have completed the process of approving laws, include, modify or add the types of crime stated in the Rome Statute, to provide the Inter-American Juridical Committee with that updated information.

It was mentioned that it would be advisable that the Inter-American Juridical Committee keep on its agenda, among the topics under consideration, the subject relating to the "Promotion of the International Criminal Court" and that, with the updated information that includes the new information provided by the States that already answered the questionnaire, as well as the new information provided by the States that have not yet done so, prepare an updated report.

Given the complementary nature of the ICC jurisdiction in relation to the national criminal jurisdictions, the importance of strengthening the national jurisdiction itself was pointed out. It would imply to properly establish the crimes stated in the Statute, national criminal codes and the qualification of the national legal system for judging the crimes in a national court.

V. LAWS RELATING TO THE ROME STATUTE [7]

As previously indicated, after the report by the IAJC Rapporteur on the topic, the Eastern Republic of Uruguay, through its Permanent Mission before the OAS, remitted a Law on Genocide, Crimes against Humanity, War Crimes and Cooperation with the International Criminal Court. Below are some aspects of interest.

It concerns a legislation that develops, at great length, the subjects of categorization and cooperation, and others.

It considers that "… Crimes are illegalities, under the jurisdiction of the International Criminal Court according to the dispositions in article 5 of the Rome Statute, and all which due to their seriousness are governed by special laws, by this Code and the regulations of international law, inasmuch as they may be applicable…" (article 1 that replaces article 2nd of the Penal Code).

It also provides that "4.4. National jurisdiction be exercised whenever: A) it concerns crimes or offenses that, for trial purposes, fall under the jurisdiction of the International Criminal Court: 1) Remittance is requested by the International Criminal Court…"

It categorizes the Crime of Genocide (art. 16 in extenso); the Crimes Against Humanity (article 18 that refers to article 7 of the Rome Statute); War Crimes (article 26 in extenso) and the crimes against the Administration of Justice by the International Criminal Court (article 27 with reference to article 70 of the Rome Statute).

Part II is referred to the Cooperation and Relation with the International Criminal Court. Article 31.1 provides the following: "The Eastern Republic of Uruguay will fully cooperate with the International Criminal Court, and shall act in accordance with the cooperation and assistance requests that are made, in compliance with the provisions in the Rome Statute of the International Criminal Court…". Following includes: "31.2. The existence of internal procedures may not be invoked to deny compliance with cooperation requests made by the International Criminal Court", and as in "31.3, There may not be discussion regarding the fact that the International Criminal Court imputes a person, nor about the culpability of the defendant".

Also established is that "The cooperation and assistance requests received from the Court be remitted to the Office of International Cooperation of the Ministry of Education and Culture, which shall act as the central authority" (article 32.3).

Chapter 3 of Heading III refers to Cooperation in the Execution of Judgments, and foresees that the "Uruguayan State accept, in compliance with the stipulations in article 103, paragraph 1, literal a) of the Rome Statute, the responsibility of executing a final sentence of imprisonment for a person condemned by the International Criminal Court, whenever:

a) It concerns a Uruguayan citizen.
b) The term of incarceration does not exceed the maximum prison sentence ordered by national jurisdiction.

[7] In "Report – Working Session of the Committee for Legal and Political Affairs on the International Criminal Court" contained in document OEA/Sec.Gral. ODI/doc.02/07 of 9 February 2007, one reads the following: "In the case of Peru, a report was made on the efforts carried out by the Criminal Code aimed at making the Statute of Rome more adequate. Reference is also made to the Criminal Procedural Code, which emphasizes the coming into effect of procedures that establish new methods of cooperation and delivery." Trinidad and Tobago emitted a detailed and very broad law of implementation (*International Criminal Court Act 2006)* in February 2006.

Also, after the Rapporteur's report, in the Official Bulletin of the Republic of Argentina, year CXV, Number 31.069, dated January 9, 2007, is the Rome Statute Implementation Law of the International Criminal Court, written in a very clear, concise and direct manner.

Article 1st of this law establishes as its object:

> … to implement the disposition of the Rome Statute … and regulate the relations of cooperation between the State of Argentina and the International Criminal Court in the exercise of the functions entrusted to that organization by the cited instrument and its complementary regulations, through the attribution of competencies to the state organs and the establishment of adequate internal procedures, in what is not provided by the Rome Statute and its complementary regulations, especially the Rules of Procedure and Evidence.

The second paragraph of article 2, establishes that:

> The conduct described in articles 6th, 7th, 8th and 70th of the Rome Statute and all those crimes and offenses that will become competence of the International Criminal Court, for the Republic of Argentina shall be punishable in the manner provided in this law.

One characteristic of this law, partially shared with the law approve by the Eastern Republic of Uruguay, is that it remits all the categorizations of genocide crimes, crimes against humanity and war directly to articles 6th, 7th and 8th of the Rome Statute (as per articles 8, 9 and 10 of the Implementation Law). In the case of War Crimes, the Implementation Law categorizes them with remittance to the Rome Statute, and including the remittance to article 85, paragraph 3, sections c) and d) and paragraph 4, section b) of the Additional Protocol to the 1949 Geneva Conventions.

The law foresees that the action and penalty for such crimes do not prescribe, and is extended to those that will become competence of the Court (article 11 of the Law).

The crimes against the ICC Administration of Justice are itemized in the law as: False Testimony, Falsification of Evidence, Corruption of Witnesses, Reprisals against Witnesses, Destruction or Alteration of Evidence, Intimidation or Corruption of functionaries and Bribery (articles 14-21 of the law).

The relations with the International Criminal Law are regulated under Heading IV of the Law, and the competent authorities for application of the laws are designated as: a) The Executive Power, and b) The Organs of Federal Justice.

Under Chapter II of Heading IV, the law considers the processes of: Injunction of inhibition against the Court Prosecutor, Contesting the Competence of the Court or the Admissibility of the Cause and the Inhibition of the Argentinean Jurisdiction in favor of the International Criminal Court.

Chapter IV of the law treats the "International Cooperation and Judicial Assistance. Petition for arrest and provisional arrest, and surrender of persons to the Court". It also treats "Other forms of cooperation with the International Criminal Court. Petitions for cooperation, Requirements, Remittance", in Chapter V of the Law.

VI. SPECIAL CAJP WORK SESSION

The General Assembly of the OAS, through resolution AG/RES. 2176 (XXXVI-O/06), Promotion of the International Criminal Court, requested the Permanent Council to, with the support of the General Secretariat, hold a working meeting on the appropriate measures that the States should take to cooperate with the International Criminal Court.

The work session of the Committee on Juridical and Political Affairs on the International Criminal Court – the third carried out – was held on February 2, 2007, and its results are contained in the document OEA/Sec.Gral.ODI/doc.02/07.

The report includes the main ideas presented during the working session. They are:

- The OAS Member States must work to promote the ratification or adoption of the Rome Statute in their Parliaments;
- The participation of the civil society and the inter-governmental organizations is fundamental regarding the promotion, diffusion and implementation of the Rome Statute;
- The proper implementation and overcoming of internal order technical difficulties require a committed political will;

- The concepts established in the Rome Statute constitute the minimum standard of reference for the States, nonetheless, every State is free to implement policies and legislations that can exceed the referred standards;
- The importance of valuing the full effectiveness of the International Criminal Court and respect for the principle of universality was emphasized;
- Cooperation with the International Criminal Court and the Office of the Attorney General in the varied phases of the process is fundamental to achieve full system efficacy. Political will is essential in this scope;
- The integral retribution of the victims constitute a great challenge that implicates the full participation of the States;
- The importance of the Organization of American States establishing cooperation agreements with the International Criminal Court, and that the Office of International Law be the intermediary with the Court, was emphasized;
- The holding of a new working session on the topic was requested, considering the positive aspects of the meeting that allowed us to have instruction on the proper implementation of national legislation, cooperation with the pertinent entities, and a report on the current activities of the International Criminal Court and the Office of the Attorney General, and others. The aforesaid work session will permit the continuation of the dialog initiated in the current session as well as the follow-up of the specific recommendations that the eventual resolution of the General Assembly may contain.

VII. PRELIMINARY CONSIDERATIONS AND RECOMMENDATIONS[8]

Having indicated the advances registered on the topic of the International Criminal Court since its report of March 27, 2006, and taking into consideration the importance of offering eventual recommendations on the way to strengthen cooperation with the International Criminal Court for consideration by the Member States, the following approaches are presented:

7.1. Importance of the Member States responses to the Questionnaires

The rapporteur's Report indicated that, in an ample sense, the IAJC questionnaire was a way of strengthening cooperation and facilitation because it allows the exchange of information between the States and use of the face-to-face experiences with the ratification or adoption of the Rome Statute, to enable internal legislations for cooperation with the Court, and in general, to ensure an efficient application of the Statute.

Based on the latter, the rapporteur considers the convenience of respectfully reiterating the request made by the IAJC to the OAS Member States that still have not responded the questionnaire, to complete it, and to those States Parties to the International Criminal Court that have complied with the adoption process of the implementation laws for part IX and X of the aforesaid Statute, to remit such information to the Committee.

Likewise, to reiterate the request made by the IAJC to the States that have concluded the adoption process for the laws incorporating, modifying or including the criminal categorizations established in the Rome Statute, to give the referred updated information to the Committee.

7.2. For those OAS Member States that are still not Parties to the Rome Statute, to consider its ratification or adoption, as the case may be, of the Rome Statute, and for effects of the latter:

7.2.1 To take into account – if considered necessary – the mechanisms used by the States that currently form part of the Statute, to overcome eventual problems of clashes with the corresponding national laws, as the case may be, in light of the experience summarized in the rapporteur's Report, which could implicate encouraging the emission of favorable judgments and/or opinions by the Ministries, organs or dependencies in charge of their preparation.

In his previous Report, the rapporteur had already indicated that to resolve the possible problems of constitutional clashes that the Statute could cause, in the opinion of some States, there was recurrence to certain mechanisms that are useful to take into

[8] Updating and eventual development of this Chapter VII of the Report of the Rapporteur will take into account any new information received from the OAS Member States.

account for the case of States that are still not Parties to the Statute. Some of these mechanisms have been:

a) One global constitutional amendment that overcomes all contradiction or opposition, accompanied or not by interpretative declarations.
b) Request control organs a report, declaration or opinion of the corresponding constitutional that permitted, in some cases, a simple interpretation regarding the Statute and the Constitution, and in one case, the direct requirement of a previous Constitutional amendment.
c) Studies and consultations that generally permitted the Chancelleries to propose direct ratification or adoption, without further inconveniences or legal reforms.

7.2.2 To consider the eventual formation of ample intersectorial commissions or working groups for the making of these reports or opinions, including the possible invitation of other State Powers and representatives of the civil society.

7.2.3 To consider the support the ample variety of document prepared by governments, academic institutions, civil society organizations, and/or experts[9] could give those consultative mechanisms and especially the works of the Inter-American Juridical Committee on the subject, and the resulting recommendations of the three meetings held by the CAJP of the Permanent Council in the Organization headquarters.

7.2.4 To consider the inclusion of clauses that treat eventual matters of concern, as may correspond to the legislative practice, in areas such as retroactiveness, so this matter contemplated in the Rome Statute may be dissipated with due certainty and confidence.[10]

7.3 For those Member States who are Parties to the Rome Statute, determine the measures –including those of legislative nature-, modalities and mechanisms to ensure the existence of procedures applicable to full cooperation with the Court regarding the investigation and prosecution of crimes under its competence, and in general, compliance with the obligations stated in the Rome Statute, and to this end:

7.3.1 To consider additional legislative actions to strengthen cooperation with the Court. Particularly, evaluate the convenience of emitting a special cooperation law such as the laws of Argentina, Uruguay and Trinidad and Tobago, or whether it is more convenient to incorporate specific provisions for already existing laws, either criminal codes or *criminal* procedural codes, as Peru has done.

7.3.2 To consider the possible conformation of Working Groups or Commissions at the level of the Executive Branch to analyze and define the best legislative implementing ways, also considering whether it is convenient the participation of representatives of other State Branches and representatives of the civil society.

7.3.3 To update the studies and provisions regarding the already existing forms of cooperation and international judicial cooperation practice –including treaties on the matter as well as cooperation laws which are regularly used– or if they can be eventually activated to attend petitions for cooperation within the scope of the Rome Statute.

7.3.4 To consider, in the inclusion of the types of crimes of the Rome Statute, the experience of the States, either through the in extenso definition used by some States in their implementing laws or the simple reference to the provisions contained in articles 6, 7, 8 and 70 of the Rome Statute, complemented in the case of Argentina with references to other instruments, or a mixed technique.

7.3.5 The States should consider the premise that the Rome Statute establishes the minimum standard accepted by the international community for the definition and scope of crimes under the competence of the ICC, therefore, the States have the prerogative of extending them.

7.3.6 To consider the designation by the States Parties of links or points of contact for issues relating to cooperation with the Court.

7.3.7 Other aspects that could deserve special attention are the following:

[9] See Annex.
[10] The *Rome Statute* in its article 11 considers that "1. The Court shall have competence only regarding crimes committed after the present *Statute* enters into force".

i. sufficient regulations for guarantees on the matter of surrender of nationals to the ICC, considering the regulations for guarantees of extradition;
ii. regulations for broad dissemination on the matter of information delivery without detriment to the limited exceptions previously established by the law;
iii. clauses for the protection of individuals –both victims and witnesses- who participate in the procedures before the ICC. The experience of the witness protection programs existing in the respective States, as the case may be, or the protection experiences of the Inter-American System of Human Rights could be evaluated with aims at deriving possible applications to Court cases.

7.3.8 Contemplate expeditious procedures to attend requests for cooperation on the matter of assistance and surrender, making sure that they are equivalent to those applicable to the assistance or extradition cases –as it may correspond–- and not more complicated or burdensome[11].

7.4 Contemplating the ratification or adhesion, as it may correspond, to the Agreement on Privileges and Immunities (APIC) of the International Criminal Court

7.4.1 The States may consider that the APIC is based on the principle of functional immunity, and therefore, it collects the international standards on the matter of privileges and immunities for the realization of the Court's function.

7.4.2 For the States that are already Members, assure effective and integral execution on the national level

7.5 It is recommended to all Member States of the OAS:

7.5.1 To intensify the exchange of information in the hemisphere. Added to the answers to the Questionnaire and the laws for implementing the Statute, the reports, declarations and opinions prepared for the ratification of the Statute by the States and any other legislative information that they may consider of interest with aims at their incorporation into the Rapporteur's Report, could be put at the disposal of the Inter-American Juridical Committee.

7.5.2 To strengthen the participation in regional and universal forums for discussion of the ICC, including –*inter alia*– the work meetings of the Committee on Juridical and Political Affairs of the OAS and the Assembly of States Parties of the Rome Statute.

7.5.3 To continue addressing the issue of the ICC within the scope of the regular sessions of the General Assembly of the OAS. It would also be important to include the topic of the ICC within the scope of the subregional integration processes, so as to keep this topic active in the inter-American, subregional and national agenda.

7.5.4 To contribute to the Fiduciary Fund established by the United Nations for victims of crimes that fall under the competence of the Court, and their family members, as well as to the Fund set up to favor the participation of less developed countries.

7.6 To consider the OAS cooperation mechanisms in the topic of the ICC

7.6.1 Possibility of cooperation agreements between the OAS and the International Criminal Court with the designation of a focus point.

7.6.2 Building a web site with the relevant and pertinent information provided by the States, with aims at facilitating access to and exchange of documents and experiences, strengthening the reciprocal knowledge of the mechanisms used by the countries with continental civil juridical tradition and Anglo-Saxon law (common law), could be considered.

* * *

[11] It is interesting to point out that the Trinidad and Tobago *International Criminal Court Act* law of *2006* establishes in articles 176 and 177 that *The Mutual Assistance in Criminal Matters Act* law of 1997 applies in respect to request for assistance, whereas *The Extradition Act* law of 1985 applies in respect to the delivery or temporary delivery of a person by the Court to Trinidad and Tobago, with the pertinent changes to be made in both cases. For these two effects, the Court is considered as if it were a foreign State, in one case, or an extradition country in the other.

ANNEX[12]

Implementation:

1) Informe de la 5ª Asamblea de los Estados Partes del Estatuto de Roma

http://www.icc-cpi.int/library/asp/ICC-ASP-5-26 English.pdf

2) AI: Cómo utilizar el derecho penal internacional para impulsar reformas legislativas que incorporen la perspectiva de género

http://www.iccnow.org/documents/AI_GuiaWR_May2005_Sp.pdf

3) CCPI: ¿Que es la legislación de implementación de la CPI?

http://www.iccnow.org/documents/CICC_Factsheet_Implementation_sp.pdf

4) AI: Corte Penal Internacional: los Estados no promulgan legislación para la aplicación efectiva del Estatuto de Roma

http://web.amnesty.org/library/index/eslIOR400192004?open&of=esl-385

5) AI: Lista resumida de requisitos para la aplicación efectiva del Estatuto de Roma

http://web.amnesty.org/library/index/eslIOR400152000?Open&of=esl-385

6) AI: Lista de requisitos para la aplicación efectiva del Estatuto de Roma

http://web.amnesty.org/library/index/eslIOR400112000?Open&of=esl-385

7) AI: Directrices para la aplicación efectiva del Estatuto de Roma

http://web.amnesty.org/library/index/eslIOR400132004?open&of=esl-385

8) AI: Guía para la Implementación del Estatuto de Roma de la CPI en la legislación interna de los Estados Partes

http://www.hrw.org/campaigns/icc/docs/handbook_s.pdf

9) HRW: Respuestas a las cuestiones planteadas por los servicios técnicos de la Asamblea Legislativa de Costa Rica en relación con el Estatuto de Roma de la Corte Penal Internacional

http://www.hrw.org/campaigns/icc/docs/costarica_final-sp.pdf

10) Documentos contenidos en la página electrónica de la Coalición por la Corete Penal Internacional (CICC)

www.iccnow.org

11) Libro Blanco de la CPI elaborado por la Cancillería Mejicana

http://www.sre.gob.mx/transparencia/rendcuentas/cortepenalint/frames.htm

12) Documento elaborado por el Comité Internacional de la Cruz Roja

http://www.icrc.org/web/spa/sitespa0.nsf/html/5TDQBB

Ratification:

1) Manual sobre la ratificación e implementación del Estatuto de Roma elaborada por Canadá

http://www.dfait-maeci-gc.ca/foreign policy/icc/Man 2ed fin jy03-en.asp

2) AI: Razones para la ratificación

http://web.amnesty.org/library/index/eslIOR400032000?Open&of=esl-393

3) CICR: Cuestiones planteadas por Tribunales Constitucionales y Consejos de Estado nacionales con respecto al Estatuto de Roma de 1998 de la Corte Penal Internacional

http://www.icrc.org/web/spa/sitespa0.nsf/html/5TDQBB

4) Listado de la Corte Penal Internacional

http://www.icc-cpi.int/region&rd=5.html

APIC:

1) CCPI: Lista de ratificaciones al APIC

http://www.iccnow.org/documents/CICC_APIClist_current_sp.pdf

Other documents only available in English:

1) Rights and Democracy and ICCLR Manual for Ratification and Implementation

http://iccnow.org/documents/RightsDem&ICCLR_Manual_Eng.pdf

2) Council of Europe Venice Commission Report on Constitutional Issues raised by Ratification

http://www.venice.coe.int/docs/2001/CDL-INF(2001)001-E.asp
3) University of Nottingham Human Rights Law Centre Implementation Database
http://www.icrc.org/ihl-nat.nsf/WebLAW2!OpenView&Start=1&Count=300&Expand=14#14

3. Access to information and protection of personal data

Resolutions

CJI/RES.123 (LXX-O/07)	Right to information
CJI/RES.130 (LXXI-O/07)	Access to information and protection of personal data

Documents

CJI/doc.25/00 rev.2	Right to information: access to and protection of information and personal data in electronic form", (Updated by the Office of International Law of the Department of International Legal Affairs of the report submitted by Dr. Jonathan T. Fried at the 57th regular session of the Inter-American Juridical Committee, CJI/doc.25/00 rev.1)
CJI/doc.239/07	Access to information: comment regarding the responses to the questionnaire sent by the Inter-American Juridical Committee to the OAS Member States (CJI/doc.232/06 rev.1, 17 Ag. 2006) (presented by Dr. Jaime Aparicio)

During the 69th regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2006), the topic's rapporteurs presented document CJI/doc.232/06 rev.1, "Questionnaire for the OAS Member States concerning Legislation on Access to Information and Protection of Personal Data in View of the Possible Drafting of a Legal Instrument", in compliance with the General Assembly's mandate.

The Juridical Committee approved the questionnaire and asked the Office of International Law to convey it to the Organization's Member States with a view to preparation of the Juridical Committee's study on the subject. The Office of International Law sent the questionnaire to the Member States on 13 September 2006.

The Chairman then reminded the Juridical Committee of the report on personal data protection prepared by Dr. Jonathan Fried and he asked the General Secretariat to update that study as it related to comparative legislation by November 15, 2006, for its subsequent conveyance to the rapporteurs.

On November 22, 2006, the Office of International Law sent document CJI/doc.25/00 rev.1 to the rapporteur for the topic, Dr. Jaime Aparicio. That document had been prepared by Dr. Jonathan Fried, and was duly updated as per the Inter-American Juridical Committee's request. Thus far, three responses have been received from the Member States answering the questionnaire prepared by the Juridical Committee. The countries that sent responses to the questionnaire were: Guatemala, Jamaica and Mexico. Those responses were duly circulated among the Committee members.

At its 70th regular session (San Salvador, February-March 2007), the Inter-American Juridical Committee welcomed Dr. Laura Neuman, Deputy Director for the Americas of the Carter Center of Nicaragua and an expert in access to information. Dr. Neuman informed the Committee of the Carter Center's project in this area, indicating that it is not limited to the Americas but embraces other continents. She stressed the importance of access to information, *habeas data*, and constitutional provisions, specifically mentioning aspects related to the Inter-American system and the OAS, as well as to other international organizations. She concluded her presentation by underlining the role that the Inter-American Juridical Committee could play in this area. The members of the Committee then spoke of transparency policies adopted in their respective countries.

During the same session Dr. Jaime Aparicio presented CJI/doc.239/07, "Access to information: comment regarding the responses to the questionnaire sent by the Inter-American Juridical Committee to the OAS Member States", summarizing the information received from Guatemala, Jamaica and Mexico.

Dr. Ricardo Seitenfus submitted an un-numbered document with the title “Notes on access to information in preparation for the 70th regular session of the Inter-American Juridical Committee: the case of Brazil”, covering legislation and other measures on transparency taken by the government of that country. He also mentioned a bill currently before the Brazilian Congress that he would remit to the rapporteur so that it could be taken account in the next report.

Dr. Mauricio Herdocia Sacasa suggested that OAS Member States again be urged to answer the questionnaire. Dr. Eduardo Vio Grossi suggested that it might be a good idea for the Juridical Committee to try to break down the matter by area, identifying critical links with, for example, democracy, corruption, good governance, etc. He stated that access to information is related to the handing over of information, and posed a question: who has rights or obligations on either side of the equation in different situations? In his opinion, that is the crux of the matter. He suggested an effort be made to define, from a strictly legal standpoint, the subject possessing a right and the subject who has an obligation vis-à-vis that right, the limits of said right and obligation, and safeguard mechanisms.

The Juridical Committee decided to maintain this item on its agenda, appointing Drs. Mauricio Herdocia Sacasa and Hyacinth Evadne Lindsay as co-rapporteurs to work with Dr. Jaime Aparicio. It was also decided to change the title of this topic to “Right to Information”. The IAJC also passed resolution CJI/RES.123 (LXX-O/07), “Right to Information”, by which the Committee decided to take note of the initial conclusion that the completed questionnaires received to date indicate that there is a need to treat various matters separately. The right of citizens to have access to public information is one such area, access to and protection of personal data, especially electronic data, is another. The Juridical Committee also recognized that there is a relationship between access to information and strengthening of democracy, accountability of civil servants, and the crucial role transparency in public administration plays in combating corruption. It urged all Member States that have not done so to respond to the questionnaire, and asked the rapporteurs to submit an updated report to the next regular session taking into account any additional responses received. The Committee also asked the Office of International Law to submit to the Permanent Council an updated version of “Right to Information: access to and protection of information and personal data in electronic form” (CJI/doc.25/00 rev.2, 7 February 2007), which was requested by the General Assembly. On 19 March 2007, the Office of International Law delivered said report and resolution CJI/RES.123 (LXX-O/07) to the Permanent Council. The document was filed as CP/doc.4193/07, 22 March 2007, with the title “Note from the Inter-American Juridical Committee transmitting resolution CJI/RES.123 (LXX-O/07), “Right to Information and Report CJI/doc.25/00 rev.2, Right to Information: access to and protection of information and personal data in electronic format”.

On 4 April 2007, the Office of International Law remitted to the members of the Inter-American Juridical Committee the 19 September 2006 judgment of the Inter-American Court of Human Rights in “Claude Reyes *et al.* v. Chile”, concerning freedom of thought and expression, with the aim of contributing to the work of the Committee in this area.

At its 37th regular session (Panama, June 2007), the General Assembly of the OAS adopted resolutions AG/RES. 2265 (XXXVII-O/07) and AG/RES. 2288 (XXXVII-O/07) calling on the Inter-American Juridical Committee to include in its next annual report an updated report on protection of personal data to be based on comparative law.

At the 71st session of the Inter-American Juridical Committee (Rio de Janeiro, August 2007), Dr. Dante Negro, Director of the Office of International Law, gave a presentation on the subject and clarified that in its resolutions AG/RES. 2265 and AG/RES. 2288, both adopted in 2007, the General Assembly had given the Committee two mandates. One had already been accomplished, which is the updating of the document prepared by Dr. Jonathan Fried, former member of the Committee, titled “Right to Information: Access to and Protection of Information and Personal Data in Electronic Form.” (CJI/doc. 25/00 rev.2) Dr. Dante Negro also reported that the resolution and report that the Juridical Committee approved at its previous regular session were also sent to the Permanent Council. Based on conversations with the Chair and Vice-Chair of the Juridical Committee, a meeting with Mr. Dario Soto, Deputy Director of the Trust for the Americas, an

Organization-affiliated institution that is conducting a project with civil society on the subject of access to information, had been scheduled for this session.

Dr. Jaime Aparicio, rapporteur for the topic, was of the view that the States had not shown any interest in responding to the questionnaire that the Inter-American Juridical Committee had prepared. Hence, the Committee did not have sufficient information with which to prepare and present either a model law or draft convention. He recalled the meeting with Dr. Laura Neuman from the Carter Center, and thought the prudent course of action would be to wait for the meeting with Dr. Dario Soto of the Trust for the Americas, before deciding which mechanism to use to address this topic. Here, Dr. Dante Negro suggested that the Secretariat might address the Member States again, asking that they answer the questionnaire, since only Guatemala, Jamaica and Mexico had thus far done so.

Following an exchange of views on the topic, the view was that the Juridical Committee had already complied with the mandate to update the report, mentioned in resolution AG/RES. 2288 (XXXVII-O/07). At Dr. Aparicio's suggestion, the Committee decided that henceforth, the agenda topic titled "Right to Information" will be called "Access to Information and Protection of Personal Data". The Inter-American Juridical Committee also approved resolution CJI/RES.130 (LXXI-O/07), "Access to Information and Protection of Personal Data", wherein it instructed the rapporteurs to continue working on this topic in partnership with the organs of the OAS, institutions like Trust for the Americas, the Carter Center and the Alianza para la Libertad de Expresión e Información, in order to assemble a list of indicators and legal principles on the subject of access to information.

CJI/RES.123 (LXX-O/07)

RIGHT TO INFORMATION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the General Assembly, through resolution AG/RES. 2218 (XXXVI-O/06), and AG/RES. 2252 (XXXVI-O/06) requested the Inter-American Juridical Committee to include in its next annual report an updated report on the protection of personal data based on compared legislation, and also to update the study Right to Information: access to and the protection of information and personal data in electronic format (CJI/doc.25/00 rev.1), taking into account the different points of view on the subject, for which purpose it shall prepare and distribute a new questionnaire on the topic among the Member States;

HAVING SEEN that during its 69th regular session (Rio de Janeiro, August 2006) the Inter-American Juridical Committee studied the document "Questionnaire for the OAS Member States concerning legislation on access to information and protection of personal data in view of the possible drafting of a legal instrument" (CJI/doc.232/06 rev.1);

CONSIDERING that in the aforesaid regular session, the Inter-American Juridical Committee had extensive discussion on the matters of access to information and the protection of personal data, mentioning the importance of emphasizing that the labor undertaken has the objective of possibly preparing an inter-American instrument on those two topics, and adopted a questionnaire that was remitted to the Member States through the General Secretariat, inviting them to thus contribute to the Juridical Committee study on the matter;

HAVING SEEN that on November 22, 2006, the OAS Office of International Law sent to the rapporteur of the subject document "Right to information: access to and protection of information and personal data in electronic form", duly updated (CJI/doc.25/00 rev.2), and that, to date; 3 answers to the referred questionnaire have been received from the Member States,

HAVING SUSTAINED, during the current regular session, an extensive and fruitful exchange on the subject of access to information with the Carter Center expert, Laura Neuman, who made a presentation of the existing legislations on the matter, as well as those that will soon be implemented in the Organization Member States, and the efforts made by other regional and international organizations, such as the United Nations, European Union, the OECD, European Council, African Union, and the Inter-American Development Bank;

HAVING SEEN the rapporteur's report on the topic, Dr. Jaime Aparicio, entitled "Access to information: comment regarding the responses to the questionnaire sent by the Inter-American Juridical Committee to the OAS Member States" (CJI/doc.239/07, 8 February 2007),

RESOLVES:

1. To express its gratitude to the rapporteur, Dr. Jaime Aparicio, for his presentation of the aforementioned report.

2. To take due note of his preliminary conclusion regarding the answers received to date, from which rise topics of a varied nature, each requiring a different approach: the first, referring to the citizens' right to access to public information; and the second, related with access and protection of personal data, especially in electronic format.

3. To request that the Secretary General remit, to the Permanent Council, the updated report "Right to Information: access to and protection of information and personal data in electronic format" (CJI/doc.25/00 rev. 2, 7 February 2007), requested by the General Assembly in the aforesaid resolution.

4. To recognize the existing relation between access to information and the strengthening of democracy, the responsibility of the public officials and the importance of transparency in public management as the foundation for the fight against corruption.

5. To request that the Member States that still have not done so answer the aforementioned questionnaire.

6. To keep the topic "Right to information" in the agenda and request the rapporteur to present an updated report during its next regular session, taking into account the additional answers that are received from the Member States.

This resolution was adopted unanimously at the session held on March 6, 2007, in the presence of the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, and Jean-Paul Hubert.

CJI/doc.25/00 rev.2

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

(Updated by the Office of International Law of the Department of International Legal Affairs of the report submitted by Dr. Jonathan T. Fried at the 57th regular session of the Inter-American Juridical Committee, CJI/doc.25/00 rev.1)

INTRODUCTION

1. Background

At its twenty-sixth regular session in Panama City in June 1996, the General Assembly requested that the Inter-American Juridical Committee pay special attention to matters concerning access to information and the protection of personal data entered in mail and computerized electronic transmission systems [AG/RES. 1395 (XXVI-O/96)].

The Inter-American Juridical Committee concluded an analysis (OEA/Ser.Q CJI/doc. 52/98) of the Convention for the protection of individuals with regard to automatic processing of personal data or Strasbourg Convention relating to a draft American Convention on self-determination with respect to information.

At its fifty-third meeting in August 1998, the Juridical Committee asked the Secretariat for Legal Affairs to solicit information from OAS member States on existing domestic legislation, regulations and policies concerning:

a) freedom of, or a person's right to access, information in the possession or control of governments;

b) the protection of personal data against unauthorized use in the possession or control of governments;

c) freedom of, or a person's right to access, information in the possession or control of private entities (for example, utilities, banks or credit agencies);

d) the protection of personal data against unauthorized use in the possession or control of private entities;

e) transborder or international dimensions of the foregoing, and

f) any other domestic legislation, regulations or policies addressing personal data or information in electronic or machine-readable form not otherwise included in a) through e) above.[12]

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

Based on the information submitted, as well as independent research, a report entitled "Right to information: access to and protection of information and personal data" (OEA/Ser.Q CJI/doc.45/99) was tabled by the rapporteur to the Inter-American Juridical Committee of the OAS in August 1999. The focus of that report was governmental regulation of personal information and data held in government hands.

In its resolution (CJI/RES.9/LV/99), the Juridical Committee requested the General Secretariat to reiterate its request for information from Member States; this was done through process-verbal OEA/2.2/32/99.

At the 57th regular session of the Inter-American Juridical Committee, doctor Jonathan Fried, submitted document CJI/doc.25/00 rev. 1, "Right to information: access to and protection of information and personal data in electronic format", which is further described in the following section.

The Inter-American Juridical Committee requested the Secretariat of Legal Affairs through Resolution CJI/RES.13 (LVII-O/00) to present the two reports on the subject prepared by the rapporteur for the information of the States and reiterate its prompt request for information from member States.

At the 63rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2003), doctor Alonso Gómez-Robledo suggested the inclusion of the subject relating to access to public government information in the Committee's agenda. The members of the Juridical Committee agreed to include this matter as follow-up under the same title with which the right to information previously appeared in the agenda, that is, "Right to Information: Access to and protection of information and personal data".

The General Assembly, at its 34th regular session (Quito, June, 2004), through resolution AG/RES. 2042 (XXXIV-O/04), noted the importance of including this topic in the agenda of the Inter-American Juridical Committee and requested the inclusion of an updated report on this matter in its next annual report.

At 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", submitted by doctor Alonso Gómez Robledo. The rapporteur on this matter outlined in such report the interdependence between accountability and transparency in the exercise of democracy.

The General Assembly, at its 35th regular session (Fort Lauderdale, June, 2005), through resolution AG/RES. 2069 (XXXV-O/05) "Observations and recommendations to the Annual Report of the Inter-American Juridical Committee", noted the importance of the topic and requested the Committee to include in its annual report an updated report on the protection of personal data based on compared legislation.

The General Assembly of the OAS at its 36th regular session (Santo Domingo, June, 2006), through resolutions AG/RES. 2218 (XXXVI-O/06) and AG/RES. 2252 (XXXVI-O/06), requested the Inter-American Juridical Committee the inclusion in its next annual report of an updated report on the protection of personal data based on compared legislation. It also requested the Committee to make an update of the study "Right to information: access to and protection of information and personal data in electronic format" of the year 2000 taking into account the various viewpoints on the issue, and to this end will prepare and distribute a new questionnaire on the topic among the member States, with the Secretariat's support.

[12] OEA/Ser.Q CJI/RES.15/LIII/98.

At its 69th regular session (Rio de Janeiro, August 2006), and concerning resolutions AG/RES. 2218 and AG/RES. 2252, the three specific tasks entrusted to the Committee were recapped: 1) include in its annual report an updated report on the topic of protection of personal data based on compared legislation; 2) update the specific study of the Juridical Committee carried out in the year 2000; and 3) prepare and distribute a new questionnaire on the topic for OAS member States.

During the same period, the President reminded the Juridical Committee about the report prepared by doctor Jonathan Fried on the matter of the protection of personal data and requested the General Secretariat an update of such study based on compared legislation to be submitted not later than November 15, 2006. The "Questionnaire for OAS Member States Regarding the Legislation on Access to and Protection of Personal Data in View of the Preparation of a Juridical Document", document CJI/doc.232/06 rev.1, of August 17, 2006, was also discussed. After its consideration, the Juridical Committee approved the document and requested its circulation among the OAS member States for the subsequent preparation of the study of the Juridical Committee regarding this issue.

2. Report of Rapporteur Jonathan Fried

As it was previously stated, based on part of the questionnaires referred in the preceding paragraph, the Inter-American Juridical Committee through its rapporteur, doctor Jonathan Fried, submitted at the 57th regular session of the Inter-American Juridical Committee, report CJI/doc.25/00 rev.1, which addresses the regulation through international instruments as well as at the level of the legislation of some OAS member countries, of the processing of personal data by the private sector. This report was prepared with the assistance of and based on in-depth research carried out by Thomas Fetz, Counsel of the Bureau of Legal Affairs of Canada's Department of Foreign Affairs and International Trade.

This report is a valuable input not only to understand the true dimension of this issue in the light of the impact that new technologies have on the expansion of the manipulation and use of the information by individuals, but to help States to take actions regarding law harmonization, improved regional cooperation and finding substantial elements for a future regional instrument on the matter.

The report examines the regulatory norm inherent to the protection of and access to personal data held in electronic format by private organizations. While data protection in the private sector can be improved using various means, even the market forces, technology, and self-regulation,[13] the focus of this report will be on governmental regulation.

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

3. Update

In the Special Session of the Commission on Juridical and Political Matters conducive to promote, disseminate and exchange experiences and knowledge relative to access to public information held on April 28, 2006, in Washington, D.C., the Rapporteur of the Inter-American Committee on the matter of access to information, doctor Jaime Aparicio, made a presentation which updated doctor Fried's report.

In his presentation, Dr. Aparicio stated that the mandates that he has received from the Inter-American Juridical Committee regarding the issue of access to information have been limited to just one aspect of this broad issue which is access to and protection of personal information of individuals. This information includes, among others, medical records, study records, credit history, judicial records, employment background, financial records, personal files in public and private entities, applications, etc.

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

The technological advances, the Internet and other means of information transmission have increased the risk of personal privacy and the right to control, protect and prevent the dissemination of personal information. The legal protection of privacy in this new reality is still precarious.

The laws and regulations on privacy initially only referred to the public sector since only the Governments held personal information on the individuals. However, the current use of personal information is not only a phenomenon between the State and the citizen but also a topic that increasingly involves the private sector and commercial businesses which collect and use personal information for commercial purposes, and in view of the nature of these operations, the information also crosses State borders and becomes an international phenomenon.

The information update submitted by doctor Aparicio was based on research in coordination with the OAS Secretariat with the collaboration of the Office of International Law, which allowed the collection of information on new laws and projects relative to the matter and added information on some countries that were not included in the previous report. However, it was considered that this information should be requested again through the OAS Department of International Juridical Matters to all member States in order to have specific and accurate information regarding the legal progress in the protection of information in the Americas.

In any case, and it does not imply that these are the only countries which have made progress in the matter, we have information from the following countries: Argentina, Brazil, Chile, Canada, Mexico, United States, Peru, Uruguay, Colombia, Paraguay, Ecuador, Costa Rica, Panama and Venezuela.

Taking into account the background that has been mentioned so far, the present update report intends to incorporate doctor Fried's report to the update presented by doctor Jaime Aparicio, including the changes occurred in the aforesaid countries in addition to providing data regarding other counties, apart from the convenience of requesting updated information from the countries. This information can contribute to the initiative to have a regional legal framework that would contribute to regulate the access to and protection of information.

The present document is divided into three parts. The first one discusses the regulation of data processing in the private sector by means of international instruments as well as legislation by a number of OAS countries.

The second part explains how these international agreements and national laws address the issue of privacy protection in the context of transborder flows of personal data.

Finally, the report identifies various approaches available for the regulation of the international flow of personal data, ranging from the international harmonization of data protection laws to the development of mutual assistance treaties.

I. REGULATION OF DATA PROTECTION IN THE PRIVATE SECTOR

1. Background

Laws and regulations concerning access to and protection of personal data have initially focused on the public sector. This was the case because governments generally hold a great deal of information about individuals. Yet, private organizations are making increasing use of sensitive information and personal data as governments have been offloading services to the private sector and as new opportunities in electronic commerce emerge. Improvements in technology, particularly in the area of computers and telecommunications, have vastly expanded the possibilities of collecting, storing, accessing, and comparing personal information. With the expansion computer networks and particularly the Internet, information can be made available to thousands, if not millions of users, simultaneously and worldwide.[14] Currently more than 150 million people use the Internet and that number is expected to grow to about 510 million by 2003. In 1998, the Internet created revenues of US$301 billion and this figure is expected to multiply over the next few years.[15]

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

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

Because personal information can be useful for marketing and sales, private organizations increasingly seek such information from individuals by traditional means or on the Internet.[16] Individuals often disclose personal data voluntarily on the Internet when visiting commercial sites, registering with discussion groups, entering contests, or voicing their opinions. The type of information disclosed may concern a person's name, civic and e-mail addresses, telephone numbers, occupation, income, marital status, age, sex, or credit card details. In addition, users of digital technologies often produce "electronic footprints", that is, digital information about where they have been, what they were looking at, the messages they sent, and the goods and services they bought. For example, "surfing" on the Internet leaves behind certain "header information" which may reveal:

a) the Internet Protocol (IP) address containing the domain name and the name and location of the organization who registered the domain name;

b) information about the user's operating system and hardware platform;

c) the time and date of the visit;

d) the Uniform Resource Locator (URL) of the Web page which was previously viewed;

e) the query put into a search engine if applicable, or

f) the user's e-mail address if it is in the browser's preference configuration screen.

Furthermore, when browsing through a web site, a user can leave behind "click-stream data" which provide information on the pages visited, the time spent looking at a page and the information sent and received. This information gathering about users may be facilitated by the use of "cookies" which are small data packets sent from the web site server to the user's hard drive. These cookies assign a unique code to each visitor and may be accessed by the server when the user subsequently visits the web site. Some cookies permit the user to gain quicker access to a web site, but can also be used to track a user's movements on the web. This type of technology, while it has its advantages, increases the risk of automatic data collection, use and disclosure without a person's knowledge or consent.[17]

As in the public sector, personal data held in the private sector may be subject to unauthorized collection, use, or disclosure, either deliberately or accidentally, and measures to minimize such activities have to be taken. Yet, the regulation of the protection of and access to personal data needs to be sensitive to the needs of data subjects, including users and consumers as well as businesses and other organizations. These needs are not necessarily contradictory. For example, confidence in on-line privacy protection is an essential feature for the growth of electronic commerce.[18] Consumers are concerned about their right to privacy in an increasingly interconnected electronic environment, and businesses want to reassure consumers and avoid interruptions in transborder data flows. Essentially, data protection is a question of striking the right balance between the rights of individuals to have their personal data protected and the free flow of information. Yet, as on many other issues, States may not agree on where the proper balance should be or whether data protection is more a human rights issue or an economic issue.

2. International Instruments

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

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

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

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

a) International human rights instruments

The right to privacy is enshrined in several international human rights instruments.[19] Article 12 of the Universal Declaration of Human Rights[20] states the following:

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

Article 17 of the International covenant on civil and political rights[21] uses almost identical terms:

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

The American Convention on Human Rights[22] provides for the express protection of "private life" in Article 11:

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

Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[23] guarantees the right to privacy and secrecy of correspondence:

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

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

b) OECD Guidelines

On 23 September 1980, the Council of the Organisation for Economic Cooperation and Development (OECD) adopted the Recommendation concerning guidelines governing the protection of privacy and transborder flows of personal data[24] (OECD Guidelines) which provides minimum standards for the protection of personal data. While the OECD Guidelines are not binding under international law, they represent a political commitment by the member States. The OECD Guidelines cover "any information relating to an identified or identifiable individual" and apply data processing in the public and private sector.[25]

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

---

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

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

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

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

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

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

25 OECD Guidelines, Part One.

Collection limitation

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

Data quality

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

Purpose specification

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

Use limitation

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

Security safeguards

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

Openness

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

Individual participation

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

Accountability principle

Data controllers should be held accountable for complying with the measures set out in the Guidelines.[26]

The OECD Guidelines recommend that countries implement these principles by: a) adopting appropriate legislation; b) encouraging self-regulation; c) providing reasonable means to individuals to exercise their rights; d) providing adequate sanctions and remedies where there is a lack of compliance; e) and ensuring that there is no unfair discrimination against data subjects.[27] The fundamental weakness of the OECD Guidelines, however, is their voluntary nature.

c) Council of Europe Convention

Unlike the OECD Guidelines, the Council of Europe Convention for the protection of individuals with regard to automatic processing of personal data[28] is a binding international legal instrument. The Convention was adopted on 18 September 1980, opened for signature on 28 January 1981, and entered into force on 1 October 1985 after five ratifications. Any State, even those which are not members of the Council of Europe, may accede to the Convention. The Convention is applicable to the automated processing of personal data in the public and private sectors.[29]

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

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

□□

[26] OECD Guidelines, Part Two.

[27] OECD Guidelines, Part Four.

[28] European Treaty Series No. 108; Council of Europe, Treaty Office: <http://conventions.coe.int/treaty/EN/cadreprincipal.htm> [hereinafter Council of Europe Convention].

[29] States are, however, permitted to limit the scope and application of the Convention by a declaration addressed to the Secretary General of the Council of Europe. Council of Europe Convention, Article 3.

The Consultative Committee established under Article 18 of the Convention has recently drafted an "Additional Protocol"[30] dealing with the establishment of supervisory authorities and transborder data flows. This draft Protocol would require Parties to establish independent supervisory authorities which ensure compliance with domestic laws giving effect to the principles set out in the Convention. These supervisory authorities (privacy commissioners or data protection officers) would hear complaints about violations of privacy laws and would have the power to investigate and intervene, as well as to engage in legal proceedings where privacy provisions of domestic laws are violated.[31]

The Council of Europe also encourages self-regulation through codes of conduct with respect to the processing of personal data. For example, the Committee of Ministers recommended to member States the dissemination of the Guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways which are addressed directly to internet service providers and users.[32]

d) United Nations Guidelines

The United Nations General Assembly adopted the United Nations High Commissioner for Human Rights' Guidelines for the regulation of computerized personal data files (UN Guidelines),[33] pursuant to Article 10 of the United Nations Charter, in 1990.[34] The UN Guidelines, which are non-binding, provide minimum standards for States to adopt when regulating privacy protection for public and private computerized and manual files.[35]

The principles included in the UN Guidelines are lawfulness and fairness, accuracy, purpose-specification, access, non-discrimination, power to make exceptions (national security, public order, public health and morality, and rights and freedoms of others), security, as well as supervision and sanctions. These principles are similar to those of the OECD Guidelines. Additional protection is provided through the prohibition of the compilation of *"data likely to give rise to unlawful or arbitrary discrimination, including information on racial or ethnic origin, colour, sex life, political opinions, religious, philosophical and other beliefs as well as membership of an association or trade union."*[36]

The UN Guidelines call upon countries to designate independent, impartial and technically competent authorities responsible for overseeing the principles set out in the Guidelines. Sanctions for violations of the principles should include appropriate criminal or other penalties as well as individual remedies.[37]

e) European Union Privacy Directive

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of individuals with regard to the processing of personal data and on the free movement of such data[38] (EU Directive) was signed in 1995 and was to be implemented by the Member States by 24 October 1998. It requires Member States to have laws in place establishing a minimum level of protection regarding the processing of personal data by whatever means. States are free to pass laws with stricter standards than those set by the EU Directive. The EU Directive recognizes that "personal data should be able to flow freely from one Member State to another, but also that the fundamental rights of individuals should be safeguarded." The EU Directive applies to the processing of personal data by any person whose activities are governed by Community law, in the public and private sectors, but not to

30 Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, "Draft Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108) regarding supervisory authorities and transborder data flows," Strasbourg, 8 June 2000; web site of the Council of Europe, Personal Data Protection: <http://www.coe.fr/dataprotection/Treaties/projet%20de%20protocole%20E.htm> [hereinafter Draft Protocol].

31 Draft Protocol, Article 1.

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

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

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

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

36 UN Guidelines, Article 5.

37 UN Guidelines, Article 8.

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

processing operations concerning public security, defence, State security, and State activities in the areas of criminal law. Neither does it apply to the data processing activities of natural persons in the course of a purely personal or household activity.[39]

The privacy protection principles set out in the EU Directive are broader and more detailed than those of the OECD Guidelines. Data can only be processed if the "data subject" has given "unambiguous consent".[40] Such consent must be explicit with respect to "data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[41] Even where consent has been obtained to process information, the data subject must "be informed before personal data are disclosed for the first time to third parties or used on their behalf for the purposes of direct marketing, and to be expressly offered the right to object free of charge to such disclosures or uses."[42]

Generally, processing without consent can proceed only if one of five exceptions applies. The processing is 1) "necessary for the performance of a contract to which the data subject is party"; 2) "necessary for compliance with a legal obligation"; 3) "necessary in order to protect the vital interests of the data subject"; 4) "in the public interest"; or 5) "processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection."[43]

The data subject must be informed about the identity of the controller (the person determining the purpose and means of processing data); the purpose of the data processing, and about any other relevant information to "guarantee fair processing". Data subjects also have a right to access and to correct or erase personal data. Data subjects are enabled to monitor and challenge the use of personal information during and after processing. They can trace which third parties hold their personal information, verify how they are using it, and block unauthorized uses.[44] Furthermore, they have a right to challenge ("not to be subject to") any decision which significantly affects them, such as one that is based on an automated processing of data intended to evaluate personal aspects such as performance at work, creditworthiness, reliability, conduct, etc."[45]

The member States of the EU are responsible for the implementation as well as enforcement of the EU Directive. States must guarantee data subjects the right to a judicial remedy, and wronged data subjects must be able to obtain damages.[46] The implementation of the EU Directive's principles on privacy protection is to be reinforced by a supervisory authority. These authorities must "act with complete independence" and have "investigative powers" which allow them access to data and to collect information. In addition, they must have "effective powers of intervention" such as the ability to deliver opinions, to publicize matters, or to order the blocking or destruction of data. The supervisory authorities must also have the power to engage in legal proceedings or to bring matters to the attention of judicial authorities.[47]

f) General agreement on trade in services

Given the impact trade rules have on so many aspects of economic and social activity, reference should be made to the *General agreement on trade in services* (GATS)[48], which is part of the World Trade Organization (WTO) treaty framework. Article XIV of the GATS states:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where

39 EU Directive, Article 13.
40 EU Directive, Article 7.
41 EU Directive, Article 8.
42 EU Directive, Article 14. Direct marketing sales in Europe totalled 125 billion dollars in Europe in 1997, compared to 1.2 trillion dollars in the United States. Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards," (2000) 25(1) Yale Journal of International Law 1 at 18.
43 EU Directive, Article 7.
44 EU Directive, Articles 10, 11 & 12.
45 EU Directive, Article 15.
46 EU Directive Articles 22-24.
47 EU Directive, Article 28.
48 Web site of the World Trade Organization, Legal Texts: <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [hereinafter GATS].

like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any member of measures:

> c) (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts.[49]

Thus, while the GATS prohibits discrimination and disguised trade barriers, there is room for national authorities to regulate the transborder flow of data for purposes of privacy protection.

3. National legislation

At the national level, data protection in private sector organizations has taken the form of constitutional protections, comprehensive laws, sectoral laws, self-regulation, or a combination thereof. Comprehensive laws tend to apply general privacy protection principles to a wide range of sectors, both public and private. Sectoral laws are concerned only with specific sectors, such as communications, or with specific data such as medical information. Most countries' laws include general data protection principles, provisions for oversight authorities, generally known as privacy commissioners or data protection officers, and some reference to industry self-regulation. The roles and powers of oversight authorities usually concern public education, the investigation of complaints, and enforcement. Self-regulation relies on market forces and industry-led initiatives to provide innovative solutions. The rules are developed and enforced by those to whom they apply. In some cases, however, independent bodies or public entities are involved in the development, implementation and enforcement of industry codes and guidelines.

Data protection in Latin America is strongly tied to the concept of *habeas data* which guarantees individuals a right to access their personal information. It is based on the recognition that an individual should have control over the data gathered about him or herself. The principle emerged recently in response to the detrimental impact of the use of computers on privacy rights. The Brazilian Constitution of 1988 was the first to use the expression *habeas data*. Thereafter, the right of individuals to access their personal information was included in the national constitutions of several other Latin American States, including Argentina, Colombia, Paraguay, Peru and Venezuela.[50]

a) Argentina

1) ARGENTINE CONSTITUTION

The 1994 Constitution of Argentina provides some protection for privacy. Article 18 states:

> The domicile may not be violated, as well as written correspondence and private papers; and a law shall determine in which cases and for what reasons their search and occupation shall be allowed.
>
> Article 43 of the Constitution provides for the right of *habeas data* as follows:
>
> 1. Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality. In such case, the judge may declare that the act or omission is based on an unconstitutional rule.
>
> ....
>
> 3. Any person shall file this action (1) to obtain information on the data about himself and their purpose, registered in public records or data bases, or in private ones intended to supply information; and in case of false data or discrimination, this action may be filed to request the suppression, rectification, confidentiality or updating of said data.

[49] GATS, Article XIV c(ii).
[50] OAS. *Op.cit*., p.26.

2) LEGISLATION

In 1996, legislation giving effect to the provisions of Article 43 of the 1994 Constitution was approved by the Senate and the Chamber of Deputies.[51] This statute was vetoed by President Menem following interventions by the Banking Association, who considered that the disclosure and privacy provisions were too strong, and would undermine the operations of VERAZ - a credit screening organization.

The *Habeas Data* regulation was later introduced by Law NE 25.326 of October 4, 2000. Such law established the general principles for data protection, the rights of data subjects, regulated issues concerning file users and keepers, data banks and records. The law also has a chapter on controls and sanctions and establishes the personal data protection action.

As the law indicates in article 1, its objective is the "overall protection of the personal data held in files, records, data banks or other technical data processing means, either public or private, intended for reports, to guarantee the right to respect and privacy, as well as access to information in conformity with the provisions of article 43, third paragraph, of the National Constitution." Its provisions are also applicable to all pertinent data regarding juridical persons.

The law establishes a difference between personal data and sensitive data, stating that the creation of data files is legal provided that the law is observed. Besides, the subject's consent is required with the exceptions provided by the law. However, the collection and processing of sensitive data is forbidden except if it has been authorized by the law for general interest purposes. The law expressly states that the Catholic Church, other religious associations, political and union organizations may keep files of their members.

The law forbids the international transfer of personal data of any type to countries or international or supranational organizations that do not provide the required levels of protection, with the following exceptions:

- International judicial collaboration;
- exchange of medical data as required by medical treatment or epidemiological research;
- bank or stock exchange transfers regarding such transactions and according to the applicable legislation;
- whenever a transfer has been agreed according to international treaties of which Argentina is party to;
- whenever a transfer is for the purposes of international cooperation between intelligence organizations to combat organized crime, terrorism and drug trafficking.

Among the regulations regarding *habeas data*, the following decrees can also be mentioned: Decree 995/2000, regarding "*Habeas Data*", Publisher in the Official Gazette of 11/2/2000, number 29517; and Decree 1558/2001, on "Personal data protection", published in the Official Gazette of 12/3/2001.

3) PENAL CODE

Articles 153-157 of the Penal Code prohibit the publishing of private communications. In April 1999, a court found that those provisions also applied to electronic mail. Also the Civil Code prohibits "arbitrary interference in another person's life: publishing photos, divulging correspondence, mortifying another's customs or sentiments or disturbing his privacy by whatever means."[52]

b) Brazil

1) BRAZILIAN CONSTITUTION

Brazil does not have a specific law for the purpose of protecting of individuals from the unauthorized collection, use, and disclosure of their personal data held in electronic forms by

[51] Law No. 24.745 (23 Dec. 1996).

[52] Art. 1071bis, Cod. Civ.; See: David Banisar and Simon Davies, "*Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*" (1999) 18 (1) *John Marshall Journal of Computer & Information Law* 1, at 15-17.

private organizations.[53] Of relevance, however, is the 1988 Constitution, whose Article 5 guarantees the inviolability of the rights to life, freedom, equality, security, and property, and defines that lawsuits for *habeas data* are free of charge. There are other laws which touch indirectly on the issue of privacy protection in the private sector.

2) Law No. 9507

Law No. 9507, of November 1997, regulates the right of access to information and codifies the procedures of *habeas data.* It considers within the public domain "all registry or databanks containing information which is or could be transmitted to third parties or that is not for the private use of an organ or entity producer or depository of information."

3) Law No. 8078

The focus of Law No. 8078, of September 1990 (*Code of consumer's protection and defence*), is on consumer protection, linked to consumer rights, consumer relations, quality of products and services, and suppliers' responsibilities. In Article 44, the law states that the consumer will have access to personal and consumer related data about his person and respective sources of information. It allows the consumer to review and demand immediate correction of mistaken data.

4) PROPOSED LEGISLATION

In 1996 the Senate of Brazil introduced Bill No. 61 which would have governed the creation and use of personal registers and databanks, whether public or private.[54] The Bill has not become law and was filed on January 1999 with the end of the 1994-1998 Legislature. There is, however, another privacy Bill in the Senate (No. 268 of 1999), already approved by the Senate's Constitution and Justice Committee, that will supersede Law. no. 9507. The new law, if enacted, will govern the structuring and the use of data banks and codify the procedures of *habeas data.* For the purposes of the law, personal data on race, political and religious opinions, beliefs and ideologies, mental and physical health, sexual life, police records, family matters, and profession are considered personal data which can not be released or utilised for any other purpose than that which led to the creation of the databank, except by court order or the person's authorisation. The bill specifies that personal data refers to both physical and juridical persons.

The Privacy Bill mentioned in the preceding paragraph (268 of 1999) is still under consideration in the Senate, and therefore, Law No. 9507 is still in full force and effect with regard to *habeas data*.

c) Canada

While Canada's Constitution, including the Charter of Rights and Freedoms, does not explicitly recognize the right to privacy, the Supreme Court has interpreted Section 8 of the Charter (which deals with search and seizure) to guarantee a right to a reasonable expectation of privacy.[55] Canada has a number of comprehensive laws governing access to and processing of personal data. The Privacy Act[56] as well as the Access to information act[57] apply to federal public sector institutions. In addition, the Personal information and electronic documents act has recently been enacted to regulate data protection in the private sector. Most provinces have comprehensive laws that cover data processing in the public sector, but Quebec's Act respecting the protection of personal information in the private sector is the only comprehensive law applying to the private sector.

1) PERSONAL INFORMATION AND ELECTRONIC DOCUMENTS ACT

The Personal information and electronic documents act[58] received royal assent on 13 April 2000 and comes into force in Canada on 1 January 2000.[59] The Act's purpose is to establish "rules to govern the collection, use and disclosure of personal information in a manner that recognizes the right of privacy of individuals with respect to their personal

53 Information on the legislation governing the electronic processing of personal data in Brazil has been provided by Luiz Miguel da Rocha from the Canadian Embassy in Brasília on 27 July 2000.

54 Privacy Exchange, Legal Library, Proposed/Pending National Legislation, Brazil, "Senate Bill No. 61, 1996": <http://www.privacyexchange.org/>.

55 *Hunter* v. *Southham* [1984] S.C.R. 159, 160.

56 Department of Justice, "Consolidated Statutes" <http://canada.justice.gc.ca/FTP/EN/Laws/Title/P/index.html>.

57 Department of Justice, "Consolidates Statutes", <http://canada.justice.gc.ca/FTP/EN/Laws/Title/A/index.html>.

58 S.C. 2000, c-5; Canada Gazette, 23(1), <http://canada.gc.ca/gazette/hompar3-2_e.html> [hereinafter PIEDA].

59 The federal Act provides for several phase-in periods to allow the provinces to adapt to the new legislation. If a province enacts a law that is substantially similar to the federal Act, the organizations or activities covered by the provincial law will be exempted from the federal law.

information and the need to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances."[60] While protecting the privacy of personal information, the Act is to support and promote electronic commerce. This new law should help Canada meet the data protection standards established in the European Union Privacy Directive.

The Act will be phased in over a period of three years and will eventually apply to every private organization that collects, uses or discloses personal information in the course of commercial activity, except to activities within provincial jurisdiction where a province has its own law that is substantially similar to the federal Act. To date the province of Quebec is the only jurisdiction in North America which has such a law. The Act does not apply to individuals in respect of personal information collected, used, or disclosed solely for personal or domestic purposes. An exception is also made for organizations collecting, using, or disclosing information whose purpose is journalistic, artistic or literary.[61]

Personal information is defined as "information about an identifiable individual", including race, ethnic origin, colour, age, marital status, religion, education, medical, criminal, employment or financial history, address and telephone number, numerical identifiers such as the Social Insurance Number, fingerprints, blood type, tissue or biological sample, and views or personal opinions.

The Act lists ten principles to govern the collection, use and disclosure of personal information:[62] accountability, identifying the purposes for the collection of personal information, obtaining consent, limiting collection, limiting use, disclosure and retention, ensuring accuracy, providing adequate security, making information management policies readily available, providing individuals with access to information about themselves, and giving individuals a right to challenge an organization's compliance with these principles. These principles are further discussed below.

Accountability

Organizations are responsible for personal information under their control and they must designate individuals to oversee compliance with the Act. Policies and procedures must be implemented, employees trained, and information provided to the public to ensure that personal information is protected. Where information is processed by a third party, an organization is required to use contractual or other means to provide for a comparable level of protection.[63]

Identifying purposes

The purposes for which personal information is processed must be identified and documented, including in cases where previously collected information is used for a new purpose. Preferably, individuals should be informed about the purposes before or at the time of collection but no later than before use of the information.[64]

Consent

Except in limited circumstances, an individual must have knowledge and give his or her consent if personal information is to be collected, used, or disclosed. Consent may be obtained after collection of the data but no later than before use of the information. To make consent meaningful, the purposes of data processing must be explained to an individual and organizations must make a reasonable effort to ensure that they are understood. The nature and form of consent may vary depending on the sensitivity of the information, the circumstances, and the individual's reasonable expectations. Consent can only be obtained for the processing of data for specified and legitimate purposes. If an organization wishes to use information for a purpose different from that for which it was collected, consent must be obtained again. Individuals are free to withdraw their consent, subject to legal or contractual obligations and reasonable notice.

An organization may collect personal information without the knowledge or consent of an individual only under very limited circumstances. This may be the case as where the collection clearly benefits the individual or where obtaining consent would compromise the

60 PIEDA, Article 3.
61 PIEDA, Article 4.
62 The Act incorporates as Schedule 1 the principles set out in the Canadian Standards Association's *Model Code for the Protection of Personal Information*.
63 PIEDA, Schedule 1, Principle 1.
64 PIEDA, Schedule 1, Principle 2.

information's accuracy. In addition, knowledge and consent are not required for a legal investigation or aid in an emergency that threatens the life, health, or security of an individual, or if disclosure is required by law, for statistical or scholarly purposes or the conservation of records of historical or archival importance.[65]

Limiting collection

The amount and type of information collected must be restricted to what is necessary for identified purposes. All information must be collected by fair and lawful means without misleading or deceiving individuals about the purpose for which information is collected.[66]

Limiting use, disclosure, and retention

Except with the consent of the individual or as required by law, personal information can only be used or disclosed for purposes for which it was collected. Personal information must be retained only as long as necessary to fulfil the identified or required purposes and to allow an individual access to information after a decision has been made. Organizations should develop guidelines and implement procedures for information retention and destruction.[67]

Accuracy

Personal information used by organizations, including information disclosed to third parties, must be as accurate, complete, and up-to-date as necessary for the identified purposes, particularly where this is in the interest of the individual. Limits to the accuracy of the information must be clearly set out. Personal information must not be routinely updated unless required by the purposes for which the information was collected.[68]

Safeguards

Security safeguards must be in place to protect personal information against loss or theft, unauthorized access, disclosure, copying, use or modification. The nature of the safeguards must be appropriate to the sensitivity, amount, distribution, format, and storage of the information. The methods of protection should include physical measures such as locked filing cabinets, organizational measures such as security clearances, or technological measures such as computer passwords. Employees must be aware of the need to protect the confidentiality of personal information, and care must be taken in the disposing of data to prevent unauthorized access.[69]

Openness

Information about an organization's policies and practices related to the management of personal information must be provided to the public. Such information must include the name, title and address of the person in charge of compliance with the Act and to whom complaints can be brought; a description of the nature of personal information held by the organization; the means of gaining access to that information; and what information is provided to related organizations such as subsidiaries. This information must be both easy to obtain and understand.[70]

Individual access

Individuals have a right to access their personal information, challenge its accuracy and completeness and have it corrected. Access must be granted unless it would compromise personal data of other individuals, be extremely costly, or is prohibited for legal, security, commercial proprietary reasons, or because of solicitor-client privilege. Organizations must inform an individual about what personal information they possess, how it is used, and to which third parties it has been disclosed. Access to information requests must be answered within a reasonable time period, which would normally be 30 days. If a request for access to information is refused, the individual must be informed in writing about the reasons and any other recourse available under the Act.[71]

65 PIEDA, Article 7; Schedule 1, Principle 3.
66 PIEDA, Schedule 1, Principle 4.
67 PIEDA, Schedule 1, Principle 5.
68 PIEDA, Schedule 1, Principle 6.
69 PIEDA, Schedule 1, Principle 7.
70 PIEDA, Schedule 1, Principle 8.
71 PIEDA, Articles 8-9; Schedule 1, Principle 9.

Challenging compliance

Individuals have a right to bring a complaint about an organization's lack of compliance with the Act to the designated official.[72] If an individual cannot settle a dispute with the designated official, he or she can complain to the federal Privacy Commissioner who performs the functions of an ombudsman. The Privacy Commissioner receives complaints concerning contraventions of the Act, conducts investigations, and attempts to resolve complaints through persuasion, mediation and conciliation. He or she has powers to seek and examine relevant information when conducting an investigation and may enter the premises occupied by an organization, examine relevant records, and interview individuals. After an investigation, the Privacy Commissioner may write a report with appropriate findings and recommendations. Persons who hinder the Commissioner's investigation, destroy documents, or move against whistle blowers are guilty of an offence and may be fined up to $100,000. The Privacy Commissioner can also audit the information management practices of an organization and make the results public. The Commissioner's tasks include public education programs and research.[73]

The Commissioner has no power to compel an organization to act on the findings or recommendations of a report. If a matter remains unresolved, an individual may, however, bring a complaint to the Federal Court of Canada within 45 days of receiving a report from the Commissioner. The Commissioner may appear on behalf of a complainant or as a party to the hearing. The Court may prescribe corrective measures to the organization involved and award damages to the complainant if appropriate.[74]

2) OTHER FEDERAL LEGISLATION

Other legislation by the Canadian Government which provides for privacy protection includes the Criminal Code which prohibits the unlawful interception of private communications.[75] In addition, there are sectoral laws like the Bank Act[76], the Insurance Companies Act[77], and the Trust and Loan Companies Act[78], among others, which provide for the protection of privacy.[79]

3) QUEBEC: ACT RESPECTING THE PROTECTION OF PERSONAL INFORMATION IN THE PRIVATE SECTOR

With the enactment of the Act respecting the protection of personal information in the private sector in 1993, the Province of Quebec became the first jurisdiction in North America to provide for comprehensive legislation governing the protection of personal information in the private sector. The Act regulates the collection, use, and dissemination of personal information and grants individuals the right to have access to their personal data and to have them corrected if applicable. Complaints can be brought to the Commission d'accès à l'information.

c) Chile

1) CHILEAN CONSTITUTION AND OTHER LAWS

Privacy and secrecy of communications are protected under Article 19 of Chile's Constitution of 1980. Law No. 19, 423 prohibits undisclosed taping, telephone intercepts, and other surreptitious means. Information obtained in such a way can only be disclosed by judicial order.[80]

2) ACT ON THE PROTECTION OF PERSONAL DATA

The *Act on the protection of personal data*[81] of August 1999 is the first comprehensive personal data protection law applying to the public and the private sector in Latin America. The Act regulates electronic as well as manual processing of personal data. The following principles are ensured by the Act:

72 Schedule 1, Principle 10.
73 PIEDA, Articles 11-13. The web site of Canada's Privacy Commissioner can be found at: <http://www.privcom.gc.ca>.
74 PIEDA, Articles 14-17.
75 Criminal Code, c-46, '' 184, 193.
76 R.S.C. ch. B-101, '' 242, 244, 459.
77 R.S.C. ch I-11.8, '' 489, 607.
78 R.S.C. ch T-19.8, '' 444.
79 See David Banisar and Simon Davies. *Op.cit.*, p.26-30.
80 See . David Banisar and Simon Davies. *Op.cit;,* p. 30-31.
81 Online: Privacy Exchange, National Omnibus Laws: <http://www.privacyexchange.org/>.

Fair Information practices

Data processing can only occur in accordance with internationally recognized fair information practices.

Consent

The processing of personal data requires express written consent from the data subject, unless authorized otherwise by law. Consent can be revoked (but not retroactively) in writing. There is no requirement to obtain consent if data are publicly available; used only for internal purposes; shared with associates or affiliates; or used for statistical or rating purposes.

Personal data can only be used for the purpose(s) for which they were collected. Individuals may object to the use of personal data for advertising or market research.

Sensitive data

Sensitive data, including those revealing formation about, race, ethnic origin, political opinion, philosophical or religious belief, physical or mental health, sexual life, and personal habits, may only be processed if authorized by law, express consent is given by the individual or if processing is required to determine a person's medical treatment and health benefits. Personal medical information may only be disclosed with the patient's express, written consent.

Accuracy and security

Data processors must ensure that data are accurate, complete, up-to-date, and secure.

Access and transparency

Individuals must be informed about who collects personal information, what information is collected for what purpose, and which third parties are to receive the information. Every six months, they are also entitled to a free copy of the information held by an organization. Individuals may not only request the correction of personal data but also its blocking or deletion if the data 1) have been voluntarily supplied; 2) are outdated or obsolete; 3) are being used for commercial purposes.

Enforcement

While there is no provision for an independent data protection authority, complaints can be made to the courts.

Chile has not enacted any other legislation after doctor Fried's report. Also, other decrees declaring certain municipal acts and documents as secret due to private interests that they may involve have been enacted. For example, this should be the case of Decree 7779/2000, Test to the Regulation of Personal Data Banks held by Public Organizations.

e) Mexico

1) MEXICAN CONSTITUTION

While the Mexican Constitution does not have specific provisions relating to the disclosure of electronic data, it does have general articles which refer to the right to information and to the freedom of the press.[82] Article 6 states that the right to information will be guaranteed by the State. Article 7 limits freedom of the press with respect to privacy, morality, and the public peace.

Article 16 of the Mexican Constitution states:

> No one shall be molested in his person, family, domicile, papers or possession except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken.
>
> .....
>
> Administrative officials may enter private homes for the sole purpose of ascertaining whether the sanitary and police regulations have been complied with, and may demand to be shown the books and documents required to prove compliance with fiscal rulings, in which latter cases they must abide by the

[82] Information on the state of Mexican law was provided by Heather Jeffrey and Gilian Moran from the Canadian Embassy in Mexico on 24 July 2000.

provisions of the respective laws and be subject to the formalities prescribed for cases of search.

2) LEGISLATION

The Federal Law on Transparency of and Access to Public Information published on June 11, 2002, contains a chapter intended for the protection of personal data. It provides for the access to and possibility of correcting personal data. The provisions of the Constitution are complementary as well as some sectoral laws, including the Federal Copyright Law.

Article 109 of the Federal copyright law (Ley federal del derecho de autor) makes it illegal to sell or offer personal information contained in an electronic database without permission of the individual. The text of Article 109 is as follows:

The access to private information on persons contained in databases to which the preceding Article refers as well as the publication, reproduction, release, public communication and transmission of said information, shall call for the prior authorization of the persons involved.

Any investigations carried out by the authorities entrusted with procuring and imparting justice, in accordance with the respective legislation, as well as the access to public archives by persons authorized by law, shall be exempt from the foregoing, provided that the consultation is made pursuant to the respective procedures.

f) Peru

1) POLITICAL CONSTITUTION OF PERU

The Peruvian Constitution of 1993 establishes in article 2, paragraph 5, the right of "any public entity to request without any explanation and to receive the information it may require, within the legal term, at the cost that such request may imply. Exceptions to this provision are the information affecting personal privacy and those expressly excluded by the law or for national security reasons. Bank secrecy and fiscal reserve may be disclosed at the request of a judge, the Attorney General or an investigative commission of the Congress based on the law and provided that it is relating to the investigation". The following paragraph of the same article also establishes that "information services, computerized or not, public or private, shall not provide information affecting personal and family privacy".

In turn, article 200 of the same constitutional law establishes *habeas data* as a constitutional guarantee, prescribing that it "proceeds against the act or omission, by any authority, officer or person, that violates or threats the rights to which Article 2, paragraphs 5) and 6) of the Constitution refer". *(Paragraph reformed by Law Nº 26.470 of June 12, 1995.)*

2) LEGISLATION

The Constitutional Procedural Code (Law No. 28237) regulates the proceedings for *habeas data* action since 2004. Article 60 of the Code establishes the right to resort to such process to have access to information held by any public entity as well as to know, update, include and suppress or rectify personal information or data stored in files, data banks or records of public entities or private institutions. It also contemplates the possibility of suppressing or preventing the disclosure of sensitive or private data which may affect the constitutional rights of an individual.

We must also mention Law 27489 of June 2001 that regulates information disclosure by private risk rating companies (regarding creditworthiness, indebtedness and payment records) and the protection of the information subject as well as the enactment of a law in April 2005 that regulates the use of unsolicited commercial electronic mail (spam).

3) PENAL CODE

Under Article 154 of the Penal Code of Peru "a person who violates personal or family privacy, whether by watching, listening or recording an act, a word, a piece of writing or an image using technical instruments or processes and other means, shall be punished with imprisonment for not more than two years. Article 151 of the Penal Code provides that "a person who unlawfully opens a letter, document, telegram, radio telegram, telephone message or other document of a similar nature that is not addressed to him, or unlawfully takes possession of any such document even if it is open, shall be liable to imprisonment of not more than 2 years and to 60 to 90 days' fine.

g) United States

The right to privacy is not explicitly protected in the US Constitution. The Supreme Court held that a limited constitutional right to privacy arises out of the Bill of Rights in relation to government surveillance. The right to privacy in the private sector is only guaranteed where there is legislation. There is no privacy oversight authority in the United States. The Office of Management and Budget plays a policy role in the federal public sector and the Federal Trade Commission oversees consumer credit information and fair trading practices.[83] The United States does not have a comprehensive law controlling access to and the protection of information and personal data held by private organizations.[84] Instead the United States has legislated on a sectoral basis and relies heavily on self-regulation of the private sector. Legislation regulating privacy protection in the private sector includes, among others, the following acts:

1) Cable communications policy act

The Cable communications policy act[85] (1984) regulates the use of cable television subscriber records. Consumers must be informed about the nature of the information collected and its use. Identifiable information such as viewer choices may not be disclosed without written consent. Information must be accurate and procedures for corrections must be in place. Consumers must be informed at least once a year about the "nature, frequency, and purpose" of information stored and disclosed. Actual and punitive damages may be obtained through court action.

2) Children's online privacy protection act

The Children's online privacy protection act (1998)[86] applies to information concerning children collected on-line. The Act requires that parents must consent before data on children under the age of 13 can be collected or disclosed.[87] Parents must also be given access to data collected and can prevent the further use of the information. Operators of commercial websites must inform parents about their information practices and must maintain confidentiality, security and integrity of the information.

3) Electronic communications privacy act

The use of electronic communications, including voice, video, and data communications, is regulated by the Electronic communications privacy act[88] (1986). The Act prohibits the unauthorized interception, acquisition, or disclosure of electronic communications, including those stored on a computer, unless the communication is readily accessible to the general public. It applies to the public as well as the private sector. Yet, the Act allows for several exceptions. Computer system operators for example may access stored data and divulge information accidentally obtained to government authorities. Since a system can be configured to store all messages that pass through it, the system operator may have access to all messages that pass through. Violations of private communications carry with them potential criminal and civil damages.[89]

4) Fair credit reporting act

Under the Fair credit reporting act[90] of 1970, the collection and use of information of credit reporting agencies is regulated. The Act applies to the activities of those who supply the information to credit agencies, to the credit agencies themselves, and users of credit information. Credit agencies must ensure that their information is accurate and provide for correction procedures. Their records must be available to consumers. Information can only be released to authorized customers who must notify the consumer if adverse action is taken based on a credit report. Users must also inform the consumer about the source of the credit information. If information is incomplete or inaccurate, the consumer can request that the matter be investigated free of charge by the credit agency. The Act is administered by

83 See David Banisar and Simon Davies. *Op.cit*. p.108-111.

84 The federal government's handling of personal data is regulated by the *Privacy Act* (1974), 5 U.S.C. ' 552a (1994).

85 47 U.S.C. ' 551.

86 Online: United States, Federal Trade Commission: "Legal Framework, Statutes Enforced or Administered by the Commission, Statutes Relating to Consumer Protection Mission" <http://www.ftc.gov/ogc/stat3.htm>.

87 Information for the protection of children using the internet and filtering programs are available at a web site called "getNetWise": <http://www.getnetwise.org/>.

88 18 U.S.C. ' 2510-2520, 2701-2709 (1997).

89 See: Domingo R. Tan, "Personal Privacy in the Information Age: Comparison of Internet Data Protection Regulations in the United States and the European Union" (1999) 21(4) Loyola of Los Angeles International and Comparative Law Journal, 661.

90 15 U.S.C. ' 1681-1681(u); Federal Trade Commission: <http://www.ftc.gov/os/statutes/fcra.htm>.

the Federal Trade Commission which has procedural, investigative and limited enforcement powers. Aggrieved persons can also bring cases to court and sue for actual and punitive damages.

5) Right to financial privacy act

The Right to financial privacy act[91] regulates the transfer of financial records. Generally banks are prohibited from disclosing clients' financial records without a court order. Individuals are generally given the opportunity to challenge access of federal investigators to financial records. Relief for actual and punitive damages may be sought in the courts.

6) Video privacy protection act

Video rental or sales information is protected under the Video privacy protection act[92]. The Act prohibits the release of consumers' names, addresses, and titles of videos rented or bought. Customers must be given an opportunity to opt out of marketing schemes. Aggrieved parties can sue in the courts.

While the US Government has regulated data protection in parts of the private sector, major legislative gaps continue to exist, for example, with respect to medical records, bank records and the internet. Some privacy protection is available through state legislation and through the courts, the tort of privacy was first adopted in 1905 and is now available in almost all states as a civil right of action.[93] The general approach, however, remains that the private sector should regulate itself through codes of conduct and market forces. There are a number of industry-based organizations which have developed codes of conduct. These include, among others, the "Information Technology Industry Council", the "Interactive Services Association", the "Online Privacy Alliance" and the "American Electronics Association".[94]

h) Uruguay

1) CONSTITUTIONAL REGULATIONS

Article 28 of the Constitution of Uruguay establishes the following: "Personal documents and personal correspondence by letter, telegraph or of any other kind are uninfringeable and shall never be searched, inspected or intercepted in any way except according to the laws intended for the general interest". This article should be jointly interpreted with arts. 7, 72 and 332.

2) LAWS AND OTHER REGULATORY INSTRUMENTS

The protection of personal data was specifically regulated by Law NE 17.838. Such law established the principle of the need to obtain the express and informed consent of the data subject to collect data which are not of commercial nature, excepting from this requirement certain data of this nature (article 4) defined as "lists containing data limited to full names, personal identity documents or taxpayer's identification record, nationality, marital status, name of spouse, type of marriage, date of birth, address and telephone number, occupation, profession and legal residence".

The law expressly establishes that the following data, among others, are not of commercial nature:

- personal data originated from the exercise of the freedom to issue an opinion, to inform,
- those relating to surveys, market studies, or similar,
- sensitive data relating to personal privacy regarding the racial and ethnic origin of a person as well as his/her political preferences, religious or philosophical or moral beliefs, union affiliation or information regarding his/her physical health or sexuality and any other area reserved to individual liberty.

91 12 U.S.C. sec. 3401 et seq.

92 18 U.S.C. ' 2710. This Act was passed in response to media reports about video rental records of Judge Robert Bork's family during Supreme Court nomination hearings.

93 See David Banisar and Simon Davies. *Op.cit*. p 108-111.

94 For data protection laws in the United States, see also: Organization for Economic Cooperation and Development; Directorate for Science, Technology, and Industry; Committee for Information, Computer and Communications Policy; Working Party on Information Security and Privacy; Inventory of Instruments and Mechanisms Contributing to the Implementation and Enforcement of the OECD Privacy Guidelines on Global Networks,@ DSTI/ICCP/REG (98)12/FINAL, (19 May 1999) at 47-50.

The general principle applicable to these data is that the express and prior conformity of the data subject is required and is limited to the purpose and scope of the register in question.

The Law also establishes a *habeas data* mechanism and a controlling body for the case of violations of the rules of protection applicable to both types of data. It establishes that everyone will have the right to file an effective action to know his/her personal data and their purpose and use, being held in public or private records or data banks and in case of error, falseness or discrimination, to demand rectification, suppression or whatever may apply.

All personal data subjects with previous due identification with personal identification document will be entitled to obtain all personal information held in public of private databases. This right of access will be exercised free of charge and at intervals of not less than six months, unless a new legitimate interest has arisen according to the legal regulations. Likewise, in case it applies due to error in the information or false information, such individual will be entitled to request the rectification, updating and elimination of his/her personal data. In case the person in charge of the database fails to comply with the obligation to rectify within the term established by the law, the interested party is entitled to bring a *habeas data* action.

On its part, art. 694 of law 16736 established the right of access to the various data banks.

There are other sectoral provisions among which are the bank secrecy regulations (decree law 15322), secrecy in Disciplinary Proceedings, Registry of Summary Proceedings, competence of the Civil Service Office of the Presidency of the Republic, arts. 17, 40 and 42 of Decree 258/92, Decree 396/03 regarding Medical Records and laws 14005 and 17668, regulating cloning and organ transplants, establishment of data banks and the necessary secrecy to protect donor's rights. Also, Law 16616 regulates the national statistical system by expressly establishing some principles to be kept in mind to safeguard the principles of information privacy and self-determination.

Likewise, there are regulatory rules that establish the free flow of information (art. 14 of Decree 500/91), electronic dossiers for Central Ministration officials (Executive Branch), Decree 385/99, and storage methods of electronic documents, Decree 83/001.

Finally, Supreme Court of Justice meeting 7564 of February 2006 regulates the protection of personal data held in the databases of such entity.

3) PENAL CODE

From the penal viewpoint, the Penal Code establishes the violation of written correspondence and telegraphic communication and the possession of secret documents by fraudulent means (arts. 296, 297 and 300).

i) Colombia

Article 15 of the Constitution of Colombia establishes the following: "Every individual has the right to personal and family privacy and to a good name and the State must respect such right and ensure that others respect it. Likewise, they have the right to know, update and rectify all information collected from them in databanks and files of public and private entities.

Data collection, processing and flow, liberty and other guarantees established in the Constitution will be observed.

Correspondence as well as other types of private communication is inviolable. It can only be intercepted or searched by way of court order in the cases and instances that they law may provide. (…)

For judicial or tax purposes and for the purposes of inspection, surveillance and intervention by the State, the presentation of accounting records and other private documents may be required according to the law".

Notwithstanding the constitutional provision, Colombia does not have a legal entity engaged in the comprehensive regulation of matters relating to the protection of data, although there are some sectoral provisions scattered in several legal entities such as the protection of data relating to medical conditions and inviolability of correspondence. In the past, several bills were submitted but were not approved. For the present term of office, there are plans to discuss in the Colombian Congress the bill "Statutory law in the matter of *habeas data*", to establish regulations for article 15 of the Constitution.

Besides, the Colombian Constitutional Tribunal has played an active role since it has pronounced more than one hundred relevant sentences guaranteeing compliance with habeas data and the protection of personal data, stating some relevant juridical principles.

The Penal Code also provides for the establishment of conducts such as the illicit violation of communications and the supply, sale or purchase of instruments intended for the interception of private communications.

j) Paraguay

1) CONSTITUTION OF 1992

Article 135 of the Constitution of Paraguay specifically contemplates the figure of *habeas data* in the following terms: "Every individual is entitled to access to personal information or data or regarding his/her assets held in official or private records as well as to be aware of their use and purpose. Every individual will be entitled to request to the competent magistrate, the update, rectification or destruction of such data if they contain errors or illegitimately affect the rights of the individual".

2) LEGISLATION

Paraguay has a law that regulates information of private nature, Law No. 1682/01, as modified by Law 1969/02. The object of this legislation is to "regulate the collection, storage, distribution, publication, modification, destruction, duration, and in general, the processing of personal data held in files, registries, data banks or any other technical means for the processing of public or private data intended for the supply of reports, in order to guarantee the full exercise of the data subject's rights". The laws in question also establish the right of every individual to access the data held in public registries.

The legislation in question also establishes the conditions under which data relative to physical or juridical persons regarding the status of their assets, economic solvency or fulfillment of their commercial and financial obligations may be published or disseminated. The laws specifically provide for three assumptions:

- with previous authorization in writing by the affected party regarding debts that are not part of a judicial claim;
- the dissemination obeys to compliance with specific legal provisions;
- the information in question is held by public sources of information.

The law also provides for the obligation to update personal data held in the registries of individuals or entities that process information, and establishes the corresponding sanctions which basically consist in fines.

3) PENAL CODE

Chapter VII of Title I of Book 2 of the Penal Code of Paraguay contains a series of provisions relevant to data protection such as those establishing the violation of personal privacy, violation of the right to communication and self-image, violation of communication secrecy or disclosure of secrets of private nature.

k) Ecuador

1) CONSTITUTION

Article 94 of the Constitution of Ecuador provides for the following: "Every individual will have the right to access documents, data banks and reports relating to his/her own personal data or assets held in public or private entities, as well as to be aware of their use and purpose. Every individual will be entitled to request to the respective officer, the update, rectification or destruction of such data if they contain errors or illegitimately affect his/her rights. If the lack of attention to this matter causes any damage, the affected party is entitled to compensation. The law will establish a special procedure to have access to personal data held in files relating to national defense".

Article 276 of the same Constitution establishes that the Constitutional Tribunal will have jurisdiction in hearings regarding "resolutions denying …. *habeas data*…".

2) LEGISLATION

The Constitutional Control Law of 1997 regulates some of the procedural aspects of the institute, particularly in Title II, Chapter II. Article 35 provides for *habeas data* as a resort to:

- obtain from the data subject complete, clear and truthful information;
- make that whoever holds the information will rectify, eliminate and will not disclose it to third parties;
- obtain certifications or verifications stating that whoever holds the information has rectified, eliminated or has not disclosed it.

Article 9 of the Electronic Commerce Law provides protection for the collection, transfer, use and transmission of personal data obtained by any means and specifically through data bases. The violation of these provisions is sanctioned as a crime.

l) Costa Rica

1) CONSTITUTION

The Constitution of Costa Rica does not provide any specific rule relating to the protection of personal data or information self-determination as a specific juridical asset subject to protection. Article 24 establishes, however, the right to privacy, extending the protection to private communications and documents

2) LEGISLATION

There is no legal regulation of general and comprehensive nature regarding this matter, although some bills have been introduced with the purpose of regulating it, for example, with the intention to introduce an additional chapter regarding *habeas data* to the Constitutional Jurisdiction Law. The Supreme Court has also drafted a bill on the matter. The protection of data is currently addressed through the general appeal system.

m) Guatemala

Articles 30 and 31 of the Constitution of Guatemala regulate the matter relating to making public the access to administrative acts and files and records, however, only files and records of governmental nature are mentioned. Several bills have been introduced throughout the years regarding *habeas data* and the protection of personal data as part of the matter regarding access to information, however, no law has been enacted so far.

n) Panama

The Constitution of Panama does not provide a specific rule addressing *habeas data*. Law 6 of January 22, 2002, regulates *habeas data* along with public administration transparency, even though the former only applies to public and private entities that by virtue of a concession provide public services. The law establishes the right of the affected parties to the correction of elimination of incorrect or outdated information. The Law of May 25, 2002, also regulates the information service on matters relating to credit solvency and includes some provisions for the regulation of the activity of entities engaged in the collection of data relating to personal economic solvency or credit history.

o) Venezuela

1) CONSTITUTION OF VENEZUELA

Article 28 of the Constitution of 1999 expressly refers to the protection of personal data: “Every individual has the right to access documents and data relating to his/her own personal data or assets held in public or private entities, with the exceptions provided for by the law and to be aware of their use and purpose, and request to the court having jurisdiction the update, rectification or destruction thereof if they contain errors or illegitimately affect the individual rights of the individual. Likewise, an individual will also have access to documents of any nature containing information of interest to communities or groups of persons, with the exception of the secrecy of the information sources for the press and other professions that the law may specify”.

Article 60 also establishes the protection of the honor, private life, self-image, confidentiality and reputation, providing that the law will limit the use of information to the effect of guaranteeing personal and family honor and privacy to all citizens.

Finally, article 281, paragraph 3, attributes to the people’s ombudsman the faculty to file for *habeas data* action.

2) Legislation

Chapter 3 of the Special Law against Computer Crimes establishes provisions relating to personal and communications privacy, establishing the conduct in violation of these juridical assts as a crime.

II. REGULATION OF TRANSBORDER DATA FLOWS

1. Background

As it is the case with many other international transactions, the flow of personal data across borders by electronic means, particularly the internet, raises numerous jurisdictional questions. The identification, assignment and enforcement of jurisdiction may pose considerable difficulties. The following example may be illustrative of the problem: personal financial information about an individual of Country A is collected by a credit bureau. The information is stored on a computer in Country B and also at the bureau's headquarters in Country C. The individual has reason to believe that some of the information may not be correct and wants to access it. The laws of Country A provide a right of access to such information if it is held in Country A. In this case, however, the information is not held in Country A. Country B has a similar law but it applies only to the public sector and thereby excludes recourse against a private credit bureau. Also Country C has data protection laws, but they apply only to its own citizens. Recourse is not possible because the individual is not a citizen of Country C. Thus, even though the three countries have data protection laws, a lack of jurisdiction prevents recourse for the individual concerned.[95]

Establishing a jurisdictional rule to cover Internet sites is rather difficult without creating conflict, given that so many individuals belonging to many distinct communities use the Internet. Additional problems are posed by technology, for example when trying to determine who should regulate a particular internet server. One approach could be to allocate jurisdiction according to the country of the domain name registration. Yet, websites could be registered under several domaines such as the ".com" domain as well as the ".uk" domain. Jurisdiction on the basis of the IP number is also difficult because two different websites could use the same IP-number. Even the establishment of jurisdiction based on the physical location of the server is problematic. Such a policy could encourage the placement of servers in locations where laws are favourable to the owner, a "cyberhaven". In any event, any assertion of jurisdiction based on the current technological configuration of the internet will likely be doomed as technology evolves further.[96]

The globalization of data processing renders privacy protection increasingly difficult without the application of extra-territorial jurisdiction. Under traditional international law, however, most States oppose extraterritorial measures that contradict or undermine the laws or clearly enunciated policies of another State exercising concurrent territorial jurisdiction over the same conduct.[97] There may be a need to devise new ways of dealing with the issue of state jurisdiction to deal with the challenges posed by the Internet and other global networks. Some attempts to address transborder data flows, including jurisdictional aspects, have been made at the international as well as domestic level.

2. International instruments

The issues of jurisdiction, transborder data flows and international cooperation have been addressed in a limited and general way by the OECD Guidelines, the Council of Europe Convention, and the UN Guidelines. A more detailed approach to the transboundary flow of data was adopted in the EU Directive.

a) OECD Guidelines

The OECD Guidelines provide some basic principles for dealing with the flow of personal data across borders and legitimate restrictions for the purpose of privacy protection. The Guidelines recommend a country should take all reasonable steps to ensure that transborder flows of personal data are "uninterrupted and secure". A country "should refrain from restricting transborder flows of personal data" unless the re-export of data would circumvent its domestic privacy legislation or the other country provides "no equivalent protection." The OECD Guidelines reinforce that "countries should avoid developing laws, policies and practices in the name of the protection of privacy and individual liberties, which

---

95 "Conflicting Assertions of National Jurisdiction over Information Matters." Noes for a Speech by J.T. Fried before the Media and Communications Law Section of the Canadian Bar Association, Ottawa, 11 October 1984.

96 For a discussion of jurisdiction over the internet in the context of European conventions see: Agne Lindberg, Delphi Lawyers, "Jurisdiction on the Internet: European Conventions," 7 January 1998, at the web site Privacy Exchange, Conference Presentations and Papers, <http://www.privacyexchange.org/>.

97 For a discussion of the principles of jurisdiction see: Pierre Trudel, "Jurisdiction over the Internet: A Canadian Perspective" (1998) 32(4) International Lawyer 1027 at 1029-1047.

would create obstacles to transborder flows of personal data that would exceed requirements for such protection."[98]

The OECD Guidelines encourage international cooperation by ensuring "that procedures for transborder flows of personal data and for the protection of privacy and individual liberties are simple and compatible with those of other Member countries." Members are called upon to exchange information related to the Guidelines and to facilitate "mutual assistance in the procedural and investigative matters involved." Finally, countries should develop "principles, domestic and international, to govern the applicable law in the case of transborder flows of personal data."[99]

b) Council of Europe Convention

The Council of Europe Convention states that A[a] Party shall not, for the sole purpose of the protection of privacy, prohibit or subject to special authorization transborder flows of personal data going to the territory of another Party. Yet, a Party to the Convention may block the transborder flow of data "insofar as its legislation includes specific regulations for certain categories of personal data or of automated personal data files, because of the nature of those data or those files, except where the regulations of the other Party provide an equivalent protection." Similarly, a Party may prohibit the cross-border transfer of personal data where "the transfer is made from its territory to the territory of a non-contracting State through the intermediary of the territory of another Party, in order to avoid such transfers resulting in circumvention of the legislation ..."[100] In short, data transfers can be blocked to countries which do not provide an equivalent standard of protection.

In order to facilitate the transborder flow of data, the Convention requires each Party to designate a national data protection authority which provides information on its laws and administrative procedures in the field of data protection to other Parties.[101] In addition, each Party is required to assist persons resident abroad to exercise their rights.[102] The Convention establishes a Consultative Committee which represents member States and makes proposals as to the application and improvement of the Convention.[103]

The Draft Protocol produced by the Consultative Committee requires the supervisory authorities established under the Protocol to cooperate with one another in the performance of their duties, particularly through the exchange of information.[104]

The Protocol also addresses the issue of transborder data flows to a recipient which is not subject to the jurisdiction of a Party to the Convention. It states that such transfers of personal data are permitted "only if that State or organization ensures an adequate level of protection for the intended data transfer."[105] Exceptions to this rule are only allowed:

a) if domestic law provides for it because of specific interests of the data subject, or legitimate prevailing interests, especially important public interests, or

b) if safeguards, which can in particular result from contractual clauses, are provided by the controller responsible for the transfer and are found adequate by the competent authorities according to domestic law.[106]

The provisions of the Draft Protocol with respect to the transfer of personal data to third countries are similar to those of the EU Directive.

c) United Nations Guidelines

The UN Guidelines address the issue of transborder data flows in Article 9 which states:

> When the legislation of two or more countries concerned by a transborder data flow offers comparable safeguards for the protection of privacy, information should be able to circulate as freely as inside each of the territories concerned. If there are no reciprocal safeguards, limitations on such circulation may not be imposed unduly and only in so far as the protection of privacy demands.

98 OECD Guidelines, Part Three.
99 OECD Guidelines, Part Five.
100 Council of Europe Convention, Article 12.
101 Council of Europe Convention, Article 13.
102 Council of Europe Convention, Article 14.
103 Council of Europe Convention, Articles 18-20.
104 Draft Protocol, Article 1.
105 Draft Protocol, Article 2.
106 Draft Protocol, Article 2.

As in the OECD Guidelines, limitations on the crossborder flow of data are only permitted if the required standards of privacy protection are not met. Measures must be proportionate to the need of protection required.

d) European Union Privacy Directive

One of the major objectives of the EU Directive was to address the transborder flow of personal data and to create a common European market. Article 1(2) of the EU Directive requires that countries of the European Union "shall neither restrict nor prohibit the free flow of data between Member States." Given that all EU States are required to provide a roughly equivalent level of protection for personal data as a result of the EU Directive, limitations on the free movement of data merely for reasons of privacy protection are not permitted within the Union.

Chapter IV of the EU Directive deals with the Transfer of personal data to third countries. EU countries must block the transfer of personal information to non-member States that do not offer an "adequate" level of protection. Article 25 of the EU Directive states:

1. The member States shall provide that the transfer to a third country of personal data which are undergoing processing or are intended for processing after transfer may take place only if, without prejudice to compliance with the national provisions adopted pursuant to the other provisions of this Directive, the third country in question ensures an adequate level of protection.
2. The adequacy of the level of protection afforded by a third country shall be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country of final destination, the rules of law, both general and sectoral, in force in the third country in question and the professional rules and security measures which are complied with in that country.

Decisions about the adequacy of a third country's data protection regime under the EU Directive are first made at the level of national authorities. The EU member States and the European Commission are required to share information with each other about cases where a third country does not properly protect personal data.[107] If the Commission finds that a third country does not offer an adequate level of protection, EU member States are required to prevent the transfer of personal data.[108]

Article 26 of the EU Directive provides the following exceptions to the rule that personal data cannot be transferred to countries providing an adequate level of protection:

a) the data subject has given his consent unambiguously to the proposed transfer; or
b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of precontractual measures taken in response to the data subject's request; or
c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
e) the transfer is necessary in order to protect the vital interests of the data subject; or
f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

The transfer of personal data to a third country that does not provide adequate privacy protection is also permissible "where the controller adduces adequate safeguards with

[107] EU Directive, Article 25(3).
[108] EU Directive, Article 25(4).

respect to the protection of the privacy", for example through "appropriate contractual clauses".[109]

Where a third country does not provide adequate privacy protection, the Commission may enter into negotiations "with a view to remedying the situation".[110] Given the importance of the EU in the global exchange of data, the EU Directive has potentially significant consequences outside the Union. Where third countries do not provide sufficient legislation to protect personal data in the private sector, public authorities or even individual businesses may be forced to undertake negotiations with the Commission with a view to demonstrating their compliance with the EU rules.

The EU Directive encourages cross-border cooperation within the European Union by stipulating that a national "authority may be requested to exercise its powers by an authority of another Member State" and that "supervisory authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information."[111]

3. National legislation

Most States do not have specific legislation dealing with the transborder flow of personal data. However, the data protection laws of some countries require that the release of personal data to foreign States can take place only if certain conditions are met. Usually the foreign State or the recipient organization must guarantee a minimum level of privacy protection. Some laws also make provisions for cooperation with other data protection or law enforcement authorities.

A) ARGENTINA

Argentina has no specific laws governing the flow of data in electronic form across international borders.[112] However, the proposed *habeas data* bill No. 606 of 1998 approved by the Argentine Senate forbids the transfer of personal data of any kind to other countries or to international or supra-national bodies which do not provide adequate levels of protection. Exceptions to this are exchange of data with purposes of international judicial cooperation, medical data if the treatment of a patient requires it or in the course of epidemiological research, bank or stocks transfers, when the transfer is done according to international treaties to which Argentina is a signatory, or when it is part of international cooperation among intelligence agencies with the purpose of fighting organized crime, terrorism and drug trafficking. It is not clear how this will be applied to the internal operations of transnational corporations, or to the operations of business level transactions.

B) CANADA

Canada's Privacy Act, which applies to the public sector, provides (in Article 8) for the transboundary disclosure of personal information:

> *f) under an agreement or arrangement between the Government of Canada or an institution thereof and the government of a province, the government of a foreign state, an international organization of states or an international organization established by the governments of states, or any institution of any such government or organization, for the purpose of administering or enforcing any law or carrying out a lawful investigation;*

Unlike *the Privacy Act, the Personal information and electronic documents act does not address the issue of transborder flow of information or cooperation in specific terms, but organizations in Canada will still be held responsible for the proper protection of personal data even when data are transmitted across borders (accountability principle).*[113] *Quebec's Act respecting the protection of personal information in the private sector provides in Section 17 that when communicating data outside Quebec, an enterprise must* take reasonable steps to ensure that the data will be used only for specified purposes and that the data subject is given an opportunity to object to use of the data for solicitation.

---

109 EU Directive, Article 26.
110 EU Directive, Article 25(5).
111 EU Directive, Article 28.
112 Information on the legislation governing the electronic processing of personal data in Argentina has been provided by Hartmuth Kroll from the Canadian Embassy in Buenos Aires on 26 July 2000.
113 Discussion with Ken Huband, Privacy Policy, Industry Canada on 1 August 2000.

III. APPROACHES TO DATA PROTECTION

1. Common data protection standards

One approach states have taken at the international level is to agree on a minimum level of convergence of national data protection regimes. The European Union has taken the most forceful approach by requiring its member States to harmonize their data protection legislation. While national laws need not be identical under the EU Directive, reasonably high-level standards must be met by all countries in order to create a common European market for the flow of data. In addition, a supranational organization, the European Commission, continues to play an important coordinating role and ensures that the Union's standards are not undermined by data transfers to third countries which do not meet the required standards. While presenting a significant challenge, this kind of harmonization of laws could be extended beyond the European Union through bilateral treaties or multilateral conventions.[114]

Indeed, all the international instruments discussed above have attempted to encourage the enactment of laws that provide a consistent and comparable level of privacy protection in the area of personal data processing. While the OECD Guidelines and the UN Guidelines represent non-binding recommendations on which to build data protection regimes, the Council of Europe Convention and particularly the EU Directive are legally binding instruments requiring states to pass laws establishing certain minimum standards in privacy protection. As a result of the Council of Europe Convention and the EU Privacy Directive, most European States introduced privacy protection regimes.[115]

The hope is that by agreeing on a minimum level of common data protection principles, states are no longer required to impose restrictions on transborder data flows. The international instruments discussed above allow for limitations to the free flow of data only in certain exceptional cases. The OECD Guidelines refer to countries that do not "substantially observe" the OECD Guidelines or fail to provide "equivalent protection"; the UN Guidelines make reference to a lack of "comparable safeguards"; the Council of Europe Convention requires the absence of "equivalent protection"; and the EU Directive provides for restrictions on data flows outside the Union where third countries do not offer an "adequate level of protection".

Where the required level of protection is not met, certain limited measures of control can be applied. The OECD Guidelines discourage measures which "in the name of the protection of privacy and individual liberties which would exceed requirements for such protection." The UN Guidelines recommend that restrictions be imposed "only in so far as the protection of privacy demands". The European Council Convention and the EU Directive clearly provide for a blocking of the movement of personal data to countries where sufficient protection is not assured.

The EU Directive imposes the strongest limitations on the transborder flow of data. Article 25 of the EU Directive obliges, rather than permits, EU member States to prohibit the transfer of personal data to States that do not provide adequate levels of protection. The standard required by the OECD Guidelines and the Council of Europe Convention may be stronger as it is one of "equivalence" rather than "adequacy", but only under the EU Directive must the transfer of data be blocked if the standard is not met. Because of the EU's economic importance, the potential of such a data embargo is a powerful incentive for states around the world to create some measure of harmonization in the protection of personal data.[116] Where the transborder flow of data is interrupted because a third country has

[114] The EU Directive itself was negotiated under the threat of a data embargo from certain EU members with data protection laws, including France and Germany, against others with less stringent laws, such as Italy. Through the creation of similar data protection standards the possible interruption of the free flow of data was averted. Gregory Shaffer, "Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards," (2000) 25(1) Yale Journal of International Law 1 at 10.

[115] For a discussion of the privacy protection regimes of OECD countries see: OECD; Directorate for Science, Technology, and Industry; Committee for Information, Computer and Communications Policy; Working Party on Information Security and Privacy; "Inventory of Instruments and Mechanisms Contributing to the Implementation and Enforcement of the OECD Privacy Guidelines on Global Networks," DSTI/ICCP/REG (98)12/FINAL, (19 May 1999).

[116] For example, the potential extra-territorial effects of the EU Directive have encouraged non-European countries such as Canada, Hongkong, New Zealand and Taiwan to pass data protection legislation to cover the private sector. See: Privacy Commissioner, New Zealand, "Report by the Privacy Commissioner to the Minister of Justice on the Trans-Tasman Mutual Recognition Bill and Transborder Data Flows," at Privacy Commissioner, New Zealand, "Reports and Submissions": <http://www.privacy.org.nz/people/transtas.html>.

inadequate privacy protection laws, the European Commission is required to enter into negotiations with that third country.

2. Safe harbour principles

In view of the entry into force of the EU Directive on 25 October 1998, the European Commission and the US Department of Commerce took up negotiations to avoid a disruption in the free flow of data between Europe and the United States. To diminish the uncertainty as to whether US organizations would meet the “adequate standard” test with respect to data protection required by the EU Directive, the United States proposed that US companies that wish to receive personal data from European Union adhere to the so-called Safe harbour principles.[117] Adherence to these Principles would establish a “presumption of adequate privacy protection” for the purposes of the EU Directive.

Decisions by organization to qualify for the safe harbour are voluntary. Organizations may qualify for the safe harbour in several ways. They can join a self-regulatory privacy programme that adheres to the Principles or they can develop their own self-regulatory privacy policies, provided that they conform with the Principles. If an organization fails to comply with self-regulation, it can be pursued under Section 5 of the Federal trade commission act, which prohibits “unfair and deceptive acts”. Organizations which are subject to a statutory, regulatory, administrative or other law that effectively protects privacy may also qualify for the safe harbour. To qualify, organizations must self-certify to the Department of Commerce their adherence to the Principles in accordance with the guidance set forth in the Frequently asked questions.

The Safe harbour principles, issued in their final version on 21 July 2000, are the following:

"Personal data" and "personal information" are data about an identified or identifiable individual that are within the scope of the Directive, received by a U.S. organization from the European Union, and recorded in any form.

NOTICE: An organization must inform individuals about the purposes for which it collects and uses information about them, how to contact the organization with any inquiries or complaints, the types of third parties to which it discloses the information, and the choices and means the organization offers individuals for limiting its use and disclosure. This notice must be provided in clear and conspicuous language when individuals are first asked to provide personal information to the organization or as soon thereafter as is practicable, but in any event before the organization uses such information for a purpose other than that for which it was originally collected or processed by the transferring organization or discloses it for the first time to a third party(1).

CHOICE: An organization must offer individuals the opportunity to choose (opt out) whether their personal information is (a) to be disclosed to a third party(1) or (b) to be used for a purpose that is incompatible with the purpose(s) for which it was originally collected or subsequently authorized by the individual. Individuals must be provided with clear and conspicuous, readily available, and affordable mechanisms to exercise choice.

For sensitive information (i.e. personal information specifying medical or health conditions, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information specifying the sex life of the individual), they must be given affirmative or explicit (opt in) choice if the information is to be disclosed to a third party or used for a purpose other than those for which it was originally collected or subsequently authorized by the individual through the exercise of opt in choice. In any case, an organization should treat as sensitive any information received from a third party where the third party treats and identifies it as sensitive.

ONWARD TRANSFER: To disclose information to a third party, organizations must apply the Notice and Choice Principles. Where an organization wishes to transfer information to a third party that is acting as an agent, as described in the endnote, it may do so if it first either ascertains that the third party subscribes to the Principles or is subject to the Directive or another adequacy finding or enters into a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is

[117] US Department of Commerce, “Safe Harbour Principles” (21 July 2000), online: Privacy Exchange, News: http://www.privacyexchange.org/.See also: online: Europa, European Commission, Internal Masrket, Media Information Society and Data Protection, Data Protection, News, <http://www.europa.eu.interamericano/comm/internal_market/en/media/dataprot/news/safeharbor.htm>

required by the relevant Principles. If the organization complies with these requirements, it shall not be held responsible (unless the organization agrees otherwise) when a third party to which it transfers such information processes it in a way contrary to any restrictions or representations, unless the organization knew or should have known the third party would process it in such a contrary way and the organization has not taken reasonable steps to prevent or stop such processing.

SECURITY: Organizations creating, maintaining, using or disseminating personal information must take reasonable precautions to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction.

DATA INTEGRITY: Consistent with the Principles, personal information must be relevant for the purposes for which it is to be used. An organization may not process personal information in a way that is incompatible with the purposes for which it has been collected or subsequently authorized by the individual. To the extent necessary for those purposes, an organization should take reasonable steps to ensure that data is reliable for its intended use, accurate, complete, and current.

ACCESS: Individuals must have access to personal information about them that an organization holds and be able to correct, amend, or delete that information where it is inaccurate, except where the burden or expense of providing access would be disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated.

ENFORCEMENT: Effective privacy protection must include mechanisms for assuring compliance with the Principles, recourse for individuals to whom the data relate affected by non-compliance with the Principles, and consequences for the organization when the Principles are not followed. At a minimum, such mechanisms must include (a) readily available and affordable independent recourse mechanisms by which each individual's complaints and disputes are investigated and resolved by reference to the Principles and damages awarded where the applicable law or private sector initiatives so provide; (b) follow up procedures for verifying that the attestations and assertions businesses make about their privacy practices are true and that privacy practices have been implemented as presented; and (c) obligations to remedy problems arising out of failure to comply with the Principles by organizations announcing their adherence to them and consequences for such organizations. Sanctions must be sufficiently rigorous to ensure compliance by organizations.

> 1. It is not necessary to provide notice or choice when disclosure is made to a third party that is acting as an agent to perform task(s) on behalf of and under the instructions of the organization. The Onward Transfer Principle, on the other hand, does apply to such disclosures.

These Principles are complemented by a document dealing with Frequently Asked Questions providing guidance to the interpretation of the Principles.[118]

Adherence to the Principles may be limited by the following:

a) to the extent necessary to meet national security, public interest, or law enforcement requirements;

b) by statute, government regulation, or case law that create conflicting obligations or explicit authorizations, provided that, in exercising any such authorization, an organization can demonstrate that its non-compliance with the Principles is limited to the extent necessary to meet the overriding legitimate interests furthered by such authorization; or

c) if the effect of the Directive or member State law is to allow exceptions or derogations, provided such exceptions or derogations are applied in comparable contexts.

The European Union recognizes the US Federal Trade Commission and the US Department of Transportation “as being empowered to investigate complaints and to obtain relief against unfair or deceptive practices as well as redress for individuals in case of non-compliance with the Principles implemented in accordance with the Frequently asked questions.”[119]

[118] Online: Privacy Exchange, News: <http://www.privacyexchange.org/>.

[119] “Annex to the Safe Harbour Principles”, online: Privacy Exchange, News: <http://www.privacyexchange.org/>.

Although the European Commission had already accepted the "adequacy" of the Safe Harbour Principles[120], the European Parliament called for the imposition of additional requirements on 14 July 2000:[121]

- recognition of an individual right of appeal to an independent public body instructed to consider any appeal relating to an alleged violation of the principles;
- an obligation on participating firms to compensate for the damage, whether moral or to property, suffered by those involved, in the event of violations of the principles, and an undertaking by the firms to cancel personal data obtained or processed in an unlawful manner;
- ease of identification of the steps to be taken to ensure data are cancelled and to obtain compensation for any damage suffered;
- provision of a preliminary check by the Commission on the proper functioning of the system within six months of its entry into force and presentation of a report on the outcome of the check and any problems encountered to the working party provided for in Article 29 and the Committee provided for in Article 31 of the Directive, as well as to the relevant committee of the European Parliament;

Despite these concerns by the European Parliament, the European Commission issued a Decision on 27 July 2000, accepting the Safe Harbour Principles released by the Government of the United States on 21 July 2000.[122] The Commission decided to proceed with the Decision, given that the European Parliament had not found that the Commission, in doing so, would be exceeding its powers. Nevertheless, the Commission notified the US Department of Commerce of the concerns of the European Parliament and stated that it would re-open discussions if Parliament's fears about the inadequacy of remedies for individuals proved to be well-founded.

3. Mutual assistance and cooperation

Where countries cannot agree on the establishment of a common data protection regime through the harmonization of laws or other mechanisms such as the *Safe harbour principles*, the effectiveness of national legislation can nevertheless be enhanced through mutual assistance and cooperation arrangements. In order to enforce data protection laws, adjudicative bodies must be able to exercise some control or influence over the offender and obtain the necessary evidence. Particularly in the area of personal data protection on the Internet and other global networks, international cooperation is required as individual countries alone cannot possibly deal with this issue. Some of the international instruments discussed above as well as national laws provide for cooperation among data protection authorities across international borders. Provisions for mutual assistance have also been included in other bilateral and multilateral treaties, particularly those dealing with criminal law.[123]

a) Mutual assistance in international instruments

The OECD Guidelines encourage members to exchange information related to the Guidelines and to facilitate "mutual assistance in the procedural and investigative matters involved."[124] The European Council Convention requires each Party's national data protection authority to provide information on its laws and administrative procedures in the field of data protection to other Parties and to assist persons resident abroad to exercise their rights.[125] The EU Directive stipulates that a national "authority may be requested to exercise its powers by an authority of another member State" and that "supervisory

120 Commission Decision C5-0280/2000

121 European Parliament Resolution on the Draft Commission Decision on the adequacy of the protection provided by the Safe Harbour Privacy Principles and related Frequently Asked Questions issued by the US Department of Commerce (C5-0280/2000 – 2000/2144 (COS)) in "Minutes of 05/07/2000 – Provisional Edition"on the web site of the European Union, European Parliament Search Guide, Resolutions; <http://www.europart.eu.interamericano/search/en/docsearch.htm#b-resolutions>

122 Data protection: Commission adopts decisions recognising adequacy of regimes in US, Switzerland and Hungary", online: Europa, European Commission, Internal Market, Media Information Society and Data Protection, Data Protection, News, <http://www.europa.eu.int/comm/internal_market/en/media/dataprot/news/safeharbor.htm>.

123 See for example: *Treaty Between the Government of the United States and the Government of Canada on Mutual Legal Assistance in Criminal Matters* (18 March 1985) 24 I.L.M. 1092 and the *Canadian Mutual Legal Assistance in Criminal Matters Act*, ch. M-13.6 (R.S., 1985, c. 30 (4th Supp.); online: Canada, Department of Justice, "Consolidated Statutes" http://canada.justice.gc.ca/FTP/EN/Laws/Chp/M/M-13.6.txt.

124 OECD Guidelines, Part V.

125 European Council Convention, Articles 13 & 14.

authorities shall cooperate with one another to the extent necessary for the performance of their duties, in particular by exchanging all useful information."[126]

b) Draft Convention on Cyber-Crime

Of relevance to the discussion of international data protection and mutual legal assistance is the proposed Convention on cyber-crime which is currently being negotiated by the member States of the Council of Europe and a number of other States, including Canada, Japan, South Africa and the United States. The Council of Europe has published the current version of the Draft Convention (Draft No. 19) on the Internet.[127] Several of the provisions of the Draft Convention relate directly to the protection of personal data, such as those dealing with illegal access to computer systems (Article 2); the illegal interception of computer data (Article 3); the interference with computer data (Article 4) or a computer system (Article 5); or other computer related offences such as forgery (Article 7) or fraud (Article 8).

In addition, the Draft Convention contains language which may be useful in dealing with questions of jurisdiction and mutual legal assistance. The Convention addresses the issue of jurisdiction in Article 19:

> 1. Each Party shall take such legislative and other measures as may be necessary to establish jurisdiction over any offence ... when the offence is committed:
>
> a. [in whole or in part] in its territory or on a ship, an aircraft, or a satellite flying its flag or registered in that Party;
>
> b. by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State. ...
>
> 5. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

The Draft Convention clearly encourages States to assert jurisdiction over offenders on their territory as well as their nationals, by way of consultation if required.

Article 20 of the Draft Convention outlines general principles relating to international co-operation:

The Parties shall co-operate with each other, in accordance with the provisions of this chapter, and through application of relevant international instruments on international co-operation in criminal matters, arrangements agreed on the basis of uniform or reciprocal legislation, and national laws, to the widest extent possible for the purposes of investigations and proceedings concerning criminal offences related to computer systems and data, or for the collection of electronic evidence of a criminal offence.

States are called upon to use any available legal means to pursue offenders.

Article 22 of the Draft Convention calls on Parties to provide for expedited mutual assistance for the purpose of enforcement:

> 1. The Parties shall afford one another mutual assistance to the widest extent possible for the purpose of investigations and proceedings concerning criminal offences related to computer systems and data, or for the collection of electronic evidence of a criminal offence.
>
> 2. For the purpose of providing cooperation under articles 24 - 29, each Party shall, in urgent circumstances, accept and respond to mutual assistance requests by expedited means of communications, including [voice], fax or e-mail, to the extent that such means provide appropriate levels of security and authentication, with formal confirmation to follow where required by the requested State.

The Draft Convention provides for mutual assistance procedures for cases where no mutual assistance treaty or arrangement is in place between the requesting and the

[126] EU Directive, Article 28.

[127] Council of Europe, Directorate General I, Legal Affairs, Treaty Office, *"Draft Treaties":* <http://conventions.coe.int/treaty/EN/cadreprojets.htm> [hereinafter Draft Convention on Cyber-crime].

requested Parties. Each Party is required to designate a central authority to deal with requests for mutual assistance. A register of central authorities is to be kept and the central authorities are to communicate directly with each other. Assistance may be refused, in full or in part, if required by law or if it would prejudice a Party's sovereignty, security, public order, or other essential interests. Parties may also forward to other Parties, without prior request, information which may lead to a request or to the initiation of an investigation. The information provided may only be used for specified purposes and may have to be kept confidential.[128] Requests for assistance may also concern the expedited preservation of data stored on computers.[129] If a third State was involved in the transmission of a communication, a Party may request the disclosure of a sufficient amount of data, in order to identify the service provider and the path which was used for the communication.[130] When a Party requests to access, seize, secure or disclose data stored on computers, the requested Party should respond as expeditiously as possible by:

a) Where permitted by its domestic law, ratifying or endorsing any judicial or other legal authorisation that was granted in the requesting Party to search or seizure the data, thereupon executing the search or seizure and, pursuant to its mutual assistance treaties or laws, as applicable, disclosing any data seized to the requesting Party; or

b) Responding to the request and disclosing any data seized, pursuant to its mutual assistance treaties or laws, as applicable; or

c) Using any other method of assistance permitted by its domestic law.

In order to ensure immediate assistance in the form of technical advice, the preservation of data, or the collection of evidence, giving of legal information, and locating of suspects, a point of contact available on a 24 hour, 7 day per week basis needs to be established.[131]

While the Draft Convention on Cyber-Crime deals with criminal law matters, its mutual legal assistance provisions may nevertheless be of value to international efforts to protect personal data, particularly given the fact that the Convention deals with an area of law which is very closely related.

c) Cyber-Crime and G-8 Countries

A parallel process on the issue of cyber-crime is also under way under the auspices of the G-8 Countries. At the Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime on 19-20 October 1999, a statement on the principles on transborder access to stored computer data was released which also contains provisions for "expedited mutual legal assistance":[132][123]

> 4. Upon receiving a formal request for access, search, copying, seizure or disclosure of data, including data that has been preserved, the requested State shall, in accordance with its national law, execute the request as expeditiously as possible, by:
>
> a. Responding pursuant to traditional legal assistance procedures; or
>
> b. Ratifying or endorsing any judicial or other legal authorization that was granted in the requesting State and, pursuant to traditional legal assistance procedures, disclosing any data seized to the requesting State; or
>
> c. Using any other method of assistance permitted by the law of the requested State.
>
> 5. Each State shall, in appropriate circumstances, accept and respond to legal assistance requests made under these Principles by expedited

[128] Draft Convention on Cyber-Crime, Article 23.
[129] Draft Convention on Cyber-Crime, Article 24.
[130] Draft Convention on Cyber-Crime, Article 25.
[131] Draft Convention on Cyber-Crime, Article 27.
[132] "Communique: Ministerial Conference of the G-8 Countries on Combating Transnational Organized Crime (Moscow, October 19-20,1999)", online: Canada. Department of Foreign Affairs and International Trade, <http://www.dfait-maeci.gc.ca/foreignp/g7/1999/moscow1-e.htm>.

but reliable means of communications, including voice, fax or e-mail, with written confirmation to follow where required.

Again, there is a recognition that effective mutual legal assistance is required in order to deal with data stored in a foreign State.

IV. CONCLUSION

The protection of personal information and data held in electronic form in the private sector has been advanced through the establishment of international instruments. The OECD Guidelines, the European Council Convention, the UN Guidelines, and particularly the EU Data Protection Directive have had a profound impact on data protection in Europe and elsewhere. Also some OAS countries, notably Canada and Chile, have enacted laws which provide relatively high levels of privacy protection.

Nevertheless, it seems fair to say that many challenges remain particularly with respect to the transborder flow of personal data on the Internet and other global networks. The privacy of citizens remains vulnerable even in those countries which have effective national laws, because of the existence of data havens where no protection is available. The existing international and national instruments leave numerous problems unresolved, such as the interpretation of what “adequate” and “equivalent” levels of protection are or the nature of the enforcement required to implement agreed upon standards. Legislation and enforcement are especially challenging because of rapidly evolving technology. In addition, those States who wish to protect the privacy of their citizens are also faced with competing economic, trade, social and political interests.

These difficulties, however, are not unique to the area of data protection. Further progress in the area of privacy protection could probably be made by a combination of measures, including the development of international standards and enforcement mechanisms, mutual legal and technical assistance, the encouragement of industry self-regulation, and the operation of market forces influenced by information and education.

Based on the limited information which was available for this report, however, it is difficult to assess the adequacy of legislation throughout the OAS. It is therefore recommended that, in order to obtain a more complete assessment of the juridical issues concerning personal data protection in OAS countries, the Secretariat for Legal Affairs repeat its request to member States for more information on existing domestic legislation, regulations, and policies.

CJI/doc.239/07

ACCESS TO INFORMATION: COMMENT REGARDING THE RESPONSES TO THE QUESTIONNAIRE SENT BY THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE OAS MEMBER STATES (CJI/doc.232/06 rev.1, 17 August 2006)

(presented by Dr. Jaime Aparicio)

The Members State of the Organization of American States received the questionnaire regarding the existing internal legislation in every country concerning access to information and the protection of personal data. The referred questionnaire was sent by the Office of International Law, at the request of the Inter-American Juridical Committee dated September 13, 2006. Only three member States remitted answers: Guatemala, México and Jamaica. Below are the resumed contents of the answers received. It is important to state that, in the reports reference is made to two matters, which even if they are within the scope of the subject of access to information, they are of a different nature, and each requires a different and specialized treatment. One is the matter of the citizen’s access to information that allows them to know the activities of public authorities, government functionaries, and the State expenses, contracts and purchases, so they may exercise social control over those expenses, and where the authorities must be legally obligated to put the information at the disposal of the people who require it in a timely and complete manner with the purpose of creating a culture of transparency. This subject has to do with improving democracy, the responsibility of the public functionaries and the importance of transparency in public management as a basis for the fight against corruption.

The other is the subject of access to and the protection of information and personal data that is in electronic format.

Reports:

Guatemala

The Guatemalan Mission to the OAS responded to the questionnaire sent by the OAS Office of International Law, on October 30, 2006.

With reference to the matter of Access to Public Information, the norm is contained in Art. 30 of its Political Constitution and in three Laws of 2005 concerning: “Ley de Acceso a Información Pública y Clasificación y Desclasificación de Información Reservada”; “Clasificación y desclasificación de Asuntos Militares, Diplomáticos de Seguridad Nacionales y Confidenciales” y “Libre Acceso a la Información” (“Law of Access to Public Information and Classification and Declassification of Confidential Information”; “Classification and Declassification of Military, Diplomatic, National Security and Confidential Matters” and “Free Access to Information”).

According to the regulations, access to public information exists. The offices of the Executive Power are obligated to publish information on each of the offices in electronic format. Also, the subject of transparency in state procurement, and national revenue, and others has been initiated. The access of more detailed public information by a civilian is only possible by means of an express request.

Among the observation received, are the necessity to complement this legislation with the establishment of more detailed regulations and specification for cases that concern military secretes and contracts and purchases of the national army. The report mentions that there are no regulations for the Legislative and Judicial Powers.

Regarding the protection of personal data, there is only article 30 of the Constitution, which provides for the guarantee of confidentiality for data provided by citizens to private or government institutions. Specifically, there are legal precepts to protect the confidentiality of correspondence, communications and publications. The access to personal information by public organizations or entities can occur by means of previous authorization by a competent judge. There are no further legal dispositions to treat the matter of protection for personal data.

Jamaica

The Jamaican Mission to the OAS responded to the questionnaire sent by the OAS Office of International Law, on December 6, 2006.

Jamaica has a legislation that is aims to reinforce the fundamental principles of the constitutional democratic system that make government accountability transparent and promote citizen participation in decision making. These precepts guarantee the public in general the right to access the information contained in documents, including their multimedia versions, which are in the possession of agencies, institutions or organizations of the Public Power, where the State has at least 50% participation.

Concerning materials, documents or others that are of a confidential character, Jamaica has legal provisions that treat the declassification of documents, especially when it involves documents of public interest, or there is previous authorization of the person who is subject of the information in question.

In as much as the protection of personal information, the answers received from the Permanent Mission of Jamaica to the Organization of American States, do not provide details on that subject.

Mexico

The Mexican Mission to the OAS responded to the questionnaire sent by the OAS Office of International Law, on October 16, 2006.

The matter of access to information in Mexico is treated by the Federal Law of Transparency and Access to Government Public Information (LAI- 2002). The dispositions of that Law only refer to the public information due to which it generates responsibilities for the public entities. That Law is of Federal application, thus the States have their own disposition for the matter.

Concerning the protection of data, the LAI Law establishes minimum rules and procedures to be followed regarding access, correction and protection of personal data and physical persons. In the private sector, there are dispositions for the protection of private

citizen information that is applicable to sectors such as credit. Nonetheless, there is no uniform regulation for the matter of protection for personal data that could be applicable for the public, as well as the private sector, nor is there a single norm for the private sector, because the norms are fractioned into material, banking, stock market, etc.

The Senate of the Republic has approved the proposal to consider the right to the protection of personal data as an individual guarantee. This proposal must be considered by the Members of Parliament and by State legislatures.

CJI/RES.130 (LXXI-O/07)

ACCESS TO INFORMATION AND PROTECTION OF PERSONAL DATA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the Inter-American Juridical Committee included in its agenda the topic on the right of citizens to access to public information;

IN VIEW that the laws that guarantee citizens' access to information on the activities of public agencies focus on the enhancement of democracy, on the responsibility of public servants and on the transparency of all public service;

HAVING MAINTAINED, during the present regular session, a useful and rich dialogue with Dr. Darío Soto, Deputy Director of the Trust of the Americas, a foundation associated with the Organization of American States that also represents the Regional Alliance for Freedom of Expression and Information, which gathers various organizations of civil society interested in the topic,

RESOLVES:

To commend the rapporteur, Dr. Jaime Aparicio, and the co-rapporteurs Drs. Mauricio Herdocia and Hyacinth Evadne Lindsay, to continue their work on the topic of Access to Public Information with the organs of the OAS, in collaboration with institutions such as the Trust of the Americas, the Carter Center and the Alliance for Freedom of Expression and Information, to prepare a list of indicators and legal principles on the subject of access to information.

The resolution herein was unanimously approved at the session held on August 9, 2007, in the presence of the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

4. Follow-up on the application of the Inter-American Democratic Charter

Resolution

CJI/RES.132 (LXXI-O/07) Follow-up on the application of the Inter-American Democratic Charter

Annexes: CJI/doc.281/07 Reasoned vote. Follow-up on the application of the Inter-American Democratic Charter (CJI/doc.274/07 rev.2)
(presented by Dr. Eduardo Vío Grossi)

CJI/doc. 284/07 - Explanation of dissenting vote on the follow-up on the application of the Inter-American Democratic Charter resolution
(presented by Dr. Antonio Fidel Pérez)

Document

CJI/doc.264/07 Report concerning the Report of the Secretary General of the Organization of American States on Implementation of the Inter-American Democratic Charter
(presented by Dr. Antonio Fidel Pérez)

Annex: The Inter-American Democratic Charter. Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)] (CP/doc. 4184/07, 4 April 2007)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), the Inter-American Juridical Committee decided to keep this item on its agenda as a topic for follow-up. On 10 April 2007, the Office of International Law sent IAJC members document CP/doc. 4184/07, "The Inter-American Democratic Charter: report of the Secretary General persuant to with resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)".

On July 12, 2007, the Office of International Law sent the members of the Inter-American Juridical Committee a copy of document CJI/doc. 264/07, "Report concerning the Report of the Secretary General of the Organization of American States on Implementation of the Inter-American Democratic Charter", submitted by Dr. Antonio Fidel Pérez, who made a presentation ot its content at the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007).

Dr. Pérez stressed that had he been made aware sooner of the comments that the Secretary General made on this topic during his visit to that session of the Juridical Committee, his own report would have been prepared from a different angle. His document consisted of a brief analysis of the Secretary General's report, in which he identified some of the questions raised by the Secretary General concerning the Inter-American Democratic Charter. In Dr. Pérez' opinion, the questions raised fell into two categories: first, how to correct any flaws or ambiguities in the Inter-American Democratic Charter; and second, how to achieve the Charter's objective and what types of conclusions can be drawn from it.

Dr. Pérez noted that the Secretary General had raised two substantive legal questions. The first question, originally raised by President Jimmy Carter, concerned the legal definition of democracy which, in Dr. Pérez' opinion, was not altogether clear should a Member State ever have to invoke application of the Charter. The second question concerned the following: absent any decision on the part of the Member States, what mechanism could the Secretary General use to initiate dialogue with a Member State in which democratic order was seriously impaired. He observed that at the present time, the provisions of the Inter-American Democratic Charter did not require a decision on the part of the Permanent Council or the General Assembly; they did, however, give the Secretary General the authority to handle the matter with the consent of the government of the Member State in which democratic order is threatened. Dr. Pérez also made the point that still a third question would be the interpretation of the term "government." The Secretary General's report suggested that one possibility might be that a branch of

"government" –other than the executive branch- could invoke the Inter-American Democratic Charter with the Secretary General, without going through the Permanent Council.

Dr. Pérez noted that his report did not examine these questions; instead it looked at how the meaning of the term "government" might be clarified; it also provided a more precise definition of the term "government" and the term "democracy" with a view to implementation of the Inter-American Democratic Charter in a case in which democratic order was threatened. He observed that he had a further objective, which was to try to identify issues that concerned the methodology of international law, since the Secretary General's report had raised some doubt as to the legal *status* of the "Inter-American Democratic Charter" as an international instrument and how the legal questions it raised could be solved through consensus. Dr. Pérez suggested that before embarking upon the process of amending the Inter-American Democratic Charter, an interpretation could be sought from the political bodies of the OAS concerning the ambiguities identified in the Secretary General's report.

Dr. Jean-Paul Hubert summarized the three questions raised in the Secretary General's report and those raised by Dr. Pérez: first, the definition of democracy; second, the absence of a definition of what constitutes a serious threat to democratic order; and third, what can or cannot be called 'government.' He observed that any concept of 'government' that would confine it to the executive branch was a narrow one.

Dr. Hubert recalled that during his visit the Secretary General had made plain that some had reacted to his report by pointing out that the political will of the Member States when the Inter-American Democratic Charter was adopted was to interpret it on a case-by-case basis. That being the case, how, then, could any effort be undertaken to amend the Charter or ascribe to it a specific interpretation? Dr. Hubert suggested that the Inter-American Juridical Committee should keep this topic on its agenda, which would signal the Committee's interest in pursuing the matter. It might even exercise its own initiative and issue an opinion on the legal *status* of the Charter and/or other questions raised by the Secretary General in his report.

The Director of the Department of International Legal Affairs, Dr. Jean-Michel Arrighi, recalled that when the text of the Inter-American Democratic Charter was being negotiated, an opinion was requested from the Inter-American Juridical Committee. The latter presented a report in 2000 in which it stated, in no uncertain terms, that it was working from the premise that the document to be approved would be a resolution of the General Assembly. The States operated on that basis and did not prepare a Protocol. He said that the term "resolution" did not imply that the document was nonbinding upon the Member States. A General Assembly resolution, he said, was binding upon the organs of the Organization; the nonbinding part of a resolution was the recommendatory section. Dr. Arrighi emphasized, then, that the nonbinding nature of a resolution was not across-the-board. At the time, the States did not want a repeat of the situation that the Protocol of Washington created, which was ratified by only 24 States. One Member State had issued a declaration expressing its opposition to the amendments introduced by the Protocol.

Dr. Eduardo Vio Grossi recalled that resolutions adopted by international organizations could be in the nature of *opinio juris* (interpretative), or they could be binding, depending on two factors: the party to whom the resolution is addressed and the hierarchy of the body that approves it. He said that the legal effect of the Organization's Inter-American Democratic Charter was inwardly directed, as it was addressed to the Secretary General and to the Councils. It had legal effect because it was based on general principles of law. He maintained that when the General Assembly adopted this resolution, it knew what it was doing. In other words, the Inter-American Democratic Charter was not simply inwardly directed; it also embodied principles and customary law. This, he said, was what made this resolution important, as it constituted a secondary source of law, despite the fact that resolutions of this type did not figure among the sources of law listed in Article 38 of the Statute of the International Court of Justice.

Dr. Antonio Fidel Pérez remarked that the Secretary General's report did not make clear what the legal nature of the Inter-American Democratic Charter was. He observed that it could be interpreted as a regular resolution adopted by an international organization, or as a special

resolution that enlightens the interpretation of the OAS Charter and is binding upon all Member States, including those that are not party to the Protocol of Washington; or it could also be seen as an interpretation of the amended OAS Charter, binding only upon those States Parties to the "Protocol of Washington". Dr. Pérez observed that the Secretary General's report provided multiple interpretations. He said that should the Juridical Committee choose to answer the Secretary General's report and pursue the topic further, the first step he would suggest would be to ask the kinds of questions that would clear up some of these basic issues.

Dr. Mauricio Herdocia Sacasa observed that in light of the Secretary General's visit and given the importance of the topic of the Inter-American Democratic Charter and of the report that the Secretary General presented to the Permanent Council, the Juridical Committee continued to revisit this topic because of its relevance to a number of other topics. He underscored the basic difference between the United Nations' concept of democracy as a universal right, and the inter-American system's model where democracy has been enshrined in the Organization's founding Charter; in the Inter-American Democratic Charter, the American States agreed upon the essential elements of representative democracy, and undertook a common and shared responsibility in the event of interruption or alteration of the legitimate exercise of power. He said that it was possible to visualize an interpretation of the essential elements of democracy as defined in Article 3 of the Charter. Dr. Herdocia Sacasa went on to say that given the current composition of the OAS and the prevailing ideological leaning within the Organization, a technical body would be needed in order to settle that difference. The Juridical Committee would play an important role because of its competence and by virtue of its advisory function. As for the interpretation of the Inter-American Democratic Charter, Dr. Herdocia Sacasa concurred with Dr. Eduardo Vio Grossi: in its advisory opinion the Juridical Committee had already made the case for the importance of certain resolutions, arguing that they reflected the applicable law at a given point in time. This was one of the fundamental characteristics of the Inter-American Democratic Charter, he observed, as it reflected the current applicable law on the defense and promotion of representative democracy. He went on to say that this was not a question of a one-time initiative; instead, it represented a series of measures taken by the Organization that culminated with the adoption of the Inter-American Democratic Charter".

Dr. Galo Leoro Franco stated that the Inter-American Democratic Charter may encounter problems in any country; not being a treaty it did not have the force of a treaty. Dr. Leoro Franco was of the view that its legal *status* might change if it were applied in a consistent, uniform manner, which would be a tacit acknowledgment of its binding nature. That would be a gradual process, he observed, that should be allowed to evolve. The Inter-American Juridical Committee should weigh all these considerations carefully to avoid transforming declarations like these or others into real international law. In this respect, he disagreed with the view that the Inter-American Democratic Charter was binding upon the States. In some States, the legislative branch must give its approval before an instrument can become law. He was concerned that the Juridical Committee might issue an opinion to the effect that a declaration –although not an international convention- had the same legal force as an international convention.

Dr. Eduardo Vio Grossi observed that some international acts did not require congressional approval or ratification to be valid. On the subject of democracy, he recalled that the Committee had already concluded that it was an inter-American legal obligation. Even before the Inter-American Democratic Charter existed, the Committee had declared that democracy was an obligation; violation of that obligation would have to be redressed in order to re-establish government by law. Dr. Vio Grossi observed that the Inter-American Democratic Charter was not a perfect document and that it allowed for interpretation, as with the term "government," the definition of democracy, the Charter itself as a source of law, the way the mechanisms operate and, finally, the ambiguity as regards the essential and basic elements.

Dr. Jaime Aparicio raised the question of whether the Inter-American Juridical Committee had any contribution to make to the Inter-American Democratic Charter. In his view, neither resolution 1080 nor the Charter was binding from the standpoint of application; nonetheless, they had been applied in certain cases. Haiti was one case in which resolution 1080 was applied, as was Peru. His view was that application of these instruments would depend on the

circumstances and the political power of the State. Dr. Aparicio suggested that the Committee should concern itself with the questions raised by the Secretary General. In other words, it should determine what constitutes an interruption or alteration that seriously impairs the democratic order, and under what circumstances the Secretary General should intervene. Another issue would be the entities authorized to invoke the Charter; in other words, to determine whether the mechanism can be opened up to allow other branches of government to invoke the Inter-American Democratic Charter.

Dr. Freddy Castillo Castellanos, too, agreed that the issue was an important one to examine. He suggested that the Committee should agree upon certain specific points to address in the opinion it would issue. These would mainly have to do with ambiguities with respect to the Charter's application; the matter of cultivating the preventive nature of the Charter in preference to the nonpunitive nature, and the obstacles standing in the way of approval of the Social Charter, as the Secretary General pointed out in his report.

Dr. Ana Elizabeth Villalta Vizcarra was of the view that the Inter-American Juridical Committee had a contribution to make to the Inter-American Democratic Charter, as this topic was already on its agenda. As for the legal nature of the Charter, she felt that it was a special declaration, because it served to further a purpose and principle of the OAS' founding Charter.

Concerning the *status* of the Charter as a legal instrument, Dr. Antonio Fidel Pérez expressed the view that a plausible albeit mistaken argument could be made for the fact that the Inter-American Democratic Charter was a faithful interpretation of the OAS Charter, just as the International Court of Justice had concluded that the United Nations' "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States" was a faithful interpretation of the United Nations Charter (according to the UN Charter, resolution 2625 (XXV)). Dr. Pérez said that he was not certain whether all the States, when they signed the Inter-American Democratic Charter, did so on the assumption that it was a faithful interpretation of the OAS Charter. As for the definition of democracy for purposes of the Charter, his view was that it would in all likelihood be impossible to arrive at an acceptable consensus interpretation based on the legal materials available at this time. Finally, on the definition of government contained in articles 17 and 18 of that instrument, he wanted to be very clear that the Inter-American Juridical Committee should not undertake such a delicate matter without first receiving a simultaneous request from the Secretary General and the Permanent Council.

Dr. Jean-Michel Arrighi, Director of the Department of International Legal Affairs, observed that in addition to the questions raised in the Secretary General's report, Article 23 of the Inter-American Democratic Charter implied that in practice, a political party could request an electoral observation mission. Another problem to be resolved was establishing the means to enable the legislative and judicial branches to invoke the Inter-American Democratic Charter when the executive branch itself was threatening democratic institutions. He added that other inter-American instruments made express provision for civil society's participation, but no express provision allowed the judicial and legislative branches to participate. After an extended debate, the Inter-American Juridical Committee approved resolution CJI/RES.132 (LXXI-O/07), "Follow-up on the implementation of the Inter-American Democratic Charter", in which it resolved to revisit this item on its agenda. It also decided to interpret the conditions and the means by which the "Inter-American Democratic Charter" can be invoked, based on the OAS Charter and other basic legal instruments concerning the defense and promotion of democracy in the Americas. Finally, Drs. Ana Elizabeth Villalta Vizcarra, Jaime Aparicio, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Eduardo Vio Grossi, Freddy Castillo Castellanos and Jean-Paul Hubert were named as rapporteurs for the topic. Dr. Eduardo Vio Grossi presented an explanation of his vote on this resolution, and Dr. Antonio Fidel Pérez presented an explanation of his dissenting vote.

CJI/RES.132 (LXXI-O/07)

FOLLOW-UP ON THE APPLICATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER

HAVING SEEN the Report by the Secretary General The Inter-American Democratic Charter (OEA/Ser.G CP/doc.4184/07, April 4 2007) presented to the Permanent Council pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06) requesting a report on the manner in which the Charter was implemented;

HAVING HELD a comprehensive working meeting with the Secretary General, during the course of this regular session, in which the participants engaged in a profitable exchange of opinions on the Report;

CONSIDERING that the Juridical Committee, for many years, has produced studies and has adopted resolutions on the topic of democracy and the Inter-American Democratic Charter, including the following:

CJI/RES.I-3/95, CJI/RES.I-2/96, CJI/RES.17 (LVII-O/00), CJI/RES.23 (LVIII-O/01), CJI/RES.32 (LIX-O/01), CJI/RES.41 (LX-O/02) and CJI/RES.64 (LXIII-O/03).

RECALLING that article 100 of the OAS Charter provides that the Inter-American Juridical Committee can, on its own initiative, undertake studies and work that it considers advisable,

RESOLVES:

1. To re-include the “Follow-up on the application of the Inter-American Democratic Charter” among its “topics under consideration”.

2. To conduct an interpretation on the conditions and access routes to the applicability of the Inter-American Democratic Charter, in the light of the OAS Charter, and other basic juridical instruments on the protection and promotion of democracy in the Americas.

3. To appoint as co-rapporteurs Drs. Ana Elizabeth Villalta Vizcarra, Jaime Aparicio, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Eduardo Vio Grossi, Freddy Castillo Castellanos and Jean-Paul Hubert.

This resolution was adopted at the session held on August 9, 2007, by the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

Dr. Eduardo Vio Grossi presented reasoned vote and Antonio Fidel Pérez presented explanation of dissenting vote.

Annexes: CJI/doc. 281/07 Reasoned vote. Follow-up on the application of the Inter-American Democratic Charter (CJI/doc. 274/07 rev.2) (presented by Dr. Eduardo Vío Grossi)

CJI/doc. 284/07 Explanation of dissenting vote on the follow-up on the application of the Inter-American Democratic Charter resolution (presented by Dr. Antonio Fidel Pérez)

CJI/doc.281/07

REASONED VOTE

FOLLOW-UP ON THE APPLICATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER (CJI/doc.274/07 rev. 2)

(presented by Dr. Eduardo Vio Grossi)

A vote in favor of the draft resolution "Follow-up on the application of the Inter-American Democratic Charter" (CJI/doc.274/07 rev.1), considering that the Inter-American Juridical Committee, as advisory body of the OAS on legal matters and in accordance with the provision by the Secretary General in his report on the Inter-American Democratic Charter (CP/doc.4184/07), should be addressed, at least in the first stage of the study on this matter, specifically to determine the focus and scope, namely, to interpret the following terms and/or concepts used in said text:

a) Government (arts. 1, 17, 18, 19, 21 and 24);

b) Situations that could affect the progress of a democratic institutional political process or the legitimate exercise of power (art. 18), and

c) Amendment to the constitutional order that seriously affects democratic order (art. 20).

CJI/doc.284/07

EXPLANATION OF DISSENTING VOTE ON THE FOLLOW-UP ON THE APPLICATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER RESOLUTION

(presented by Dr. Antonio Fidel Pérez)

I dissent because I think paragraph 2 of this resolution of the Inter-American Juridical Committee (IAJC), which calls for a study of "access routes" to the applicability of the Inter-American Democratic Charter (the Democratic Charter), necessarily implies that IAJC will seek to develop an interpretation of the term "government" within the meaning of articles 17 and 18 of the Democratic Charter. Dr. Vio Grossi's explanation of vote in support of the resolution makes this implication explicit. To do so, without an explicit request from the Secretary General and either the Permanent Council or General Assembly is, in my view, unwarranted at this time and in conflict with the comity the IAJC should accord these OAS bodies.

This question has arisen because of the Secretary General's Report, entitled "The Inter-American Democratic Charter: report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)" - (OEA/Ser.G CP/doc.4184/07), April 4, 2007). Here the Secretary General expressed to the Permanent Council, among other things, his concern about cases in which democracy has been threatened in a Member State through action by the executive branch against the legislative or judicial branches, and he raised the question whether the consent of a "government" to the Secretary General's involvement may be effected, consistent with articles 17 and 18 of the Democratic Charter, through a request from the legislative or judicial branches, rather than only through a request from the executive branch. These provisions in effect authorize the Secretary General of the Organization of American States (the Secretary General) to act under the Democratic Charter, at the request of the "government" of a Member State, without a prior decision by the General Assembly or Permanent Council of the OAS, in contrast to article 20 and 21, which explicitly provide for the involvement of the Secretary General on the basis of advance approval by the Permanent Council or General Assembly.

As I have detailed in the review of the Secretary General's Report I submitted at the current session of the IAJC, the Secretary General's Report clearly and cogently raised the question of the meaning of the term "government" as a matter that should be resolved in order to strengthen the implementation of the Democratic Charter, but the Secretary

General's Report is directed to the Permanent Council for further consideration of this issue, not to the IAJC. Both the resolution and Dr. Vio Grossi's explanation of vote, in this connection, refer to the Secretary General's Report, but neither asserts that the Secretary General has asked the IAJC to answer any question of interpretation raised by the Secretary General's Report. Neither am I aware that the Permanent Council or General Assembly has expressly or impliedly requested the IAJC to interpret any question relating to the implementation of the Democratic Charter. Therefore, the only question before the IAJC is whether it should now exercise the unique discretion afforded to it under the Article 100 of the OAS Charter to, "on its own initiative, undertake such studies and preparatory work as it considers advisable" in order to respond to the general desire expressed by the Secretary General's for greater legal clarity with respect to the Democratic Charter.

While I do not doubt the competence of the IAJC to perform the function of interpretive legal questions that arise under the Democratic Charter, I regard the question whether to seek a legal opinion that resolves a potential conflict between the Secretariat and Permanent Council of the OAS, particularly in a matter that is the subject of ongoing discussion between these two organs, as essentially a political question. This question, whether to invite the IAJC, which is a juridical rather than political organ, to intervene, is a question which, in my view, is better resolved by a joint decision of the Secretariat and either the Permanent Council or General Assembly. In addition to the potential undesirability of attempting to resolve what is in effect a question that determines the allocation of authority between the Secretariat and the Permanent Council or General Assembly in the implementation of the Democratic Charter, as well as the OAS Charter, the subject matter of the Democratic Charter is particularly sensitive. The legal opinion addressing the tension between the thirst for democracy as the common right of all the peoples of the Americas and the principle of nonintervention, as both are inscribed in the OAS Charter, is most likely to receive general acceptance when it is offered in response to a request from all relevant political decision-makers. I would not hesitate to undertake such a task, but I do not think it is consistent with the IAJC's place in the OAS legal system for it to appear to reach out to seek to answer so delicate a question.

CJI/doc.264/07

REPORT CONCERNING THE REPORT OF THE SECRETARY GENERAL OF THE ORGANIZATION OF AMERICAN STATES ON THE IMPLEMENTATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER

(presented by Dr. Antonio Fidel Pérez)

In discharging its responsibilities under the Charter of the Organization of American States (Charter of the OAS), the Inter-American Juridical Committee (IAJC) has maintained on its agenda the subject of the Inter-American Democratic Charter (IDC). In accordance with that responsibility, this rapporteur for that agenda item submits the following report concerning the report submitted by the Secretary General of the OAS (the SYG) on April 4, 2007 (the Report) (OEA/Ser.G, CP/doc.4184/07). (A copy of the SYG's Report is appended to this report.). The SYG's Report was submitted pursuant to OAS General Assembly Resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06), requesting the Secretary General to submit a report to the Permanent Council on how the IDC has been implemented. As the Report indicates, resolutions 2154 and 2251 also asked the SYG "to devise proposals for timely, effective, balanced, gradual initiatives for cooperation, as appropriate, in addressing situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power ….". (See Report, p. 1). This report will summarize the Report, including its proposals for reform in implementation of the IDC, and then offer some preliminary comments on those proposals.

I. SUMMARY OF THE REPORT

A. Discussion of the Nature of the IDC

The Report begins with a series of foundational observations about the nature of the IDC and its implementation. While it specifically seeks to avoid "reopening" the "debate" about the "content of democracy", the Report goes on to cite a number of provisions of the IDC which evidence that the conception of democracy in the IDC has a series of attributes that are civic and political in nature, and it gives particular emphasis to the "republican"

nature of the IDC's conception of democracy (Report, p. 2 note 1). The Report also asserts, without citing any particular provisions, that the IDC "…proclaims 'social citizenship' whereby democracy and economic and social development are interdependent and mutually reinforcing." The Report holds, then, that the IDC's conception of democracy "includes … its democratic origin, the fundamental organization of the state, and full political, civil, and social citizenship", although "social citizenship" is not an "essential" feature (Report, p. 2).

In discussing the background to the IDC, the Report contrasts the content of the IDC to the content of Resolution 1080, adopted in Santiago in 1991, and to the current Article 9 of the Charter, as amended by the Protocol of Washington. It does not, however, identify the Member States that have ratified those amendments or discuss the SYG's view of any questions that might arise in the application of the IDC with respect to Member States that have not ratified the Protocol of Washington. In this connection, while the Report describes Resolution 1080 as a resolution of the OAS General Assembly that is binding only on the organs of the OAS but operates merely a recommendation to Member States, it makes no such statement with respect to the status of the IDC, which is also in form a General Assembly Resolution (Report, p. 3 note 2). Without going into the matter in any detail, the Report's characterization of these legal instruments is not necessarily in conflict with the view that the IDC has a normative status different from an ordinary resolution of the General Assembly, but it does not support that view either. This report will return to this question in connection with its discussion of the specific proposals contained in the Report.

B. Discussion of the IDC Implementation and Proposals for Reform

In discussing the implementation of the IDC, the Report then divides the question of implementation into three distinct dimensions: monitoring the situation of democracies, promoting democracy, and applying the IDC in crisis situations (Report, p. 4). With respect to the first dimension, the monitoring of democracy, the Report states that the SYG's consultations with Member States reveals that "many member countries believe that any evaluation of the condition of democracy in a given country not performed by that member state itself would run counter to the principle of nonintervention enshrined in the OAS Charter." (Report, p.4). The Report goes on to argue that an evaluation of different "traits" of democracy, rather than a global evaluation of democracy, can instead be conducted by various institutional mechanisms, such as through the work of the Inter-American Commission on Human Rights, the Mechanism for Follow-up on the Implementation of the Inter-American Convention against Corruption, the Inter-American Commission of Women, the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities, the Department for the Promotion of Democracy, and the reports pursuant to the Protocol of San Salvador. (Report, p. 4-5)

With respect to the second dimension of implementation, described initially as "promoting democracy" but at this stage in the report described as "cooperation," the Report describes in some detail a number of activities by various organs of the OAS, namely electoral observation, crisis prevention and special missions, support and strengthening of political parties, promotion of democratic governance, promoting citizenship, human rights, freedom of the press and expression, discrimination, gender, and probity (Report, p. 6-11). Notably, the only area in which cooperation is described as presenting "significant problems" is in freedom of expression (Report, p. 9).

With respect to the third dimension, the "IDC in times of crisis", the Report makes clear that the mechanisms contemplated in Chapter IV of the IDC relate to threats against the "essential features" of democracy described in Article 3, namely, representative democracy, the rule of law, and presence of a constitutional regime. The Report alludes to criticisms of lack of precision or vagueness in these terms, and it then describes specific proposals made by former U.S. president Jimmy Carter in January 2005 for clarifying the meaning of these terms (Report, p. 11). Asserting that the Carter proposal "goes generally in the right direction," the Report states: "If the IDC does not clearly define what constitutes an alteration or interruption of the institutional order, it would be appropriate for the Permanent Council or the General Assembly to do so by means of a definition of this kind, thereby bringing much greater certainty to application of the Democratic Charter. If the principal asset to be safeguarded is democracy, how can we do so without clearly defining when and how it is imperiled" (Report, p. 12).

Indeed, against the criticism that the IDC undermines the principle of nonintervention, the Report makes the following powerful assertion: "Those who intervene illegitimately are

those who threaten to subjugate the people, not those who act to defend them" (Report, p. 13).

In sum, it would appear that the Report generally endorses the Carter proposals for seeking further legal clarity. Yet, while it does not itself endorse the proposition that the IDC "does not" now "…clearly define what constitutes an alteration or interruption of the institutional order…", it does conclude that "if" such a conclusion were drawn by the Permanent Council or General Assembly, it would be "appropriate" for them to adopt definitions of the kind suggested by President Carter. But in any event, the current IDC is not inconsistent with the nonintervention provisions of the OAS Charter. The Report does not, however, identify the legal basis for providing such new definitions or explain the legal status of the resolution through which those new definitions would be adopted.

Another criticism of the "IDC in times of crisis," according to the Report, is "…restricted access for those seeking to invoke the Democratic Charter when they consider democratic institutions to be threatened or to have been undermined…" (Report, p. 14). The Report notes that, while the SYG can act under articles 17 and 18 with the consent of the Member State involved before an unconstitutional interruption has occurred, a Member State may request convocation of the Permanent Council under article 20 only after a disruption of the institutional order has already occurred. The Report then goes on to identify the concern that when it is the Executive branch of a government of a Member State that threatens an unconstitutional alteration, it should be made clear that other branches of that member state's government ought to be competent to request the assistance of the SYG. Thus, the Report proposes, as follows: "the expression 'government'… must be understood as referring to all the branches of state. It is natural, then, that the other branches of government of a country should be able to turn to the OAS, citing the IDC, to denounce the disruption or breakdown of democratic institutions in their country" (Report, p. 15). In contrast to its suggestion that "it would be appropriate" for the Permanent Council or General Assembly to clarify the meaning of essential elements of democracy prescribed in article 3 of the IDC, the Report makes no specific suggestion for action by the political organs of the OAS to establish this new proposed interpretation of the term "government" within the meaning of Chapter IV of the IDC.

The Report nonetheless treats the "separation of powers" issue as a critical question; for it goes on to observe that "…while there is growing compliance with the IDC with respect to the inception of democracy, there remain important shortcomings in our Hemisphere in the separation, independence, and reciprocal control of the branches of government ….". But it adds that there are important shortcomings "…in full respect for the three spheres of citizenship: political, civic, and social" (Report, p. 16). In light of these two deficiencies, the Report proposes that Member States: "Maintain and strengthen the role of the OAS as the principal agency of electoral observation and promotion in the Americas"; "Expand OAS action substantially in terms of strengthening democratic institutions, respect for the rule of law, and the independence of the Judiciary"; "Strengthen republican institutions and the democratic rule of law"; "Extend application of the IDC in terms of expanding civic citizenship…"; and "Adopt the Social Charter of the Americas as a way of promoting social citizenship and strengthening democracy" (Report, p. 16-17).

II. LEGAL ISSUES RAISED BY THE PROPOSALS SUBMITTED BY THE REPORT

While many of the elements of the Report are welcome contributions to the ongoing implementation of the IDC, and raise important policy questions, at least two raise important questions of legal policy or interpretation. Specifically, two proposals either explicitly or implicitly call for further action by the General Assembly or Permanent Council of the OAS: one relating to the meaning of the "essential elements" of democracy, for purposes of applying Chapter IV; the other relating to the meaning of "government," for purposes of determining who may invoke articles 17 and 18 to receive the assistance of the OAS Secretariat.

As noted above, the Report does not articulate the Secretariat's legal theory of the precise status of the IDC, whether as an ordinary resolution of an organ of the OAS, as a special resolution signaling an authoritative interpretation of the OAS Charter binding on all Member States (including those not party to the Protocol of Washington), or as an interpretation of the amended OAS Charter binding only on parties to the Protocol of Washington, or some other possible status. If the Report's proposals are to be interpreted as having legal significance, it would be helpful for the Secretariat in some further addendum to articulate its legal rationale for these proposals. To the extent the new substance of the

concepts proposed by the Report are seen as new concepts that are not already included in the IDC, disagreement about the legal status of the instruments through which these new concepts are established may well increase the level of legal uncertainty surrounding the IDC, rather than accomplish the SGY's stated goals of reducing the legal uncertainty that has arisen in the application of the IDC during its first five years of implementation.

Even if agreement could be reached on the precise legal status of any new instruments modifying or interpreting the IDC, these gains in legal certainty might be achievable in other, less risky ways. It might be argued that many of the elements described by President Carter's proposal are already embedded in the IDC's definition of the "essential elements" of democracy; and it might be argued the concept of "government" in the Chapter IV mechanism already, where appropriate in the context of the particular government in question, already includes branches other than the Executive. Indeed, the general tenor of the Report suggests that the SYG believes this to be the case. If so, then the General Assembly, Permanent Council and Secretariat in particular cases should already be free to construe the IDC as applicable, achieving through a pattern of decisions applying the IDC the legal certainty that might be promised by additional instruments. Another potential problem of further instruments is that, even if the specification of additional concrete elements were to increase legal certainty and deterrence with respect to one set of concrete problems, the process of drafting new instruments would through lack of foresight implicitly exclude other elements.

This description and analysis of the Report is merely preliminary in nature and does not reflect this rapporteur's final conclusions on the legal issues discussed. It is offered only to further the IAJC's discussion of the Report and the IAJC's continuing review of the implementation of the IDC in the hope that this review may enable the IAJC to further support the work of the other organs of the OAS.

Attachment: CP/doc.4184/07, 4 April 2007 – The Inter-American Democratic Charter: Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06).

ANNEX

CP/doc.4184/07, 4 April 2007

THE INTER-AMERICAN DEMOCRATIC CHARTER

[Report of the Secretary General pursuant to resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06)]

Review of action taken and considerations for the future

This report is in response to a mandate from the General Assembly, issued in resolutions AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06). Those resolutions ask the Secretary General to submit a report to the Permanent Council on how the Inter-American Democratic Charter has been implemented since its entry into force. They also instruct him "to devise proposals for timely, effective, balanced, gradual initiatives for cooperation, as appropriate, in addressing situations that might affect the workings of the political process of democratic institutions or the legitimate exercise of power, in keeping with the provisions of Chapter IV of the Inter-American Democratic Charter, with respect for the principle of nonintervention and the right to self-determination, and to present those proposals to the Permanent Council."

Both mandates demonstrate the importance member countries of the Organization attach to compliance with the standards and principles contained in the Inter-American Democratic Charter, as well as their conviction of "the need to provide the Organization with procedures that facilitate cooperation in complying with the standards and principles contained in the Inter-American Democratic Charter, so that it may contribute effectively to the preservation and consolidation of democracy in the countries of the Hemisphere".

Pursuant to that instruction, the General Secretariat presents this report, which elaborates on the ideas set forth in the consultations held with the Permanent Council on September 22, 2005, in the Annual Report to the General Assembly in Santo Domingo, in June 2006, and at the special meeting of the Permanent Council in September 2006. On those occasions, some of the concepts set forth here were addressed, especially those

relating to limitations on plans to monitor the situation of democracies, as called for in the Charter, and the real possibilities of action by the Secretariat in crisis situations.

This report is intended to fulfill the full mandate of those two resolutions, examining the main concepts included in the IDC's definition of democracy; the resulting mandates to the different bodies of the OAS; how they have been met; and some reflections on the future of the IDC.

1. Our objective: a democratic Hemisphere

Debate over the content of democracy is as old as the concept itself, and I may say at the outset that I have no intention of reopening such debate here. That is unnecessary, in any case, because in the text itself the member states have settled the debate over the requirements they wanted to include in its definition of democracy. Quite apart from the legitimate theoretical questions, its meaning for the countries of the Americas is very clear in the wording of the IDC.

In effect, after proclaiming in Article 1 that peoples have the right to democracy, the IDC (in Article 2) defines representative democracy, the rule of law, and the constitutional system as the foundations of democracy, adding that this representative democratic system is strengthened by full and responsible citizen participation within a framework of law and constitutional order.

The IDC then includes as essential elements (in Article 3) respect for human rights and fundamental freedoms, access to power and its exercise under the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

Article 4 completes the idea of democracy by citing, as components, transparency, probity, responsible public administration, respect for social rights, and freedom of expression and of the press, while also insisting on the subordination of all to civilian authority and the rule of law.

The concept of democracy in the IDC is both broad and demanding, and includes a priori requirements in the very formation of a democratic government, as well as a series of attributes it calls "essential" or "fundamental" for the exercise of democracy, referring to the "republican"[1/] form of government, characterized by the effective democratic rule of law, independence among the branches of government, a pluralistic party system, a transparent and accountable government, and subordination to legitimate authority. It also includes respect for the fundamental rights of the citizens (universal suffrage and secret balloting, human rights, freedom of expression, and citizen participation). The importance of the issue of political and civic citizenship in the IDC is highlighted by its insistence on issues such as participation (Article 6), human rights (Articles 7 and 8), elimination of discrimination (Article 9), and full and equal participation for women.

But the IDC also proclaims "social citizenship," whereby democracy and economic and social development are interdependent and mutually reinforcing; it then holds that poverty and illiteracy, among other social ills, negatively affect the consolidation of democracy, and commits governments to promote and observe economic, social, and cultural rights and to respect the rights of workers.

This proclamation of "social citizenship" is an especially important aspect of the IDC, in a Hemisphere in which poverty still afflicts some 40% of the population, and extreme poverty around 20%, with a high degree of inequity in the distribution of wealth; a Hemisphere where many citizens face discrimination for reasons of race, gender, or other factors; where there are high levels of illiteracy and lack of access to social services. Building democracy, then, also means building social citizenship in a region where workers' rights, enshrined as they may be in the books, and even in some constitutions, are often not respected in practice.

In the vision of the IDC, social citizenship is not an essential, defining requirement of democracy; but without it democracy loses force, credibility, and support among our peoples. Social and economic development are not part of democracy; but if democracy does not

[1] I use the word "republican" in the sense defined by the *Encyclopaedia Britannica*: "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law."

promote them, it can become a lifeless form of organization divorced from the daily reality of our peoples–and, in the final analysis, from the aim we posed at the beginning of this Chapter: building a democratic Hemisphere.

In short, the IDC includes in its definition of democracy its democratic origin, the fundamental organization of the state, and full political, civil, and social citizenship. For that reason, we have said many times that, in order to be considered democratic, a government must not only be elected democratically but also govern democratically.[2/]

2. The IDC in action

The Inter-American Democratic Charter has been recognized as the most complete inter-American instrument enacted to date for promoting democratic practices in the states of the Hemisphere and pursuing the cooperative activities that are needed in cases where performance is clearly not up to standard.

It is also the instrument to which governments of the member countries of the Organization may turn, if they face threats to their democratic institutions or the legitimate exercise of power, to use diplomatic channels and good offices, at all stages of the process of resolving risks to, or the breakdown of, democratic institutions.

Nevertheless, although it has become the hemispheric benchmark for the preservation of democracy, when the Democratic Charter has been put to the test in existing or potential crisis situations, it has revealed some limitations as to its legal, operational, and preventive scope.

After defining the principal features of democracy, it is logical that the Charter should concern itself with defining its main application mechanisms. For this, however, we must look beyond the Democratic Charter: Chapter IV applies only in cases of democratic crisis or threatened crisis. It contains no indication as to how the democratic process in member countries should be monitored in light of the IDC, nor does it offer any guidelines for monitoring and promoting the values of the IDC.

The IDC must not be viewed as applying solely to action in crisis situations. On the contrary, it was conceived also as an instrument for objectively monitoring and assessing progress in the democratic process in the Hemisphere, and for promoting cooperation in strengthening democratic governments. What has happened is that both the monitoring and the promotion of democracy are placed in the hands of the General Secretariat, which must report on them to the Permanent Council and the General Assembly. On the other hand, in crisis situations, it is the Council that, on its own initiative or at the request of a country or the Secretary General, must adopt the main decisions required.

In this light, it is appropriate to examine the IDC in the following three dimensions: (a) monitoring the situation of democracies; (b) promoting democracy; and (c) applying the Democratic Charter in crisis situations.

[2] The first references to democracy in the OAS are in the founding 1948 Charter, which in Article 5.d declares that "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." In 1959, the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago, Chile, listed the necessary identifiers of a representative democracy, among them protection of human rights. After the era of dictatorships, and with the incorporation of the English-speaking Caribbean countries and Canada, the American states again met in Santiago, in 1991, at the twenty-first regular session of the General Assembly, where they adopted resolution AG/RES. 1080, authorizing the General Assembly or an ad hoc meeting of Ministers of Foreign Affairs to take measures whenever there occurs "a sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government" of a member state. Shortly afterwards, the 1992 Protocol of Washington incorporated into the OAS Charter the current Article 9, according to which "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...". The first of these instruments is a resolution, binding on the organs of the Organization and having the force of a recommendation to the member states; the second is a treaty, binding only on states that have ratified it. Both envisioned a military coup, which, in the following years, occurred only in Haiti, when a military junta overthrew democratically elected President Aristide. The "self-coups" in Peru and Guatemala did not exactly fit the scenarios envisioned, since the violators of the constitutional order were the authorities themselves, who had been democratically elected. The new forms of disruption of, or threats to, the democratic rule of law led the member states to adopt new inter-American legal instruments to deal with these new risks. Thus, in 2001, the General Assembly, at a special session in Lima, adopted the Inter-American Democratic Charter. *See Jean Michel Arrighi, statement at the UNAM Seminar, Mexico, 2006.*

2.1. Monitoring

Several member countries have indicated, especially in the lead-up to the General Assembly session in Fort Lauderdale (2005) and on the fifth anniversary of signature of the IDC (2006), the need for mechanisms for periodic evaluation of the status and quality of democracies in the Hemisphere. On the second occasion, the Government of Peru formally proposed, for example, that the Secretariat create a voluntary evaluation mechanism whereby countries that so wished could subject themselves to a peer evaluation of their compliance with the precepts of the IDC.

However, no resolution has been adopted on monitoring the progress of democracy in light of the Democratic Charter, except for the one asking the Secretary General to present a report on the issue.

In this area, the member states have the final word; if they consider it possible to implement a self-evaluation mechanism, the General Secretariat will take the steps needed to implement that decision. Nevertheless, I must advise the Council that, according to the consultations I have conducted, on which I now report to the Council, many member countries believe that any evaluation of the condition of democracy in a given country not performed by that member state itself would run counter to the principle of nonintervention enshrined in the OAS Charter.

On the other hand, there is another evaluation alternative, which we have been employing in some areas. This involves periodically evaluating the behavior of the different countries with respect to each constituent element of democracy, as identified in the IDC.

As examples of this form of monitoring:

a. The Inter-American Commission on Human Rights (IACHR) delivers reports on different countries every year, as well as an annual report to the General Assembly on the human rights situation in the region.

b. The IACHR also uses special rapporteurs to evaluate other aspects of the IDC relating to human rights, such as freedom of expression; the rights of women, indigenous peoples, and people of African descent; and the status of persons deprived of freedom.

c. The Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption examines compliance with its rules in each of the 28 signatory countries, issues its evaluations, and seeks to cooperate with them in resolving their most severe problems.

d. The Inter-American Commission of Women monitors compliance with the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.

e. At its first meeting, the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities agreed also to monitor compliance by member countries with their obligations under the Convention.

f. The Secretariat for Political Affairs conducts ex-post evaluations of electoral processes and systems in member countries, through its electoral observation missions, carried out in accordance with the standards of the IDC (Chapter V). In the coming months, that Secretariat will deliver a report on all the elections held in the region over the last year.

g. The Department for the Promotion of Democracy, now part of the Secretariat for Political Affairs, produced reports in 2005 on election financing in the countries of Latin America and the Caribbean.

h. The Protocol of San Salvador on Economic, Social, and Cultural Rights requires states parties to present reports on progressive measures they have adopted to guarantee due respect for those rights. It has not been possible as yet to present such reports, because member states have not agreed on a mechanism for doing so, despite the mandate from the General Assembly.

As an alternative, then, to the idea of mechanisms for the global evaluation of democracy in member countries, it seems much more feasible and practical to evaluate the different traits of democracy covered in the IDC. With this approach, it would be possible to perform multilateral evaluations, or to apply other mechanisms agreed between states to

areas not yet considered, such as political parties or judicial systems, rounding out this evaluations grid.

A procedure of this kind would have three clear advantages:

First, it would eliminate any suspicions of intervention that the pretension of "evaluating democracy" in a general way might arouse.

Second, it is consistent with what we think the OAS should be doing to strengthen the condition of democracy: promote international cooperation over imposition, complaints, or sanctions. Multilateral evaluation would allow us to work with countries in each of the areas where there are shortcomings, with cooperation programs designed to correct those shortcomings, and to advance democracy in its concrete aspects.

Third, it would enlist the participation of civil society, of which some of the more important organizations are moving precisely in the areas to which these evaluations refer. In fact, on questions of human rights, gender issues, and discrimination, and in the MESICIC process, civil society participation has been extremely useful.

2.2. Cooperation

In this area, the General Secretariat has done some significant work, based on the fundamental features of the Democratic Charter. Most of our cooperation activity in the political area is devoted to strengthening those aspects of promotion and prevention that flow from the Democratic Charter. They represent, therefore, an important contribution to the process of consolidating democratic solidarity, and the IDC serves as an essential tool in defining them.

a. Electoral observation

The IDC not only considers periodic, free, and fair elections based on universal suffrage and secret balloting as one of the essential elements of democracy, but also devotes Chapter V to electoral observation missions.

The number of democratic elections held in recent years, especially in the last 18 months, has generated very intensive activity for the electoral assistance and observation units. In particular, we might mention:

- Initiatives to enhance transparency, efficiency, and credibility in electoral processes and agencies, through technical assistance programs with the electoral authorities of various member countries.
- Electoral observation missions: over the five years that have elapsed since adoption of the IDC, the OAS has fielded more than 40 electoral observation missions in 19 member states. In 2006 alone, we mobilized more than 900 observers to cover the following elections: Bolivia (Constituent Assembly); Costa Rica (special mission, presidential and legislative elections); Nicaragua (presidential and regional/Atlantic coast); Colombia (presidential and legislative); El Salvador (municipal and legislative); Peru (presidential and municipal/regional); Dominican Republic (legislative); Mexico (special mission, presidential); Guyana (parliamentary); Saint Lucia (parliamentary); Ecuador (presidential); Panama (referendum); and Venezuela (presidential).

b. Crisis Prevention and Special Missions

In this respect, it is important to recall the dispute settlement and negotiation efforts in which we have participated; we look back over recent months with the satisfaction that there has been no interruption of any presidential mandate, in contrast to what seemed a frequent occurrence in Latin America prior to mid-2005. While in some of these cases the IDC was invoked to resolve problems, in fact it was cooperation and dialogue promoted by the General Secretariat that in all cases was the primary factor in preventing confrontations and breakdowns of the institutional order.

In addition there were the following efforts:

- Strengthening the Organization's institutional capacity to identify and analyze situations that could affect democratic institutional and political processes in the region, through:
  - Development of a methodology for multiple-scenario analysis that takes account of the region's characteristics to enhance our crisis prevention capacity.

- Training of personnel of the Secretariat for Political Affairs to strengthen analytical and technical capacities for use in implementing this methodology.

- The holding of regional seminars designed to strengthen and promote the institutional role of the OAS in preserving democratic governance in the region.

c. Support and strengthening of political parties

Here we might point to:

- The creation in 2001 of the Inter-American Forum on Political Parties (FIAPP).
- During 2005, the FIAPP pursued national technical assistance projects, projects on the gender perspective and women's political participation, and an agenda for reform and institutionalization of political parties and the generation of knowledge. In particular:
  - Support for the National Constituent Assembly process in Bolivia.
  - International observation of the formation of a Supreme Court of Justice in Ecuador.
  - Actions in support of dialogue and political reform sponsored by the Program for Democratic Values and Political Management in Guatemala.
- The FIAPP cooperated with women's ministries in Central America to discuss affirmative action measures, the adoption of quotas within political parties, and political training.

d. Promotion of democratic governance

The Secretariat for Political Affairs designs programs and activities to support member states in implementing public policies to strengthen state modernization and studies on the major challenges to sustainable democracy and the exercise of democratic citizenship in the Hemisphere.

In addition, to ensure compliance with Article 27 of the Democratic Charter, which cites the need to promote governance, good management, democratic values, and the strengthening of political institutions, the SPA is working to strengthen the commitment of OAS member states to decentralization and local governance as essential facets of democracy-building. This activity includes:

- Political dialogue and consensus-building among domestic stakeholders in decentralization policies.
- Dialogue between member states of the High-Level Inter-American Network on Decentralization, Local Government and Citizen Participation (RIAD).
- The study of government decentralization policies.

For its part, the Executive Secretariat for Integral Development (SEDI), pursuant to Article 4 of the IDC, and in the spirit of promoting the modernization of public institutions and making them more efficient, more transparent, and more participatory through the use of new technologies, has engaged in the following principal activities, through its departments:

- Training of 2,000 public officials in electronic government, since 2002, and consolidation of the Network of E-Government Leaders in Latin America and the Caribbean.
- Support for municipal modernization through the Efficient and Transparent Municipalities Program.
- Financing of 92 development cooperation projects.
- Strengthening of interparliamentary cooperation within MERCOSUR.
- Creation and implementation of a Political Training School for Women in the Dominican Republic.
- A study of educational and social factors in the political socialization of young people and children, culminating in publication of the report "Strengthening Democracy in the Americas through Civic Education" and various outreach activities.
- The Inter-American Program on Education for Democratic Values and Practices, providing opportunities in (i) research, (ii) professional and educational resource development; and (iii) information exchange.

- Development and adaptation of an online course in English for teaching democratic values and practices, for teachers in the Caribbean.

e. Promoting citizenship

Programs on civil registry have taken on great importance for the Organization, with successful experiences in Haiti, Honduras, and Paraguay. The Organization is now ready to conduct a more ambitious program to comprehensively address shortcomings in many countries in terms of birth records and the civil registry, so as to guarantee the right of identity for all citizens of the Americas.

f. Human rights

The activities of the Inter-American Commission on Human Rights as a whole relate directly to democratic governance in the Americas, in the terms stipulated in Articles 4 and 5 of the IDC, on the essential elements of representative democracy and of the exercise of democracy. Consequently, and since the full observance of human rights is indispensable for the democratic rule of law and for democracy, the Inter-American Commission's promotion and protection of these rights is a direct contribution to democratic governance in the Americas.

For fulfilling its role, the system has a number of instruments, including:

- On-site visits to Member States of the Organization.
- Hearings on the overall situation of human rights or specific human rights topics.
- The system of individual cases and precautionary measures.
- Publicity for matters that require the attention of the international community.
- Reports on specific topics.
- Recommendations to states relating to their obligation to respect and guarantee human rights.

The Commission has created rapporteurships for specific topics and specialized units, including those on women, indigenous peoples, migrant workers and their families, the rights of the child, the Special Rapporteur for Freedom of Expression, and the Human Rights Defenders Unit. Those rapporteurs and units engage in studies and promotional activities, prepare reports, and visit countries--all important contributions to democratic governance in the Americas.

The Inter-American Democratic Charter also recalls that the elimination of all forms of discrimination, particularly discrimination based on gender, ethnic origin, or race, and of various forms of intolerance, as well as the promotion and protection of the human rights of indigenous peoples and migrants and respect for ethnic, cultural, and religious diversity in the Americas, contribute to strengthening democracy and citizen participation. From this perspective, the topical rapporteurs are working for full social integration of traditionally marginalized sectors as an essential way to build democratic governance.

g. Freedom of the press and expression

Freedom of expression and of the press is considered in the IDC as one of the fundamental components for the exercise of democracy. It is clearly essential to guarantee adequate political participation, effective inclusion of various sectors of the population, and democratic control over the action of government. The freedom of expression allows people to form their own political opinion, to compare it with those of others, to decide freely whether they will support one position or another within the political spectrum, and to take informed decisions on matters that concern them.

The situation of freedom of expression in the region continues to present significant problems. There has certainly been important progress in recent years, but there are still problems and obstacles to full exercise of the freedom of thought and expression in our region, which we must address. It is essential that states promote legislative reform and implement policies to guarantee all citizens the full and effective exercise of the freedom of thought and expression and broad access to public information. These measures include strict prohibition of prior censorship, the elimination of contempt (*desacato*) laws, and the distinction between public and private persons in determining potential liability for the release of information of public interest. Assassinations, attacks, and threats against journalists must also be carefully investigated, and those responsible prosecuted. Without doubt, the work of

the Rapporteur on Freedom of Expression is very important in this area, and we must reinforce and support that work.

The road to improved democracy can only be trod through greater participation by society in addressing problems common to all citizens, through mechanisms that include the full exercise of the freedom of thought and expression.

h. Discrimination

The IDC affirms that the elimination of all forms of discrimination, especially gender, ethnic, and racial discrimination and the various forms of intolerance, contributes to strengthening democracy and citizen participation. It calls for the necessary promotion and protection of the human rights of indigenous peoples and migrants, and respect for ethnic, cultural, and religious diversity in the Americas.

Today in the Organization we are working to establish various international instruments that will set down very clear rules against discrimination, and that will also help member states to adopt domestic legislation against discrimination and intolerance.

For example, we have a Working Group to Prepare a Draft Declaration of the Rights of Indigenous Peoples. There is also a Working Group to Prepare a Program of Action for the Decade of the Americas for the Rights and Dignity of Persons with Disabilities (2006-2016). We recently created the Committee for the Elimination of All Forms of Discrimination against Persons with Disabilities. There is a work plan for the rights of migrant workers, in which various areas of the Organization have committed themselves to adopt measures in this regard.

The Organization's Inter-American Commission on Human Rights has established a Special Rapporteur on the rights of people of African descent and on racial discrimination; this is an important initiative, because very few cases of racial discrimination are brought before the Commission. In this respect, we should note that, in the great majority of our documents, there is no explicit reference to people of African descent, who constitute the largest minority group subjected to discrimination. Consequently, this is a very important emphasis to make in preparing the Inter-American Convention against Racism and All Forms of Discrimination and Intolerance—also being discussed in another working group.

This is a topic we must address very seriously. There is no doubt that the majority of people in our Hemisphere have suffered discrimination at some time. The problem can only grow, despite our efforts, unless we focus directly on key ways to eliminate it. If we are successful in preparing and adopting these instruments and having their provisions adopted into the domestic law of states, we will be helping to create fairer and more caring societies in our Americas. This issue is closely related to democratic governance and consolidation of the rule of law, because they presuppose fostering a culture of inclusion, equality, and tolerance among our peoples, promoting equality, and eliminating all forms of racism, discrimination, and xenophobia.

i. Gender

By means of Article 28 of the Inter-American Democratic Charter, the OAS has adopted the question of full and equal participation by women in the political structures of the countries as a fundamental element in the promotion and exercise of a democratic culture. In pursuit of this mandate and the Inter-American Program on the Promotion of Women's Human Rights and Gender Equity and Equality, the Inter-American Commission of Women (CIM) of the Organization of American States (OAS) is promoting women's participation in the various political structures of member states, through multiple initiatives detailed in the Annex to this report.

j. Probity

Consistent with Article 4 of the IDC, which declares that "transparency in government activities, probity, [and] responsible public administration ... are essential components of the exercise of democracy," the Office for Legal Cooperation of the Department of International Legal Affairs has been serving as Technical Secretariat of the Mechanism for Follow Up on Implementation of the Inter-American Convention on Corruption (MESICIC). This mechanism was adopted by states parties on June 4, 2001, during the OAS General Assembly session. The work of the MESICIC Technical Secretariat has facilitated progress in the bodies that make up the mechanism, namely the Conference of States Parties and the Committee of Experts. The first body held its second meeting in November 2006; the second has successfully held its first eight meetings.

2.3. The IDC in times of crisis

The mechanisms contemplated in Chapter IV of the IDC refer to the essential features of Article 3, representative democracy, the rule of law, and the presence of a constitutional regime. A reasonable interpretation is that open and repeated violations of human rights or other fundamental guarantees should be addressed within these concepts.

The criticisms most frequently leveled against Chapter IV speak of "vagueness" in the terms used and a lack of "precision" in the criteria for defining when and to what extent a country's democratic institutions have been altered. They also point to the obvious tension between the principle of nonintervention and the possibility of protecting democracy through collective mechanisms. Finally, they mention problems of access for those seeking to avail themselves of the IDC's mechanisms.

The first point has sparked a number of initiatives outside the Organization to define more precisely those situations that seriously affect democratic institutions. An example of these initiatives is found in the speech by former U.S. President Jimmy Carter, given at the inauguration of the Lecture Series of the Americas, in January 2005, in which he summarized the basic criteria presented by the political scientist Robert Dahl in developing the notion of "polyarchy," to propose a definition of the concept of "unconstitutional alteration or interruption" of the democratic order, which, in his judgment, must include:

1. Violation of the integrity of central institutions of the state, including the weakening or inaction of reciprocal checks and balances governing the separation of powers;

2. Elections that do not meet minimal international standards;

3. Failure to hold periodic elections or to abide by electoral outcomes;

4. Systematic violations of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights;

5. Unlawful termination of the term in office of any democratically elected official by another official, elected or not;

6. Arbitrary or unlawful appointment of, removal of, or interference in, the service or deliberations of members of the judiciary or electoral bodies;

7. Interference by nonelected officials, such as military officers, in the jurisdiction of elected officials;

8. Use of public office to silence, harass, or disrupt the normal and legal activities of, members of the political opposition, the press, or civil society.[3/]

Without going into detail on this proposal here, I want to indicate that, in my opinion, it goes generally in the right direction. If the IDC does not clearly define what constitutes an alteration or interruption of the institutional order, it would be appropriate for the Permanent Council or the General Assembly to do so by means of a definition of this kind, thereby bringing much greater certainty to application of the Democratic Charter. If the principal asset to be safeguarded is democracy, how can we do so without clearly defining when and how it is imperiled?

On the second point - the obvious contradiction between the principle of nonintervention and the possibility of collective action in the face of a specific situation in a member country - Sharing the opinion of some experts on the inter-American system, we

□□

3 These definitions follow very closely those contained in the Declaration of Santiago of 1959, cited above, on the attributes of representative democracy:
"1. The principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state.

2 The governments of the American republics should be the result of free elections.

3. Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy.

4 The governments of the American states should maintain a system of freedom for the individual and of social justice based on respect for fundamental human rights.

5 The human rights incorporated into the legislation of the American states should be protected by effective judicial procedures.

6 The systematic use of political proscription is contrary to American democratic order.

7 Freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime.

8 The American states, in order to strengthen democratic institutions, should cooperate among themselves within the limits of their resources and the framework of their laws so as to strengthen and develop their economic structure, and achieve just and humane living conditions for their peoples."

might argue that, far from being a contradiction of principles, this actually reflects the inherent tension at the heart of the Organization.

The OAS Charter itself prohibits all states from intervening “directly or indirectly, for any reason whatever, in the internal or external affairs of any other State,” and affirms, later on, that "every State has the right to choose, without external interference, its political, economic, and social system and to organize itself in the way best suited to it". How can we reconcile this language with Chapter IV of the IDC, which provides for means of collective action when a clearly "internal" matter threatens or interrupts the democratic process?

The answer, as we see it, is in Article 1 of the IDC, which declares that democracy is a right of peoples and an obligation of governments. The OAS acts in defense of those rights. Those who intervene illegitimately are those who threaten to subjugate the people, not those who act to defend them.

Owing precisely to the need to ensure this compatibility, the IDC refers to these mechanisms solely in cases of serious interruption or disruption of democracy. Furthermore, even this sanctioning process does not authorize the OAS to act against the offending state--only to make diplomatic approaches and, in extreme cases, to suspend it from participation in the Organization, a penalty already provided in Article 9 of the OAS Charter.

In adopting the Inter-American Democratic Charter, member states were not introducing any new principle or purpose into the OAS Charter. On the contrary, they were reaffirming something already in force. It is the recognition that representative democracy is indispensable for the region's stability, peace, and development, and that it is possible to promote and build representative democracy without violating the principle of nonintervention.

The "graduated response" component of these forms of action is essential to the work of the OAS. It makes possible the design of ways for the Secretariat and the Permanent Council to act to prevent crises and, even when they erupt, to move step-by-step to prevent their escalation.

This component has introduced mechanisms and processes for assessing and analyzing politically the severity of the situation and developing graduated responses, consistent with the level of the crisis, in order to restore the integrity of democratic institutions or prevent their breakdown.

In this context, particular importance attaches to the contribution of the OAS General Secretariat as the Organization’s source of technical and analytical support for member countries as they seek to maintain peace and the stability of democratic systems. The same holds for the political work of the OAS Secretary General in support of member states, and his function as the appropriate political channel for informing and providing support to the Permanent Council in generating initiatives to deal with a crisis that may emerge. Hence the importance of strengthening the capacity of the General Secretariat to assist member states in pre- and post-crisis responses that include monitoring, negotiation, dialogue, and political agreements, in addition to national reconciliation and strengthening political institutions, parties, and organizations and civil society.

As a preventive instrument, our action must include collective analysis and assessments, within the competent bodies of the OAS, of the social and political situation in the country; diplomatic initiatives; and international cooperation in the prelude to and early stages of a crisis.

The sanctions tool is used only when diplomatic means have been exhausted and a breakdown of democratic institutions in a member state is imminent. Even in this case, it is preceded by diplomatic steps taken by the Secretary General, on his own initiative (Article 18), or by the Permanent Council (Article 20), which may go so far as a special Meeting of Ministers of Foreign Affairs.

The third point of criticism is perhaps the most obvious in the content of the IDC: restricted access for those seeking to invoke the Democratic Charter when they consider democratic institutions to be threatened or to have been undermined.

In effect, there are only three channels of access to the Democratic Charter: (i) "when the government of a member state considers that its democratic political institutional process or its legitimate exercise of power is at risk …" (Article 17); (ii) when the Secretary General considers that situations have arisen in a member state that may affect the development of its democratic political institutional process or the legitimate exercise of power, (Article 18); or (ii) when in the event of an alteration of constitutional order in a member state, any

member state or the Secretary General requests the immediate convocation of the Permanent Council (Article 20).

But we must note that all three channels lead to the Permanent Council; this is the body that must decide whether the situation merits the adoption of declarations or the convening of the Meeting of Ministers. The Secretary General may act directly, under Article 18, to arrange visits and other actions, but only with the consent of the government concerned, and he must report on his action to the Permanent Council. Another state can act only when a disruption of institutional order has already occurred, and it must also lay its position before the Permanent Council.

Consequently, the IDC, in practice, does not provide a clear route for action, except when the state affected by the upheaval so requests or consents, thereby safeguarding to the maximum the principle of nonintervention. A recent case where the IDC was used in this way occurred in Nicaragua, in June 2005, when the President of the Republic asked the Secretary General to head a mission in the face of what he saw as an imminent threat to his legitimate exercise of power from elements of the opposition. The Secretary General went to Nicaragua, then reported to the Permanent Council, and carried out a successful internal mediation effort.

But, in practice, at this time no branch of government other than the Executive can really invoke the IDC to prevent a breakdown of democracy. Much less, for example, can civil society organizations do so. Naturally, if the Executive itself is threatening democratic institutions, in the judgment of the other branches, it can be blocked only by the Permanent Council once the rupture has occurred.

There was also a recent case in point in Ecuador, in December 2004, when the President of the Republic decided to dissolve the Supreme Court of Justice. Despite calls from that country for the OAS to make the Government recognize the gravity of dissolving a branch of government, this did not occur. When the Ecuadorian Congress removed President Lucio Gutiérrez, the OAS took no special action. It was only in April 2005, at the request of the new President of Ecuador, Dr. Alfredo Palacios, that the OAS sent a mission to investigate the problem of vacancy in the Ecuadorian Judiciary. None of the routes seemed open for the OAS to consider preventive action; nor was the issue brought before the Permanent Council.

The IDC was equally ineffective in Venezuela in April 2002, when the OAS was unable to prevent the coup against the constitutional President, or to produce any resolution on the rupture of democracy before the country returned to normal. There was a resolution invoking the IDC in general terms, dispatching a special mission, and convening a special session of the General Assembly, but it was adopted only after the President returned to power. On April 18, the General Assembly adopted a declaration supporting democracy in Venezuela.

However, the Democratic Charter was fully applicable in this case, under Article 20, since there had already been an obvious interruption of the constitutional process. It was not the IDC that failed here: it was the Council's delay in taking a decision that prevented this event from going down in history as the first effective application of the IDC.

Nevertheless, it seems clear that we must broaden the means of access to the mechanisms of the IDC. Along these lines, I want to propose what seems to me the simplest form. While the expression "government" used in the IDC has been interpreted as meaning the "Executive," the truth is that "government" must be understood as referring to all the branches of state. It is natural, then, that the other branches of government of a country should be able to turn to the OAS, citing the IDC, to denounce the disruption or breakdown of democratic institutions in their country. As always, it will, of course, be up to the Permanent Council to determine whether the complaint is valid. But the effectiveness of the IDC seems seriously limited when only the executive can use it to defend a democracy.

3. The future of the IDC

Throughout this report, I have put forward various options for enhancing the effectiveness of the Inter-American Democratic Charter. In summary, the main proposals are as follows:

3.1. Strengthen the monitoring mechanisms available to the General Secretariat by extending the forms of multilateral evaluation to each of the features the IDC deems essential to the existence and survival of democracy.

3.2. Expand the capacity of the General Secretariat to foresee and prevent crises that threaten seriously to alter or interrupt democratic processes in member states.
3.3. Reach a formal political consensus, through a resolution of the General Assembly, on what situations may be identified as serious disruptions or interruptions of the democratic process.
3.4. Produce periodic reports, if possible annually, on the main issues defined as essential for democracy in the IDC.
3.5. Reinforce the capacity of the General Secretariat to assist member states before and after crises, including monitoring, negotiation, dialogue, and political agreements, as well as national reconciliation, the strengthening of political institutions, parties, and organizations and of civil society, and the supremacy of civilian power vis-à-vis the military.
3.6. Expand access to the OAS, for requesting action by the Council, to all branches of member governments.

Still, the future of democracy in the Hemisphere and the role the IDC can play in it will depend crucially on the way we handle certain areas, especially those where our action to date has been very incomplete.

We have increased our capacity to prevent institutional disruptions; in the holding of clean and free elections; we have been effective in resolving crises; we have well-earned prestige in human rights; and we have taken great steps on issues relating to transparency and probity. But we still have far to go to meet the principal challenge of ensuring democratic governance and sustainable democracy on a permanent basis--the raison d'être of the IDC.

Democracy is a value that must be preserved; at the same time, it is a set of procedures and institutions that can always be improved, and of human rights and civil rights that must be extended and protected.

Of the 14 cases involving interruption of presidential mandates that have occurred over the last decade, none was the direct result of objections to electoral procedures. Our goal is not only that governments be properly elected and kept in office; it is also that citizens feel they live in a democracy that addresses public problems and improves their lives, and that the democratic form of government be a permanent process in the Americas, the only way of handling and resolving conflicts in society.

In terms of the first Chapter of this report, we may say that, while there is growing compliance with the IDC with respect to the inception of democracy, there remain important shortcomings in our Hemisphere in the separation, independence, and reciprocal control of the branches of government, and in full respect for the three spheres of citizenship: political, civic, and social.

Our future task is to strengthen the force of the Inter-American Democratic Charter, extending its monitoring and the cooperation surrounding it, and addressing in particular those areas that are weakest, but without abandoning those where we have already gained important ground and strength.

Consequently, I would like to add to the previous five proposals the following ones:

3.7. Maintain and strengthen the role of the OAS as the principal agency of electoral observation and promotion in the Americas.
3.8. Expand OAS action substantially in terms of strengthening democratic institutions, respect for the rule of law, and the independence of the Judiciary.
3.9. Strengthen republican institutions and the democratic rule of law. While democratic shortcomings are more acute in the civic and social spheres, we still have serious political problems. One of these needs to be resolved urgently: the weakness of our republican forms of government, whether these involve presidential, parliamentary, or constitutional monarchy systems. The republican system and democracy are mutually reinforcing. The first creates the conditions for the second to grow. Without a republic, democracy has no underpinnings. And we all know that, in many cases, there are serious weaknesses in the separation, independence, and reciprocal control of the branches of government -- the basis of republican organization.

Consequently, when I think about expanding and developing the Democratic Charter, I also think about expanding and consolidating republican organization. The separation and balance of powers, a legislative branch endowed with its own political and technical capacity, a professional and fully independent judiciary; clear limits on the exercise of power; clear and stable rules for the democratic process; strengthening of political parties -– these are some of the elements of the democratic rule of law we want to strengthen.

The republican form of government also attaches particular importance to mechanisms of citizen oversight. A democracy without accountability will inspire little confidence, and it is in the lack of confidence that most of today's crisis of representation has its roots.

It is important to highlight the role civil society can play here, as in other aspects of expanding and strengthening democracy, in bringing to light those areas of public action that are still nontransparent or presenting substantiated complaints about shortcomings in probity.

3.10. Extend application of the IDC in terms of expanding civic citizenship, which has not been sufficiently considered, and which by all accounts lies at the root of the institutional instability of recent years. The Democratic Charter is addressed to people, who, in addition to exercising their unrestricted right to elect their governors, develop as human beings and as citizens through the full exercise of their recognized rights.

To achieve democratic stability means giving effect to the principles set forth in Article 1 of the Democratic Charter: "The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it".

The Report on the State of Democracy in Latin America, presented by the UNDP in 2004, put this another way, equally succinct but powerful: the subject of democracy is not the voter but the citizen.

This tells us that democracy is essential for translating political, civil, and social rights from the nominal to the real. And it also reaffirms the obligation of our governments to promote and defend democracy. Here is the heart of the matter, the central challenge towards which we must direct the expansion of the Democratic Charter: how do we give effect to this right to democracy, and how do we give specific content to the obligation of governments?

3.11. Adopt the Social Charter of the Americas as a way of promoting social citizenship and strengthening democracy.

This means that the expansion of the Democratic Charter must be consistent with two of its own principles:

> Article 12: “Poverty, illiteracy, and low levels of human development are factors that adversely affect the consolidation of democracy.”
>
> Article 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 …”.

To ensure the future of democracy and the role of the Inter-American Democratic Charter, our countries require structural changes for the sake of sustainable democracy, and these must include a frontal attack on the prevailing social inequality of our societies.

In this context, I reaffirm the importance of moving forward in the substantive areas mentioned in the remarks on the Fifth Anniversary of the IDC, namely, prompt adoption of the Social Charter, to implement Chapter III of the Democratic Charter; prompt completion of our Declaration on the Rights of Indigenous Peoples; negotiation of the Inter-American Convention against Racism and All Forms of Discrimination and Intolerance; and substantive strengthening of the work of the Inter-American Commission of Women.

Some programs under way in the General Secretariat, such as those on civil identity, consumer protection, and access to justice, are part of the same task of cooperation to generate social citizenship, which we must address as a priority.

These actions, designed above all to strengthen the preventive aspect of this hemispheric instrument, will make an important contribution to democratic solidarity, with the IDC as an essential tool.

I want to conclude by reaffirming the principal criterion that guides our action: a progressive approach to applying and interpreting the IDC. Success in a matter so complicated and sensitive must be built step by step. In a multilateral system based on consensus, there is no other way to proceed. Of course, gradualism does not preclude the occasional bold stroke needed to introduce the necessary changes; but it does govern the timing of such audacity.

We must also take the gradual approach in expanding the sphere of the Democratic Charter. Both the strengths and the weaknesses of multilateral systems lie in their dimension and complexity. The decision of 34 states carries enormous weight in the Hemisphere; but the important thing is to recognize how difficult it is for so many parties to build that decision. This difficulty must be borne in mind when new elements are introduced. Expanding the sphere of application of the Democratic Charter requires us to understand that constraint and adjust our pace accordingly.

Finally, there is institutional gradualism. The necessary corollary to broadening our challenges is expanding our institutional capacity and improving and modernizing our Organization. We must never demand of an administrative system more than it can give at each stage of its evolution. Every new initiative, in order to be put into practice, must have the necessary institutional conditions in terms of OAS financial, human, and organizational resources.

5. The struggle against discrimination and intolerance

Resolution

CJI/RES.124 (LXX-O/07)	The struggle against discrimination and intolerance in the Americas

Annexes:

CJI/doc. 258/07	The Inter-American Juridical Committee Report on the 'Preliminary Draft Inter-American Convention against racism and all forms of discrimination and intolerance'
CJI/doc. 261/07	Explanation of vote: the struggle against discrimination and intolerance in the Americas (presented by Dr. Jean-Paul Hubert)

On 10 October 2006, the Chair of the Working Group on this topic sent a note to the Inter-American Juridical Committee requesting a contribution in writing regarding the draft convention. The IAJC Chairman responded on 17 October 2006, informing the Working Group that the Committee had submitted a report on the matter (March 2002) and that it would give the topic place of priority in its next regular session.

On January 5, 2007, the Office of International Law sent to the Juridical Comittee members a consolidated text prepared by that Office, containing the original preliminary draft with the comments received to date from Member States. At the request of the Committee Chairman, on 7 February 2007 the Office of International Law forwarded to IAJC members written comments submitted by various delegations during 2005-06 (i.e. before a draft convention had been prepared). As could be expected, these comments were thus general in nature and did not refer to the draft *per se*.

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Jaime Aparicio, rapporteur for this topic, said that examination of the documents distributed to Committee members made it clear to him that the Committee should lend its expertise in this area, but that the draft itself was too general in nature, and its scope and objectives needed to be better defined. With this in mind, he recommended that the Juridical Committee not enter into an analysis of the draft itself, but rather contribute to the process through general observations. He added that it would also be necessary to define the complementary nature of the new convention, and to clearly set out its limits to assure that it would not trespass on other areas of the Inter-American system.

Dr. Ana Elizabeth Villalta Vizcarra recalled that there are a number of existing UN and Inter-American conventions on this topic, and that this draft gets into complex areas, especially in regard to the rights and duties of States or the respective roles of the Inter-American Court and the Inter-American Commission on Human Rights.

Dr. Antonio Fidel Pérez added that to assure that the United States would be willing to enter into a convention on human rights, it would be necessary to insert safeguard clauses taking into account certain constitutional issues, such as freedom of expression and religion, and especially in regard to the Internet.

Dr. Eduardo Vio Grossi underlined that in its response the Inter-American Juridical Committee should not appear to be against the adoption of a text in this area as that could make it seem that its members were in favor of racism and discrimination, and that for that reason the Committee should stay on the margins of the legislative process that has been initiated. In his opinion, the document prepared by the Committee is an extension of the previous report and should be complementary in nature without diverging from other Inter-American instruments such as the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights and its Additional Protocol. He stressed that the question of racism and discrimination in the Americas is not a legal problem but a social one: Member States have no domestic legislation regulating non-discrimination. He proposed that an effort be made to come up with a text that would be acceptable to all States, including those that are not Parties to the American Convention, under a title such as Inter-American Commitment against Racism, rather

than a convention. This would mean that the document would not require legislative-branch ratification. He said that such a document could comprise 5 chapters. The first would lay out the objectives. The second could explain the meaning and scope of the American Declaration and the American Convention, citing which articles of each are being interpreted and reiterating that said articles impose an international duty to combat acts of racism or discrimination according to the Draft Convention. The third chapter could give examples of acts that are to be considered racist or discriminatory. A fourth chapter would treat the obligation on States to refrain from carrying out, promoting or protecting racist or discriminatory acts. The fifth chapter would cover the protective measures to be provided by States Parties to the Convention, and the application of Article 106 of the Charter of the OAS by non-parties. Dr. Vio Grossi said that the Juridical Committee opinion on this topic should clearly state what is involved and why this matter is being taken up. It should mention that Article 45 of the Charter of the OAS is not sufficiently explicit and needs to be extended to cover new forms of discrimination. He cited the provisions of Article 2 of the American Declaration of the Rights and Duties of Man, Article 1 of the American Convention on Human Rights, and Article 3 of the Additional Protocol, explaining that all leave a door open for the addition of other forms of discrimination. This, he added, leads him to conclude that a new document must complement rather than substitute existing norms. He added that the report could mention existing apprehensions and the conclusions of Dr. Felipe Paolillo in his previous report. In conclusion, he pointed out that Article 45.a of the Charter and the American Declaration of the Rights and Duties of Man are common to all Member States, but there is no enforcement mechanism. The Convention does have such mechanisms, but not all OAS Member States are Parties to it. The difference is an enforcement mechanism. During the session, Dr. Vio Grossi presented document CJI/doc.251/07, “Preliminary Report on the ‘Preliminary Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance’ (CP/CAJP-2357/06, 18 April 2006)”, which he cited when explaining his opinions.

Dr. Ricardo Seitenfus said the he favored a formal convention because it would have the force of law and could also complement existing instruments, especially in regard to new forms of discrimination that are not *per se* acts of racism, such as neo-nazi actions, xenophobia, certain ways that illegal immigrants may be treated, etc. He underscored the complexity of the topic, which would certainly provoke debate in all countries. Nonetheless, he thought that the Juridical Committee had to do something.

Dr. Galo Leoro Franco expressed doubts on a real need for new international law in this area. In his opinion, States already have in place domestic measures to safeguard human rights. National constitutions usually provide for protection of rights in principle, although they often prove ineffective. The Inter-American System, he added, already has enough instruments in place, including a Court, which would lead one to suspect that a new document was not going to have any greater legal or political force than the existing instruments. In spite of these doubts, however, he would support any decision of the Juridical Committee.

Dr. Jean-Paul Hubert reminded the group that the letter received from the Chairlady of the Working Group of the Committee on Juridical and Political Affairs asks the Juridical Committee to offer its views as a contribution to the negotiating process. In other words, she asks for a simple opinion within a process that is still at a preliminary stage.

Dr. Freddy Castillo Castellanos joined the view that the Committee should submit an opinion more comprehensive in character than its previous one. He added that he also favored a complementary instrument that would be more expository than specific in regard to identifying new forms of discrimination.

Dr. Jorge Palacios Treviño stated that the Inter-American Juridical Committee should respond to the consultation in line with the faculties granted it under the Charter. Although the majority opinion seems to that a convention is not going to resolve the problem, he believes that the Committee should work on the text of the convention, taking into account comments from governments.

Dr. Antonio Fidel Pérez suggested a hybrid solution: a response that would set out the criteria deemed necessary to the success of a convention and that should be taken into consideration during work on a new version of the draft text.

Dr. Mauricio Herdocia Sacasa said that it was necessary to comply with the General Assembly mandate, but it should be done from an appropriate legal perspective as the draft is clearly in need of more work. He added that a binding instrument is needed, be it a convention or something else suitably based on the progressive development of law, and that it must also be complementary in nature. He expressed agreement with the view that the IAJC should not limit itself to compiling a list of the contents of existing instruments, and it should bear in mind that many States of the Americas are parties to other international conventions. Thus the UN Convention against Racism should be taken into consideration and its terminology followed to avoid the use of varying definitions. Other aspects of the matter should also be considered, such as culture, indigenous peoples and the causes of discrimination, with stress being placed on prevention. By proceeding in this fashion, the Inter-American Juridical Committee would be contributing to the progressive development of international law.

Having considered all these views, the Inter-American Juridical Committee approved resolution CJI/RES.124 (LXX-O/07), "The struggle against discrimination and intolerance in the Americas", by which it reiterated its concern for the persistence of acts of discrimination and intolerance and the appearance of new forms of the same. It stressed the need to remain united and seek greater cooperation among States in order to eradicate such acts. Through this resolution, the Juridical Committee also adopted document CJI/doc.258/07, "The Inter-American Juridical Committee Report on the Preliminary Draft Inter-American Convention against racism and all forms of discrimination and intolerance", by which it hoped to contribute to the negotiations undertaken by the Working Group, and decided to remit it and the resolution to the Chairlady of the Working Group. It also decided to maintain this topic on its agenda under the heading "The struggle against Discrimination and Intolerance in the Americas," with Drs. Jaime Aparicio, Ricardo Seitenfus and Hyacinth Evadne Lindsay as co-rapporteurs. The resolution was adopted with Dr. Galo Leoro Franco abstaining. Dr. Jean-Paul Hubert registered an explanation of vote, now classified as document CJI/doc.261/07, "Explanation of Vote: The struggle against discrimination and intolerance in the Americas".

On 21 March 2007, the Office of International Law delivered to the Chairlady of the Working Group the note of the Chairman of the Juridical Committee by which he remitted to her the resolution, the document adopted by the Committee, and Jean-Paul Hubert's explanation of vote.

On 6 July 2007, the Office of International Law distributed to the members of the Inter-American Juridical Committee document CP/CAJP-2357/06 rev.7, "Preliminary Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance". This seventh revision includes the observations and comments made by OAS Member States during the Working Group's efforts leading to the 37th regular session of the General Assembly.

During the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007), Dr. Jaime Aparicio suggested that this item should remain on the Juridical Committee's agenda and that the Committee itself stay abreast of the work being done by the Organization's political bodies, as it had as yet received no response to the document it had approved.

CJI/RES.124 (LXX-O/07)

THE STRUGGLE AGAINST DISCRIMINATION AND INTOLERANCE IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING SEEN report CJI/doc.80/02 rev.3 dated March 7, 2002, prepared in attention to the mandate of resolution of the General Assembly AG/RES. 1774 (XXXI-O/01), Preparation of a Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance, through which an "analysis document" was requested with the purpose of contributing to and making progress on the works of the Permanent Council taking into account, among others, the international juridical instruments on the matter;

HAVING SEEN resolution CJI/RES.39 (LX-O/02), "Preparation of a Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance",

through which the Juridical Committee adopted the conclusions contained in the aforesaid report, remitting such resolution and report to the President of the Permanent Council;

CONSIDERING that the General Assembly, through 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", entrusted the Permanent Council with the formation of a working group in charge of receiving contributions, among others, from the Inter-American Juridical Committee, in order that such Group prepare a draft convention on the matter;

CONSIDERING also that the General Assembly, through resolution AG/RES. 2168 (XXXVI-O/06), "Combating Racism and all forms of Discrimination and Intolerance and consideration of the Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance", instructed the Working Group to initiate negotiations regarding a draft convention on the matter, taking into account the preliminary draft presented by the Presidency of such Working Group and reiterated its invitation to the organs, organizations and entities of the Organization to prepare contributions for the consideration of the Working Group;

HAVING SEEN note dated October 10, 2006 through which the President of the Working Group transmitted to the Juridical Committee the Preliminary Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance (CP/CAPJ-2357/06), in order to obtain their point of view as contribution to the negotiations carried out by the Working Group;

HAVING SEEN also the document prepared by the Office of International Law of the Department of International Legal Affairs of the OAS, "Consolidated Text of the Preliminary Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance" containing the observations and comments of the OAS Member States (CAJP/AT/RDI-33/06 of November 9, 2006);

HAVING CONSIDERED the referred documents and held extensive discussions in that regard during the present regular session, in the light of the preceding conclusions, and taking into account the international juridical instruments of universal scope (among them the Universal Declaration of Human Rights of 1948 and the International Convention on the Elimination of all forms of Racial Discrimination of 1965) and of regional scope (among them the OAS Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and the Protocol of San Salvador additional to such Convention),

RESOLVES:

1. To reiterate its concern with the persistence of acts of discrimination and intolerance and the emergence of new forms of such acts and to stress again the need for making common cause to face these manifestations through the intensification of cooperation among States in order to eradicate such practices.

2. To adopt the document attached to the present resolution (CJI/doc.258/07) as contribution to the negotiations underway on the part of the Working Group in charge of preparing a Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance and remit such document along with the present resolution to the President of such Working Group.

3. To keep the topic on its agenda under the title "The Struggle against Discrimination and Intolerance in the Americas" with Drs. Jaime Aparicio, Ricardo Seitenfus and Hyacinth Evadne Lindsay as co-rapporteurs.

The present resolution was adopted at the session held on March 6, 2007, in the presence of the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jean-Paul Hubert (who presented an Explanation of Vote), with the abstention of Dr. Galo Leoro Franco who will provide an explanation of vote.

Annexed: CJI/doc.258/07 Inter-American Juridical Committee report on the 'Preliminary draft convention against racism and all forms of discrimination and intolerance'

CJI/doc.261/07 Explanation of vote: the struggle against discrimination and intolerance in the Americas (presented by Dr. Jean-Paul Hubert)

CJI/doc.258/07

INTER-AMERICAN JURIDICAL COMMITTEE REPORT ON THE 'PRELIMINARY DRAFT INTER-AMERICAN CONVENTION AGAINST RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE'

The Inter-American Juridical Committee, having reviewed the Preliminary Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance, sent by the President of the Working Group in charge of drafting the aforesaid project, as well as the consolidated text, prepared by the Office of International Law of the Department of International Legal Affairs of the OAS, considers that in this stage of negotiations, the role of the Juridical Committee should be that of contributing with general comments and recommendations on the scope, content, structure and characteristics of the preliminary draft convention that is currently in the hands of the Working Group.

The Inter-American Juridical Committee, after an analysis of the international legislation on the subject, confirms that the current inter-American human rights instruments contemplate all forms of discrimination, either explicitly or through a general regulation referring to all forms of present or future discrimination, as is proven in the following regional instruments: The Charter of the Organization of American States (article 5), the American Declaration of the Rights and Duties of Man (article 2), the American Convention on Human Rights (article 1), and the Protocol of San Salvador (article 3).

Consequently, the Juridical Committee considers that the utility of a new instrument lies in providing an express legal treatment regarding forms of discrimination that have not been explicitly determined, or for new forms of discrimination that have surged after the declarations and treaties, due to new circumstances.

In that sense, this Convention would be coherent with the current regional and universal instruments in force, expanding the scope of effective application for the aforesaid in control of the new forms of discrimination and intolerance.

General Comments

In context of the international instruments, the term "discrimination" covers all forms of discrimination due to race, gender, nationality, creed, and political opinions or for any other reason. In that sense, the generic and ample term that is recommended is that of "discrimination" instead of "racism", which only constitutes one form of discrimination due to race.

To include the development of referred regulations for the new forms and manifestations of discrimination and intolerance, in the preliminary draft convention. As an example, the discrimination of groups such as the populations of Afro-Latin Americans, indigenous peoples, the immigrants, or subjects such as discrimination due to sexual preference, infectious diseases, the use of genomes, or the use of new technology to disseminate discrimination and intolerance could be included, as well as others.

The regulations contained in the preliminary draft must be precise and not repeat or contradict those existing regulations with regional or universal scope. A simple and flexible language is suggested.

It is necessary to define the scope of application and objective of the proposed convention. To that effect, the regulations of the convention must be unequivocal and capable of being implemented in a coherent manner, without leaving doubt for divergent interpretations regarding one point.

Keeping in mind that acts of discrimination may constitute an expression of cultural or social conduct that is not only attributable to the States, the preliminary draft convention must approach the referred topic in light of the acts that are directly attributable to the State, as the measures that must be adopted by each State to proscribe any form of discrimination and intolerance in the society.

In the preliminary draft writing process the document must take into account the role and implication that the convention will have in the Inter-American Court and Commission on Human Rights. Therefore, these organs should be consulted during the negotiation process.

It is considered of the greatest importance to continue the consultations, in the most ample possible manner, with the relevant sectors of civil society.

Conversely, the preliminary draft must contemplate the developments in the matter of discrimination derived from the judicial decisions and judgments of the Inter-American Court and Commission on Human Rights.

The Inter-American Juridical Committee will continue to be at the disposal of the Working Group in charge of analyzing the preliminary Draft Inter-American Convention against racism and all forms of discrimination and intolerance, in order to continue contributing with the matters the Working Group deem necessary.

CJI/doc.261/07

EXPLANATION OF VOTE

THE STRUGGLE AGAINST DISCRIMINATION AND INTOLERANCE IN THE AMERICAS

(presented by Dr. Jean- Paul Hubert)

Given that what was asked of the Inter-American Juridical Committee by the letter of October 10, 2006 of the President of the Working Group was its opinion on a draft convention currently being discussed and negotiated by the OAS Members States, I fully endorsed resolution CJI/RES.124 (LXX-O/07) and its attached document CJI/doc.258/07 as the best possible answer the IAJC could give to the request received from the Working Group.

That being said, I firmly believe that adding yet another convention on the subject of discrimination in all its form is not the best possible answer, from a legal angle, to the problem been addressed. I remain convinced that discrimination in all its forms is already fully addressed and adequately covered in several existing international instruments, both of the universal and the international levels. Some of those are mentioned in the document we have approved.

I am of the opinion that if a need is felt to address new and future forms of discrimination in any specific way, that could better and more easily be done by simply, for example, amending those already existing documents (such as by way of protocols), or by adopting a solemn declaration, the effect of which would be to clarify or expand upon the interpretation to be given to such expressions as “all other forms of discrimination”. I find that the above have already been expressed in a more detailed fashion, in a report considered by the IAJC during its 60th regular session held in Rio de Janeiro in March of 2002, when first asked by the OAS General Assembly [AG/RES. 1774 (XXXI-O/01)] for a general analysis of the question. The conclusion of the report (CJI/doc.80/02 rev.3) had been adopted by the Inter-American Juridical Committee by its resolution CJI/RES.39 (LX-O/02).

Finally, I truly believe that the international law of the Americas would not be well served by putting up for adoption an additional convention on a subject matter already more than adequately covered, as I have indicated above. In my view, fighting discrimination and intolerance requires not an additional convention but the putting into effective operation those already in existence by the adoption and implementation of measures at international and national levels that would result in a more widespread abiding by the obligations undertaken under such existing international instruments.

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

Resolution

CJI/RES.122 (LXX-O/07)	Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)

Documents

CJI/doc.242/07	Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.243/07	Report on CIDIP-VII with respect to the negotiation of legal instruments concerning consumer protection (presented by Dr. Antonio Fidel Pérez)
Annex:	Explanatory Introduction to the Experts Meeting carried out by the OAS, Porto Alegre, December, 2-4, 2006

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), the Director of the Department of International Legal Affairs of the OAS presented a report on the Porto Alegre meeting, at which Dr. Ana Elizabeth Villalta Vizcarra was also present in representation of the government of El Salvador. He indicated that two documents were examined at length in said meeting, namely the Brazilian proposal and the United States' proposal for a model law. Due to time constraints, the Canadian proposal could not be discussed at length. Upon continuation, the Committee on Juridical and Political Affairs held a meeting during which these three proposals were elaborated upon by their respective coordinators: Professor Cláudia Lima Marques of Brazil, the delegates of the State Department and Federal Trade Commission of the USA, and the representative of Canada.

The Director of the Department of International Legal Affairs mentioned it had been agreed that each of the three coordinators would draft a text to be submitted to the experts attending the Porto Alegre meeting, and that shortly thereafter a final report would be submitted to the Committee on Juridical and Political Affairs. He indicated, however, that it had been agreed that the CIDIP would focus exclusively on consumer protection. He pointed out that at this point the Porto Alegre document still needed to be finalized so that all parties involved, including the Inter-American Juridical Committee, could make comments. The Chairman of the Juridical Committee moved that note be taken of the progress made and that no further steps be taken until the conclusions of the Group of Experts are received.

Dr. Ana Elizabeth Villalta Vizcarra presented document CJI/doc. 242/07, "Seventh Inter-American Specialized Conference on International Private Law (CIDIP-VII)". She referred to the Porto Alegre meeting which she attended as a governmental expert. She stated that the Brazilian proposal was discussed in detail and that a consensus was reached to set aside the question of checks and to adopt the law most favorable to consumers as applicable law. The US proposal was received with expressions of satisfaction, although fine-tuning of language was needed. All agreed that the proposals put forward by Brazil and the USA were not mutually exclusive but rather complementary, the former being a convention and the latter a model law. She also mentioned that the delegation of Canada presented a proposal, but that it hadn't been made clear if it took into account the law most favorable to consumers and the *non conveniens* forum. She concluded her remarks by stressing that the Inter-American Juridical Committee now has before it three proposals for consideration and will have to make its views known, as the General Assembly has given it a mandate to do so and the matter is of vital importance. The substantive work done by the experts must be supported.

Dr. Antonio Fidel Pérez introduced document CJI/doc.243/07, "Report on CIDIP-VII with respect to the negotiation of legal instruments concerning consumer protection", by summarizing the background, the three proposals that have come forward, and the reports submitted by the co-rapporteurs. He said that, in his opinion, the proposals require further work to assure compatibility and thus effective consumer protection once implemented. He concluded that, since new drafts of the proposals are in the works, the Juridical Committee should await the final results of Porto Alegre to further collaborate in the process.

The Inter-American Juridical Committee approved resolution CJI/RES.122 (LXX-O/07), "Seventh Inter-American Specialized Conference on International Private Law (CIDIP-VII)", by which it expressed satisfaction with the progress made in negotiations on the drafting of instruments to facilitate the implementation of consumer protection measures and safeguards, especially during the first meeting of the group of experts; reaffirmed its desire to help meet the goals set by the Member States for the successful celebration of a CIDIP-VII on the subject of consumer protection, and renewed the mandate given to the co-rapporteurs to represent the Juridical Committee in preparations of CIDIP-VII and report back to it.

During the CJI's 71st regular session (Rio de Janeiro, August 2007), Dr. Jean-Paul Hubert observed that it seemed to him that the rapporteurs had already completed their work, as each had presented separate reports at the Committee's previous sessions. If the topic was to remain on the Committee's agenda, he suggested that it might be divided into subtopics.

Dr. Mauricio Herdocia Sacasa regretted that the Committee had not been present for the negotiations of the CIDIP-VII, as it might have been able to help resolve issues on which no consensus was reached in the negotiations.

Dr. Eduardo Vio Grossi observed that the approach the Committee adopted to address this issue was the source of the problem, i.e., not to issue official opinions or even express its view as to what the applicable law was. He stated that on the whole, those Committee members who were experts in public international law did not venture into the realm of private international law, with the result that relatively few Committee members were working on issues in private international law. The rapporteurs' reports were approved, he noted. But no document was produced that had the support of the Committee's full membership. In his view, the Juridical Committee should have been acting as legal advisor on this subject and should have addressed the question of whether the three proposals on the table were compatible.

Given the comments made, discussion of the topic was postponed until the Inter-American Juridical Committee's next regular session.

CJI/doc.242/07

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

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

1. BACKGROUND

By means of resolution AG/RES. 2218 (XXXVI-O/06) of the XXXVI Regular Session of the General Assembly of the Organization of American States (OAS), celebrated in the Dominican Republic, in June 2006, and denominated "Observations and Recommendations to number 7 of the Inter-American Juridical Committee Annual Report", it was resolved to:

> To request the Inter-American Juridical Committee to continue to consider the subject of the codification and harmonization of international law in the Americas and collaborate on preparations for the next Inter-American Specialized Conference on Private International Law (CIDIP-VII); and to encourage the rapporteurs for this topic to participate in the consultation mechanisms that are to be established for work on the topics proposed for that Conference.

These topics were established in the General Assembly of the OAS during its 35th regular session, held in Fort Lauderdale, United States of America in June 2005, where it approved resolution AG/RES. 2065 (XXXV-O/05) denominated the "Seventh Inter-American Specialized Conference on International Private Law", by means of which the following list of topics was determined 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 Inter-American Model Law on Secured Transactions.

In the referred resolution, the Permanent Council was entrusted the establishment of the methodology to prepare the Inter-American instruments to be considered in the CIDIP-VII, to set the date and place, and that when studying future topics for the coming CIDIPs, to consider, among other things, the subject of an inter-American Convention on international jurisdiction.

In that sense, the Inter-American Juridical Committee, by means of resolution CJI/RES.100 (LXVII-O/05) produced in its 67th regular session, held in Rio de Janeiro, and denominated the "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", asked the rapporteurs of the subject that they participate in the consultation mechanisms that would be established with an aim of developing the topics proposed for CIDIP-VII, and especially in the meeting of experts that will be called for that effect. It also asked the rapporteurs to keep the Juridical Committee informed about the advances in the discussion of the topics, and requested that a report be prepared for presentation during its 68th regular session.

The subscribed, in her role of topic rapporteur, presented report CJI/doc.209/06, during the 68th regular session of the Inter-American Juridical Committee, held in Washington D.C, in March 2006, denominated the "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", where it requested the Inter-American Juridical Committee to present its comments on the final topics of CIDIP-VII, and to collaborate with the corresponding preparatory work, recalling the mandates of the General Assembly of the Organization of American States (OAS) contained in resolutions AG/RES. 2069 (XXXV-O/05) and AG/RES. 2065 (XXXV-O/05).

The topics approved in the CIDIP-VII Agenda were thoroughly described in that report, which are Consumer Protection and the Electronic Registry for the Implementation of the Inter-American Model Law on Secured Transactions.

Resolution CJI/RES.104 (LXVIII-O/06) was approved during the 68th regular session of the Inter-American Juridical Committee, denominated "Seventh Inter-American Specialized Conference on Private International Law", where document CJI/doc.209/06, presented by the subscribed as co-rapporteur of the topic, was approved. The other rapporteurs of the topic were asked to participate in the consultation mechanisms that would be established with the purpose of developing the topics proposed for CIDIP-VII, in a coordinated and in representation of the Inter-American Juridical Committee. They also asked the rapporteurs to keep the Inter-American Juridical Committee informed about the advances in the discussion of the topics, and that the present a new report to the Committee in its next regular session, with observations and comments made to the CIDIP-VII Agenda.

In the 69th regular session of the Inter-American Juridical Committee, held in Rio de Janeiro in August 2006, as co-rapporteur of the topic, the subscribed expressed that the Virtual Forum designed by the Office of International Law of the Department of International Legal Affairs as part of the preparatory work process for the CIDIP-VII has proceeded successfully to date, thus indicating that the Juridical Committee could have a more active role in it, because it could give concrete recommendations on the proposals in view of the fact that they have already been discussed by the Experts, especially the proposal presented by the Brazilian Delegation, concerning the "Inter-American Draft Convention on Consumer Protection".

Resolution CJI/RES.115 (LXIX-O/06), denominated the "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", was approved during that regular session of the Inter-American Juridical Committee on this matter, in which support to the CIDIP process was reiterated, as an excellent forum for the coding and harmonizing of Private International Law in the hemisphere. In the referred resolution, support to the rapporteurs was reiterated for their participation in the CIDIP-VII preparatory work, and were asked to continue representing the Juridical Committee in the mechanisms for the preparation of Inter-American instruments on consumer protection and electronic registries for secured transactions.

II. PREPARATORY WORK FOR THE CIDIP-VII

In resolution AG/RES. 2217 (XXXVI-O/06), denominated "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", adopted by the General Assembly of the OAS, in its XXXVI regular session, held in the Dominican Republic in June 2006, in its fourth plenary session resolved the following in numerals 2, 3, 4, and 5:

2. To express its satisfaction with the creation of a group of experts for each CIDIP-VII topic, consisting of governmental and independent experts, as well as experts from other international organizations and the Inter-American Juridical Committee; and to urge Member States that have not yet done so to designate governmental experts to participate in said groups.

3. To express its satisfaction with the current preparatory work, including the creation and launching of the Internet Discussion Forum developed by the Office of International Law of the Department of International Legal Affairs, through which the groups of experts will participate in the preparatory work.

4. To instruct the General Secretariat, through the Office of International Law of the Department of International Legal Affairs, to organize the necessary consultations by the groups of experts on preparation of the draft Inter-American instruments to be considered by CIDIP-VII and, if necessary, seek external funding for the preparatory and final work of this Conference.

5. To take note of the methodology adopted by the Permanent Council by which the groups of experts will participate in the preparatory work through the Internet Discussion Forum; and to encourage Member States to host meetings of experts, as needed, to finalize the drafting of the inter-American instruments to be considered by CIDIP-VII.

Complying with the aforesaid related resolution AG/RES. 2217 (XXXVI-O/06) that was developed as part of the preliminary work for the CIDIP-VII, the “First Meeting of Experts of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)”, which was held in Porto Alegre, Brazil, from December 2-4, 2006, on the topic of Consumer Protection, Applicable Law, Jurisdiction and Monetary Redress (Conventions and Model Laws), in which government experts and independent experts of the OAS Member States participated.

During the progress of the referred meeting, the three instruments proposed for the topic that were presented by the Brazilian, United States of America, and Canadian Delegations were discussed, and which comprised: a) The proposal presented by Brazil for a “Inter-American Specialized Conference on Private International Law (CIDIP-VII) on Law Applicable to Some Contracts and Consumer Relations”; b) the Proposal presented by the United States of America denominated “US Federal Trade Commission proposal for OAS Model Law on Monetary Redress for Consumer Transactions”, and c) the Proposal presented by Canada denominated “Model Law on Jurisdiction and Rules of Conflicts of Consumer Contracts Laws”.

Regarding the Proposal presented by the Delegation from Brazil, after it was extensively discussed by the government experts and independent experts, the delegates supported the objective of the said proposal, that is: to provide legal protection for the consumers in their relationships with the suppliers, provide economic benefits to the consumers by increasing availability and choice and reducing product costs and to provide consumer confidence in the market place.

The experts agreed to reach a consensus on the fundamental ideas of the draft, by only making specific observations to the norms, agreeing to write the convention text without the use of brackets and they would later perfect the language, thus reaching approval by consensus of the Convention language with the commitment of adapting and clarifying aspects of language in the following concepts: the definition of consumer contracts and the inclusion of third party consumers; the use of the concept "most favorable consumer law”; the use, scope and definition of the imperative rules and the application of public order; the general dispositions of article 4, and aspects of language in articles 5, 6, and 7.

Regarding the proposal presented by the United States Delegation, which was also object of extensive discussion by the delegations of government experts and independent experts, the Agreement was reached that the Proposal by Brazil as well as the Proposal by the United States were totally complementary and were not mutually excluding. In general, the delegations expressed their support for the Proposal structure, and emphasized that it focuses on different important subject areas, including actions for individual, collective and government retributions, but at the same time the convenience of adapting the language of the proposals to the internal common civil law framework of the States, due to which it was agreed to improve the language by means of a small task group proposed by the United States Delegation.

Finally, the Canadian Delegation made the presentation of its Proposal, which was favorably received by the Delegations who considered that the topic was very important, nonetheless some preoccupation was expressed about the aforesaid regarding the definitions contained in the proposal and that it was necessary to adapt them.

Thus the delegations thought it necessary to: adapt the language in article 3 with the purpose of including a reference to article 6 that demands that a Court refuse to execute an election clause of the forum under certain circumstances; the concern regarding the inclusion of the *non conveniens forum* in the Draft Proposal; the overall viability of article 4 regulation was also expressed regarding its application to electronic commerce; comments if the proposal should assume the form of a Convention or one of a Model Law; positions and concerns were presented regarding the interrelation of this Proposal and the Proposals of Brazil and United States of America. And finally, the concerns for the application of this Proposal to internal consumer Model Law on Jurisdiction and Norms for Conflicts in Laws for Consumer Contracts, and regarding the assumption that the internal norms should be modified according to a model law, were considered.

III. RECOMMENDATIONS

Taking into account that the preliminary works for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), are being successfully developed, that is the Expert Internet Discussion Forum, a mechanism prepared and developed by the Office of International Law of the Department of International Legal Affairs of the OAS General Secretariat, as well as the First Meeting of Experts for the CIDIP-VII held in Porto Alegre, Brazil in December 2006, in compliance with resolution AG/RES. 2217 (XXXVI-O/06) in which the OAS General Assembly on this particular topic, entrusted the Office of International Law to organize the necessary consultations and to work with the member States so the latter may sponsor the Expert Meetings in order to finish the preparation of the inter-American instruments to be considered by the CIDIP-VII.

In that sense and considering that the topic of Consumer Protection has been widely discussed by the Experts in the Virtual Discussion Forum as well as in the First Meeting of Experts where there was ample debate about the proposals presented by Brazil, The United States of America, and Canada, and presented by their corresponding delegations, that complete Instruments were available.

In that sequence of ideas and taking into account the mandates of the OAS General Assembly contained in resolutions AG/RES. 2069 (XXXV-O/05) and AG/RES. 2065 (XXXV-O/05), in which the Inter-American Judicial Committee was asked to present its comments on the final CIDIP-VII topics, and that it collaborate with the corresponding preliminary work, also taking into consideration the conclusions on which there was consensus about this topic in the 68th Regular Session of the Inter-American Juridical Committee. Regarding the participation of the aforesaid in the discussion Forum, it would be convenient that the Juridical Committee give their opinion regarding the proposals presented by Brazil, the United States of America and Canada concerning the topic of Consumer Protection, either by means of the rapporteurs of the subject or by means of collective institutional participation of the Inter-American Juridical Committee, thus contributing to the CIDIP-VII preliminary work.

Bibliography

1. Resolutions of the General Assemblies of the Organization of American States (OAS)
2. Resolutions of the Inter-American Juridical Committee
3. Virtual Discussion Forum developed by the Office of International Law of the Department of International Legal Affairs of the Secretary General of the OAS
4. Meeting of Experts held in Porto Alegre, Brazil, December 2 – 4, 2006
5. Proposal by Brazil: “Inter-American Specialized Conference on Private International Law (CIDIP-VII) on Law Applicable to Some Contracts and Consumer Relations”.
6. Proposal by The United States of America: “US Federal Trade Commission proposal for OAS Model Law on Monetary Redress for Consumer Transactions”.
7. Proposal by Canada: “Model Law on Jurisdiction and Rules of Conflicts of Consumer Contracts Laws”.

CJI/doc.243/07

REPORT ON CIDIP-VII WITH RESPECT TO THE NEGOTIATION OF LEGAL INSTRUMENTS CONCERNING CONSUMER PROTECTION

(presented by Dr. Antonio Fidel Pérez)

I. INTRODUCTION AND SUMMARY

This report is submitted to the Inter-American Juridical Committee (IAJC) to inform it of the status of current discussions in the CIDIP-VII negotiating process with respect to the agenda item relating to consumer protection, which involve three separate proposals. This report concludes, for the reasons stated below, that the CIDIP-VII is proceeding effectively in efforts to draft documents with respect to this issue, and this process is beginning to address the issues of compatibility of the three proposals previously identified by the IAJC. Therefore, at this stage in the CIDIP-VII process there is no need for the IAJC to intervene to identify issues for discussion by the Member States. Furthermore, until the Member States have had an opportunity to formulate new draft language that attempts to resolve the issues that have been raised, any commentary by the IAJC on the existing draft would be premature, intrusive, and would potentially subvert and divide a process that holds the possibility of yielding legal documents that would reflect a broad-based consensus of OAS Member States.

II. BACKGROUND

As the members of the Inter-American Juridical Committee are aware, the CIDIP-VII process with respect to the issue of consumer protection is based on three proposals – one made by the Government of Brazil for a treaty concerning applicable law and other matters in consumer transactions; another by the Government of the United States concerning means for obtaining monetary redress for small claims with respect to consumer transactions; and a proposal by the Government of Canada for a model law governing jurisdiction and applicable law in electronic consumer transactions – all of which, it was understood, were to be treated on the basis of equality. As the members of the IAJC will recall, at the IAJC's last meeting in August 2006, the IAJC was able to conclude that significant issues regarding the compatibility of these proposals had not been discussed in the Internet Discussion Forum established by the OAS Department of International Law for the purpose of stimulating preparatory work and discussion of the three proposals. Unfortunately, as the IAJC members will recall, the internet discussion proceeded with an article-by-article review of the three proposals without a prior discussion at a conceptual level of their different objectives, methodologies, and effects on producers, consumers, and other stakeholders. The conclusion of the Juridical Committee at that time was that, if the Member States did not engage in this kind of foundational discussion, the IAJC would consider posing a set of questions at the Internet Discussion Forum in order to facilitate the negotiating process and identify for the Member States the important issues of a legal and policy character that would need to be resolved to ensure that the three proposals did not subvert each other and result in unintended consequences.

III. REPORT ON PORTO ALEGRE MEETING

Fortunately, at the informal, but widely-attended, meeting in Porto Alegre, Brazil on December 2-4, 2006, a consensus was reached with respect to the objectives of the Brazilian proposal. As stated in the Final Act of that meeting, those objectives are "to provide legal protections for consumers in their relationships with suppliers, to provide economic benefits to consumers by increasing availability and choice and decreasing product costs, and to provide consumer confidence in the market place…." Similarly, the delegations agreed that "the U.S. proposal and Brazilian proposal were complimentary and not mutually exclusive." The Canadian proposal for a model law on jurisdiction and applicable law, which was submitted to the delegations only days before the meeting, was also considered briefly in the little time that remained, and views "were expressed regarding the interrelation of the model law with the proposals from Brazil and from the United States." Both with respect to the Brazilian and U.S. proposals, it was decided that working groups would be established to develop language that would address the issues raised during the meeting. It is not clear from the Final Act whether the Canadian proposal, which was discussed much more briefly that the other two proposals, will also be the subject of a working group. However, precisely because new language was to be developed by working groups, the delegations decided

that none of the current texts would be bracketed. It was understood by all concerned that the effect of the decision to establish working groups to draft new language was to establish that no existing text would serve as the exclusive basis for future negotiations. See Explanatory Introduction to the Experts Meeting carried out by the OAS – Porto Alegre, December 2-4, 2006 (made available to this rapporteur by the Delegation of the United States of America) (English copy attached).

Accordingly, while consensus was achieved as to the objectives of the CIDIP-VII, no consensus was reached as to the means that should be developed to further those objectives. Rather, the negotiators agreed to establish working groups for each of the proposals, and it was decided that those working groups would attempt to develop specific language in order to revolve questions that had arisen concerning each of the proposals.

Indeed the discussions held by the delegations at the Porto Alegre meeting reveal that the Member States are finally now engaging in a very thoughtful and productive process of considering the underlying foundations and possible effects of each of the three proposals. Based on this rapporteur's discussions with the U.S. Delegation, it appears that various delegates made the following points, among others:

1. Basic goals

The Mexican delegate noted that experience in his country had shown that overprotection of debtors could lead to reduced access to credit and increased interest rates. Accordingly, by similar reasoning, excessive protection of consumers could likewise have negative effects and ultimately deny access to products. In his view, setting aside the interests of producers, a balance between protection of producers and consumers needed to be struck even for the single purpose of serving best the interests of consumers.

2. Legal certainty in the Brazilian Proposal

Delegations discussed questions concerned how the concept in the Brazilian proposal of "law most favorable to the consumer" would be interpreted and implemented in practice, and the possibility was raised that this would generally be the law of the consumer's domicile; perhaps because of this the member of Brazilian delegation who authored the Brazilian proposal indicated that it might be possible to reconsider the proposed formulation ("law most favorable to the consumer") and substitute it with another choice of law rule. Indeed, in this connection, the Mexican delegate noted that the most practical goal for furthering consumer interests would be to focus on both choice of law and jurisdiction system with the goal of ensuring that consumer claims will be enforced in the jurisdiction in which the defendant's assets are located.

3. Trade issues in the Brazilian Proposal

The delegations discussed the potential trade implications of the Brazilian proposal, including the possibility of trade discrimination, which was raised initially by the U.S. Other delegations seemed to be divided on this issue. An academic participating as a member of one delegation indicated this issue was not a part of private international law. Nonetheless, he agreed to provide alternative draft language to the Brazilian delegation to attempt to address the question. A delegate from another country, however, stated that he regarded the question as a significant problem that was part of private international law and could not be resolved as a mere technical issue.

4. Legal certainty issues in the U.S. Proposal

As to the U.S. proposal, the Mexican delegate noted there might be significant issues in implementing its concepts in civil law countries, which have not developed the legal concepts (such as "adequate compensation," "abusive," and "disproportionate," to name just a few) that give the U.S. proposal precision and legal certainty in a common-law framework.

5. Institutional compatibility issues in the U.S. Proposal

The Brazilian delegate also noted that the proposal for collective actions in the U.S. document was unprecedented in many civil law countries in Latin America. The Canadian delegate suggested that it might be possible to provide incentives for the use of class action procedures in Latin American countries which had not yet experimented with this institutional model.

6. Issues concerning the Canadian Proposal

Issues similar to those discussed with respect to the Brazilian and U.S. proposals were also raised with respect to the Canadian proposal. There was some discussion about whether the Canadian proposal would be subject to the same difficulties that faced the effort

some years ago at the Hague Conference on Private International Law to negotiate a global convention on the recognition and enforcement of judgments. It was noted that in this process the difficulty of dealing with consumer law questions persuaded the Hague Conference negotiators to agree to leave this issue outside of the draft, which ultimately resulted merely in a choice of court convention. It was also noted that the CIDIP process would focus on consumer law issues, making the possibility of success greater than at the Hague Conference. There was basic concern about the question whether, in this area, the treaty approach or the model law approach, as embodied in the Canadian proposal, would be adequate for the Latin American countries, although it was acknowledged that in other item on the CIDIP-VII agenda, significant progress in implementation was being achieved through the model law approach. Some fundamental issues concerning the text were also raised. For example, at one point a Brazilian delegate indicated that the inclusion in the Canadian proposal of a *forum non conveniens* exception from the exercise of jurisdiction, which is found in most common-law jurisdictions, was contrary to public policy and to the protection of human rights. On the other hand, another delegate suggested that further preparatory work could be done to advance the Canadian proposal, such as a questionnaire to Member States.

Thus, the very productive discussion in Porto Alegre should assure the IAJC that the CIDIP-VII negotiating process is now making the progress required for the successful completion of the negotiation, notwithstanding the initial shortcomings of the Internet Discussion Forum, which was experimental in character. If this rapporteur's understanding of the nature of the discussions held in Porto Alegre is correct, those discussions addressed, among other things, the questions raised by the IAJC in its study of the issue in its August 2006 meeting. Accordingly, it appears the IAJC's concerns as to the quality of the negotiating process have now been addressed. Therefore, it appears that, at this time, there is no need for the IAJC to intervene directly in the CIDIP-VII to ensure that the Member States adequately consider the issues the IAJC previously identified as critical to the successful completion of the CIDIP process.

It would also seem to be premature for the IAJC to comment on the existing proposals, when, at least insofar as this rapporteur is aware, the working groups have not yet met and no specific language has been presented in the CIDIP-VII process to take account of the questions and concerns raised at the Porto Alegre meeting. It is important for the IAJC to ensure that its understanding of the state of the current CIDIP-VII negotiating process reflects a realistic appraisal of the progress that has been achieved thus far and, where possible, allows the Member States to define in their own way the degree of consensus that has been achieved. In this connection, unfortunately, it should be noted that the Annotated Agenda for this meeting of the IAJC presented by the Legal Department of the OAS states that:

> Concerning Brazil's proposal, during the meeting it was agreed that the Convention would be drafted without bracketed text, that consensus would be reached on the major ideas of the draft, and that agreement on specific language would be deferred until later discussions. In general, the Convention was approved. There remained the need to adapt and clarify the following concepts contained in the original proposal: the definition of consumer contracts, and the inclusion of third-party consumers; the use of the concept of the "law most favorable to the consumer"; the use, scope, and definition of imperative norms and the application of *ordre public*; general provisions of Article 4 of the proposal; and the endeavor to draft new language for Articles 5 through 7." See Annotated Agenda of the Inter-American Juridical Committee, OEA/Sec.Gral. OILP/doc.01/07 (19 January 2007) (Original: Spanish).

Yet, if the English translation of the Annotated Agenda is an accurate translation of the meaning of the original Spanish, it is quite clearly incorrect to say that the Brazilian proposal "was approved." Such an interpretation would clearly be contrary to language and spirit of the Final Act of the Porto Alegre meeting. This rapporteur submits that the premise that any document – whether the Brazilian, the U.S., or the Canadian – was "approved" would be erroneous and should not serve as the basis for the IAJC's consideration of this agenda item. For the IAJC to proceed on the premise suggested by the Annotated Agenda would be seriously in conflict the common understanding of the delegations participating in the Porto Alegre meeting as expressed in the Final Act of that meeting.

IV. RECOMMENDATION

In sum, the IAJC should continue to monitor the negotiating process. If the negotiating groups contemplated by the Porto Alegre Final Act produce new language before the IAJC's next meeting, the rapporteurs should submit analyses of those proposals, with the object and purpose of assisting the Member States in reaching final agreement on those texts. If the working groups are not convened and progress is not made toward preparing new texts before our next meeting, the IAJC should consider whether the Member States are truly committed to progress in the CIDIP process and re-evaluate its own role in support of CIDIP, reporting its conclusions to the political organs of the OAS.

Attachment**:** Explanatory Introduction to the Experts Meeting carried out by the OAS, Porto Alegre, December 2-4, 2006

Explanatory Introduction to the Experts Meeting carried out by the OAS
Porto Alegre, December 2-4, 2006

The initial session was held in the morning of December 2, with a welcome by Brazil, as organizer of the meeting. The Brazilian representative, Dr. Ricardo Morishita Wada was elected Chairman of the Meeting. Dr. John Wilson then proceeded to explain the CIDIP process and the methodology adopted for this meeting.

Discussion of the Brazilian proposal followed the approval of the new agenda. The delegations proceeded to read the proposal for an Inter-American Convention for the Protection of Consumers for CIDIP-VII and discussed Articles 1 through 7. The project as a whole was well received. Delegates applauded the goals of the Brazilian proposal: to provide legal protections for consumers in their relationships with suppliers, to provide economic benefits to consumers by increasing availability and choice and decreasing product costs, and to provide consumer confidence in the marketplace. This premise was taken into consideration when analyzing the text and general agreement was reached on various issues — notwithstanding some specific concerns with certain aspects related to the drafting of the articles.

At this stage, a system of bracketing the text was not adopted; rather, participants sought to reach consensus on the ideas and strengths of the project, and made specific observations on the provisions. It was agreed that the drafting should be perfected by the working group organized by the OAS, following an agenda to be adopted so as to enable final ratification of the document by as many countries as possible. The view was expressed that the rules in the proposal were generally positive, but their interplay needed to be further considered keeping in mind that the objective of a private international law convention is to determine the applicable law. By way of summary, drafting issues that should be addressed through a proposed working group include the following:

1. The definition of consumer contracts, and the coverage of bystander consumers, in Art. 1.

2. The use of the "law most favorable to the consumer" in Art. 2.1.

3. The use, scope, and definition of mandatory rules and the application of *ordre public* in Art. 3.

4. The loophole provisions in Art. 4.

5. Drafting issues in Arts. 5-7.

On the second day, participants discussed the proposal of the United States of America. The U.S. delegation then made some general comments regarding their proposal, followed by comments by various delegations who support the objectives of the U.S. proposal. No special focus was placed at this stage of the discussions on the drafting of the text. Delegations agreed that the U.S. proposal and the Brazilian proposal were complementary and not mutually exclusive. An article-by-article discussion ensued, including general comments on each of them by the U.S. delegation. The delegations expressed their support of the project, as a whole, and noted that it addresses many important subject areas including individual, collective and government redress actions. They also noted the proposal's interaction with various subject areas, including contracts, illegal activities, criminal law, domestic procedural law and international procedural law. Many of the issues will be discussed and some language improvements will be suggested and the streamlining

of some of the points so as to maintain a positive intention to promote the protection of consumers through these mechanisms to have access to justice in light of the diversity of procedural laws and the cultures in the OAS countries. Consideration should be given to referring to existing definitions under national law to ensure consistency. The section on government dispute resolution and redress was considered a positive development. However, prior to agreeing to support its inclusion in the Model Law, some expressed the view that the details of the provisions need to be known. There could be public policy considerations that would need to be carefully weighed and considered.

Specific reference was made by one delegation to the issue of credit cards. There was general consensus on the scope and overall approach, including coverage of both domestic and international consumer disputes and the need to provide mechanisms for adequate redress. As a whole, the project was well received, subject to improvements to the language to be suggested through a proposed working group. By way of summary, drafting issues that should be addressed through a proposed working group include the following:

1. Transforming the text from general “soft law” principles to a more concrete text appropriate for a model law, accompanied by commentary and practical examples.
2. Reworking the language to be more compatible with the approach of Member States using a civil code.
3. The definitions related to consumer transactions in light of the definitions in the Brazilian and Canadian proposals.
4. On remedies for consumers acting individually, the additional issues of a possible role for central authorities in international actions; the role of credit card companies in dispute resolution; the use of alternative dispute resolution in international transactions, including the possibilities of agreed on arbitration; and whether to provide several alternative draft model provisions on this subject, reflecting the different possible dispute resolution mechanisms that are possible.
5. On remedies for consumers acting collectively, reworking the language in light of existing class action remedies in other countries and existing model laws; analyzing the section on procedures to insure an appropriate balance between access to justice and discouraging abusive practices; and the application and implementation of opt-in and opt-out notices.
6. Drafting governmental dispute resolution provisions to ensure appropriate narrowness of coverage.

Participants then discussed the Canadian proposal for a model law on jurisdiction and applicable law. It is a complement to the initial text that was submitted by Canada previously. Delegates welcomed the presentation, and the subject was considered very important.

The questions and concerns received on the proposal included the following:

- It was suggested that further work be undertaken on the definitions contained in the proposal. Some delegates indicated that it would be desirable to include definitions in the text of the document.
- The point was made that the drafting could be improved. Among other things, some were of the view that it would be preferable to redraft article 3 and in particular, include a reference in article 3 to article 6 which requires a court to refuse to enforce a forum selection clause in certain circumstances.
- Concerns were also raised regarding the inclusion of *forum non conveniens* in the draft proposal. Other views were expressed that it was necessary that *forum non conveniens* be included in the proposal.
- Concerns were expressed regarding the general viability of the rule in article 4 in terms of its application to e-commerce, as well as the onus the provision places on the seller to take reasonable steps to avoid concluding contracts with consumers residing in another state. Concerns were raised that this would be too onerous on small and medium-sized businesses and that party autonomy should be recognised.
- Comments were also made that the proposal should take the form of a convention and not a model law. The opposite view was also expressed.
- Views were expressed regarding the interrelation of the model law with the proposals from Brazil and from the United States of America.

- Concerns were expressed about the application of the proposal to internal consumer contracts and the assumption that national rules of jurisdiction should be modified according to a Model Law.

CJI/RES.122 (LXX-O/07)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING resolution AG/RES. 2218 (XXXVI-O/06), "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee", by means of which the General Assembly resolved to "request the Inter-American Juridical Committee to continue to consider the subject of the codification and harmonization of international law in the Americas and collaborate on preparations for the next Inter-American Specialized Conference on Private International Law (CIDIP-VII); and to encourage the rapporteurs for this topic to participate in the consultation mechanisms that are to be established for work on the topics proposed for that Conference";

CONSIDERING furthermore its resolution CJI/RES.115 (LXIX-O/06), "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", by means of which it reiterated its support to the CIDIP process as the ultimate forum for codifying and harmonizing private international law in the hemisphere, and specifically the need to prepare inter-American instruments with the scope of CIDIP-VII in the matter of consumer protection, and others, and also reiterated its support for the participation of the rapporteurs in the preparatory work for the CIDIP-VII, requesting them to continue representing the Juridical Committee in the mechanisms for the preparation of Inter-American instruments on consumer protection;

HAVING CONSIDERED the subject in its 70th regular session held in San Salvador, El Salvador, from February 26th to March 9th, 2007, and being aware of the preliminary results of the First Meeting of Experts of the Seventh Inter-American Specialized Conference on Private International Law, held in Porto Alegre, Brazil, December 2-4, 2006, on the subject matter of Consumer Protection: Applicable Law, Jurisdiction and Monetary Restitution (Conventions and Model Laws), in compliance with resolution AG/RES. 2217 (XXXVI-O/06), "Seventh Inter-American Specialized Conference on Private International Law";

HAVING SUSTAINED a fruitful exchange with the President of the Ibero-American Forum of Consumer Protection Agencies, Dr. Evelyn Jacir de Lovo;

HAVING SEEN the reports presented during the referred 70th regular session by the co-rapporteurs, Dr. Ana Elizabeth Villalta Vizcarra [CJI/doc.242/07, "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)]", and Dr. Antonio F. Pérez (CJI/doc.243/07, "Report on CIDIP-VII with respect to the negotiation of legal instruments concerning consumer protection)",

RESOLVES:

1. To thank the co-rapporteurs, Dr. Ana Elizabeth Villalta Vizcarra and Dr. Antonio F. Pérez, for the presentation of their corresponding reports.

2. To express its satisfaction for the progress achieved to date in the negotiation process aimed at the creation of instruments to facilitate, make effective and guarantee protection for consumers, especially on the occasion of the mentioned First Meeting of Experts.

3. To reiterate the growing importance and need for said instruments, from the perspective of greater juridical certainty, especially considering that the validity of a consumer protection system can positively influence in other areas of immediate interest in the inter-American community, such as access and protection of information and personal data, access to justice and the promotion and defense of democracy.

4. To maintain their entire disposition, in expectation of the conclusions of the ongoing deliberations and negotiations, and of the corresponding decisions that are made, to collaborate first with the achievement of the OAS member State objectives for a successful holding of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) on the subject of consumer protection, and after, having seen

the multidimensional character that envelops the referred subject, with the subsequent development and treatment that may occur in the juridical area.

5. To reiterate their mandate to the co-rapporteurs so they may continue participating in representation of the Juridical Committee in the preparatory process of the CIDIP-VII, and report to the Committee on the matter.

The present resolution was adopted unanimously at the session held on March 5th, 2007, in the presence of the following members: Drs. Eduardo Vio Grossi, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, Jean-Paul Hubert and Antonio Fidel Pérez.

7. Implementation of International Humanitarian Law in the OAS Member States

At its 37th regular session (Panama, June 2007), the General Assembly adopted resolution AG/RES. 2293 (XXXVII-O/07), "Promotion of and Respect for International Humanitarian Law", wherein it instructed the Inter-American Juridical Committee to prepare and propose model laws supporting efforts to implement treaty obligations concerning international humanitarian law, on the basis of priority topics identified in consultation with the Member States and the International Committee of the Red Cross, and to present a progress report on this matter prior to the thirty-eighth regular session of the General Assembly.

At the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007), Dr. Dante Negro, Director of the Office of International Law, recalled that the Committee on Juridical and Political Affairs (CAJP) currently had this topic under study. He remarked that in the last three years, the topic had taken on great importance because of the mandates instructing the CAJP to hold special meetings to collaborate with the International Committee of the Red Cross and the Office of International Law (OIL). He said that last year, the Office was given a mandate to conduct a course on international humanitarian law, targeted at the personnel of the Permanent Missions and the OAS General Secretariat, all in an attempt to explain concepts and more broadly disseminate the topic within the Organization. Dr. Negro also noted that the mandate given to the Juridical Committee was basically to propose model laws, devoting particular attention to the operative part of the resolution which states that the model laws should be proposed "on the basis of priority topics identified in consultation with the Member States and the International Commission of the Red Cross." He suggested that the Inter-American Juridical Committee might prepare a letter or questionnaire for the Member States to ascertain what they consider to be the priority topics in the realm of international humanitarian law. The letter, he said, could also be sent to the International Committee of the Red Cross. Dr. Negro went on to say that his office had worked on a document on priority issues, which was based on informal conversations with the Red Cross and on the issues that had been raised in other General Assembly resolutions that did not necessary directly concern the issue of international humanitarian law but that were related to it, such as the following: the International Criminal Court, terrorism, antipersonnel landmines, illicit weapons trafficking, and others. The document prepared by the Office of International Law was circulated. Its title was "Implementation of International Humanitarian Law in the Members States of the OAS: preparation and presentation of model laws" (ODI/doc.08/07).

Dr. Dante Negro also reported on a recent Seminar of Red Cross Committees, held in Mexico City, which discussed the topic of international humanitarian law. Dr. Negro suggested that the Committee might invite some member of the Red Cross to attend the March 2008 session, in order to hold a working meeting, and also in August, when they attend –as they do every year- the Course on International Law. As for the priority that the Red Cross attaches to the development of model laws on the subject, Dr. Negro indicated that in informal talks the Red Cross had expressed its interest in the topic of disappeared persons. He thought, however, that other topics might come up in direct dialogue between the Red Cross and the Committee.

In answer to Dr. Jorge Palacios' question as to the origin of the mandate given to the Inter-American Juridical Committee, Dr. Dante Negro explained that many of the political reasons for the mandate were unknown, but it was the Mexican Delegation that had proposed the mandate. Political motivation aside, Dr. Negro pointed out that many of the international treaties on the subject do not elaborate upon all the possible aspects in detail, and leave that job to domestic laws. He noted that a State need not adopt a model law in its entirety; it might adopt those provisions that are not at variance with its constitution and adapt them to fit the circumstances and needs of its domestic law.

Dr. Antonio Fidel Pérez observed that it might be useful to know which States were interested in the topic. He also noted that there was great confusion between human rights and humanitarian law. On this point Dr. Dante Negro commented that once each year the CAJP holds a special meeting on the topic; the next will be held in January 2008. He suggested that one of the rapporteurs for the topic might attend the meeting and that the Juridical Committee

could ask the Member States about what they consider to be the priority issues where model laws are most needed.

Dr. Ricardo Seitenfus suggested that terrorism and forced disappearance be selected as the subjects of the model legislation to be developed. He observed that all the amnesty laws adopted in some of the Member States would have to be taken into account.

Dr. Eduardo Vio Grossi felt it was important to get at what the Inter-American Juridical Committee understands by international humanitarian law and to consult the Member States and the Red Cross in order to get a better idea of what the priority issues were. The Committee's report, he said, would have to take into account which treaties were in force and what obligations were undertaken in those treaties that require implementing legislation.

Dr. Antonio Fidel Pérez suggested that the Secretariat put together a table of the conventions on international humanitarian law and their status of ratification, so as to enable the Committee to ascertain where any vacuum in this area might be.

The Chairman of the Inter-American Juridical Committee, Dr. Jean-Paul Hubert, suggested that two letters be sent: one to the Permanent Council and another to the Red Cross, requesting some guidance as to the Member States' priority issues.

In the end, the Inter-American Juridical Committee did not adopt a resolution on the matter. It named the following as rapporteurs for the topic: Drs. Ana Elizabeth Villalta Vizcarra, Ricardo Seitenfus and Jorge Palacios Treviño.

8. The legal *status* of migrant workers and their families in international law

Resolutions

CJI/RES.127 (LXX-O/07)	The legal *status* of migrant workers and their families in International Law
CJI/RES.131 (LXXI-O/07)	The legal *status* of migrant workers and members of their families in International Law

Documents

CJI/doc. 266/07	The legal *status* of migrant workers and their families in International Law (presented by Dr. Jorge Palacios Treviño)
CJI/doc. 269/07	The legal *status* of migrant workers and their families in International Law (presented by Dr. Ana Elizabeth Villalta Vizcarra)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Jorge Palacios Treviño proposed that this topic be added to the agenda. After a presentation by Dr. Dante Negro, Director of the OAS Office of International Law, on the evolution of this topic within the OAS system, the Inter-American Juridical Committee passed resolution CJI/RES.127 (LXX-O/07), "The legal *status* of migrant workers and their families in the international law", by which the topic is to be placed on the IAJC agenda and Drs. Jorge Palacios Treviño, Ana Elizabeth Villalta Vizcarra, Ricardo Seitenfus and Galo Leoro Franco appointed co-rapporteurs.

On July 9, 2007, the Office of International Law provided members of the Inter-American Juridical Committee with a document prepared by that Office, ODI/doc.06/07, "The role of the OAS in protecting the human rights of migrants". It also reported that much more extensive information on the subject was available at its web site www.oas.org/dil.

During the Inter-American Juridical Committee's 71st regular session (Rio de Janeiro, August 2007), Dr. Dante Negro gave a presentation on the topic, pointing out that three years earlier, the OAS General Assembly had approved the "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families*".* He reported that on the basis of that program, a series of special meetings had been held and that the reports from those meetings had already been circulated among the members of the Committee. He went on to point out that the program had also been used as the basis for the Secretary General's work program, with a timetable for its full completion. Dr. Negro suggested that the members should consult the web page of the Office of International Law on migrant workers. It features those documents in greater detail, as well as the immigration laws of 16 Latin American countries. Dr. Negro reported that the Office had plans to include, sometime in the future, the laws of the Caribbean countries.

Dr. Jorge Palacios Treviño presented his preliminary report, titled "The legal *status* of migrant workers and their families in international law*"* (CJI/doc.266/07). The introduction to that preliminary report speaks of a global phenomenon affecting millions of people in the region and worldwide, who are uprooted for economic, racial, religious reasons or by war. Most of these people end up in situations of extreme vulnerability. In his observations on the phenomenon, as described in the report, the rapporteur concludes that the Inter-American Juridical Committee should prepare a document on international migration driven by economic factors, i.e., lack of jobs. The document might make reference to the basic human rights that must be observed when people are uprooted, from the time they leave their country of origin, during transit through third countries, and while living and working in their country of destination, including upon return to the country of origin. The basic rights described in the reference document would be based on the "Universal Declaration of Human Rights" and Part Three of the "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families"; in other words, the human rights that every individual enjoys by virtue of being a human being and that must be respected no matter what the circumstance.

The report presented by the rapporteur also addresses the international instruments that concern the human rights of migrant workers. In his presentation, the rapporteur suggested that it might be useful to also include the evolving international law on the human rights of migrant workers.

Dr. Palacios also pointed out that while sovereign States have the right to determine their own immigration rules, those rules ought not to create situations that are degrading to individuals. When any individual enters the territory of a State, it is up to that State to guarantee the minimum rights to which every individual is entitled and to treat the migrant with humanity. He closed his remarks by proposing that a kind of manual should be prepared detailing all the rights of migrant workers, to inform those who find themselves in that situation. He added that it was not his intention to promote undocumented migration; however, should undocumented migrants be given a job, certain rights should come with that job.

The co-rapporteuse for the topic, Dr. Ana Elizabeth Villalta Vizcarra, then presented the report titled "The legal *status* of migrant workers and their families in international law*"* (CJI/doc.269/07), and pointed out that the document had taken into account the "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families", two resolutions adopted by the General Assembly, and the "Advisory Opinions of the Inter-American Court of Human Rights".

She recalled that the Inter-American Program was the outcome of the Summits of the Americas and was a basic tool of the OAS for protecting the human rights of migrants. She also mentioned the Report of the Rapporteur of the Inter-American Commission on Human Rights on Migrant Workers and Their Families. Other sources included two resolutions approved by the OAS General Assembly: "Migrant Populations and Migration Flows in the Americas" AG/RES. 2326 (XXXVII-O/07), and "The Human Rights of All Migrant Workers and Their Families" AG/RES. 2289 (XXXVII-O/07). She also took into account the two advisory opinions issued by the Inter-American Court of Human Rights (OC-18 and OC-16) and remarked that the Court's finding had been that every individual's human rights were infrangible and could not be subordinated to any power of the State; that a State shall not introduce discriminatory rules into its legal system and has an obligation to combat practices that violate the principle of equality and nondiscrimination. Reference was also made to the right that every individual in foreign territory has to consular assistance, a right provided for in Article 36 of the "Vienna Convention on Consular Relations". As a rule, migrants are not aware of this right, nor are the agents of the state. This is especially true in cases of detained migrants, who not only have the right to due process but also the right to communicate with a diplomatic representative of their country. She added that the Court's Advisory Opinions represented precedent for international courts.

Dr. Jean-Paul Hubert thanked the co-rapporteurs for presenting their reports. He observed that the Inter-American Juridical Committee should consider a contribution of its own to this field, which would be an important and valuable addition.

Dr. Mauricio Herdocia Sacasa concurred with the Chairman in the sense that the Committee should make its own contribution to add to the universal convention and international instruments. The Juridical Committee, he observed, should establish precisely what added value it intended to provide. Its goal, he thought, should be to fill in any gaps in the regulation of mobility. While from a general standpoint, he believed the regulations already in place were sufficient, he also thought that the Committee might focus its attention on some as yet unregulated aspect of the process.

Dr. Freddy Castillo Castellanos supported the rapporteur's proposal that the Juridical Committee approve minimum standards to guarantee and protect the special mobility needs of migrant workers. Dr. Castillo agreed that the manual that Dr. Palacios proposed would be very useful.

Dr. Eduardo Vio Grossi pointed out that the main objective should be for the Committee to come up with its own opinion, its own resolution spelling out the applicable law. It would have to determine whether all the norms –or some of them- were *jus cogens* or applicable *erga omnes*, and distinguish between those that were binding upon the State and those that were not, since some rules could be traced to custom. The Committee would also have to state what the

applicable law was in the case of migrant workers and avoid any statement that might have political overtones. He added that particular emphasis should be placed on the relationship between the States of origin and the receiving States. He indicated that another important topic would be the issue of the rights of illegal migrants and the right of States to regulate their *status*. Dr. Vio Grossi observed that all countries were grappling with immigration problems and their laws were not adequate to deal with all the issues that migration raised. Matters would have to be viewed from the standpoint of the States, not in order to stop migration but to protect it. A third issue that Dr. Vio Grossi proposed for the Committee was the specificity of human rights in the case of migrants.

Dr. Antonio Fidel Pérez singled out the various issues that concern the State's interests with respect to this topic. One of these is the economic dimension of migration. Some States export labor, while others import labor. Still others do both. In today's world, the main source of revenue for the economies of some States is the remittances that migrant workers send home to their families in their country of origin. As for the politics of migration, Dr. Pérez noted that the immigrant vote could be very important in elections. In the social area, he observed, some migrants were able to exercise their civil rights. Other migrants, however, don't fit into any particular category, not even as relatives of migrant workers. The first question to ask, apart from what the State's interests are, is what rights and obligations do migrant workers have. He therefore was of the view that the Juridical Committee's report should address the legal dimensions of the problem.

Dr. Galo Leoro Franco, for his part, mentioned the problems that come up when a migrant wants to return to his or her country of origin, at the latter's expense, and the country has neither the financial resources nor the legal obligation to pay the costs of the return. He added that a country's national interest was a consideration. Dr. Leoro Franco went on to say that a solution had to be found to help mitigate the problem, perhaps in the form of a fund set up between the sending and receiving States, to pay for migrants' return. Dr. Galo Leoro Franco indicated that, working within the framework of international treaties on the subject, the Juridical Committee should focus on the problems that those treaties do not solve and that require a collective solution that engages all the countries in the inter-American system.

Dr. Jean-Paul Hubert observed that the solution lies in development –a migrant worker would never leave his country in the first place if he could earn a living.

Based on all these discussions, the Inter-American Juridical Committee approved resolution CJI/RES.131 (LXXI-O/07), "The Legal *status* of Migrant Workers and Their Families in International Law*",* wherein it takes note of the reports presented by the rapporteurs and requests that they present a combined report prior to the next regular session, which they are to send to the General Secretariat.

CJI/RES.127 (LXX-O/07)

THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN THE INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the worker migration and their families, legal or illegal, is a matter of interest to all the States of the American Continent;

BEARING IN MIND that worker migration is mainly due to economic reasons and lack of employment;

RECOGNIZING the impact that free trade agreements have on migration, due to economic reasons;

CONSIDERING that it is necessary to learn about the juridical aspects of human mobilization, particularly those relative to human rights, in order that they reflect on migrant workers;

RECOGNIZING also the responsibility that both sending and receiving countries of the migratory workers and their families have with regard to the migratory phenomenon;

WHEREAS the studies carried out on this topic in the inter-American system,

RESOLVES:

To include the topic “Legal status of Migrant Workers and their families in the International Law” in the agenda of the Inter-American Juridical Committee and designate Drs. Jorge Palacios Treviño, Ana Elizabeth Villalta Vizcarra, Ricado Seitenfus and Galo Leoro Franco as rapporteurs on the topic.

The present resolution was adopted unanimously at the session held on March 7, 2007, in the presence of the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco and Jean-Paul Hubert.

CJI/doc.266/07

THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL LAW

(presented by Dr. Jorge Palacios Treviño)

International migration is today a world phenomenon that affects almost all countries. It is calculated that around 200 million people participate in this phenomenon and that number is growing: between 1990 and 2006, the calculation is of the order of 35 million. The effects of migration are reflected in different aspects of both the countries of origin and destination, such as the economy, politics, culture and religion, and although migration is at times a voluntary decision on the part of people to pursue cultural, educational or religious objectives, the majority is motivated by economic reasons, and basically the lack of jobs, due in turn to the economic imbalance that exists between countries, as reported by the World Bank on 15 April 2007.

During the presentation of the report on migration and development before the General Assembly of the Organization of the United Nations on 6 June 2006, the Secretary General, Kofi Annan, stated that: “…international migration, if based on idoneous policies, can and should be very beneficial for the development both of countries of origin and receiving countries. However, these benefits are conditioned to respect and defense of the rights of migrants”. To support the first affirmation, the Secretary General added:

> It is not by accident, nor should it come as a surprise, that many countries that until recently were a “source” for migrants, such as Ireland, some countries in Southern Europe, the Republic of Korea and Chile, have experienced spectacular development and now enjoy prosperous economies that make them attractive destinations for migrants … the benefits that the countries of origin and destination obtain have deep repercussions on development, since many developing countries belong to one of these two categories. In fact, some developing countries, such as Malaysia and Thailand, are moving from one category to another at this very moment. Current inter-governmental cooperation in this ambit is being evaluated, including norms, different world and regional initiatives that have been put in place and the bilateral focuses being experimented, including agreements on transferring pensions and medical payments … international cooperation is likewise crucial to protect people against the execrable crime of trafficking in human beings.

The affirmation of the Secretary General in the sense that the benefits of migration are conditioned to respect for the human rights of migrants reflects the well-known fact that all sorts of abuses and crimes are committed against many migrants during the journey to the country of destination, especially to undocumented migrants. Also, in the countries of destination they are often exploited by unscrupulous employers, exposed to discrimination and even harassment, not only by some groups of the local population but also by representatives of the police force, which makes it impossible for the migrants to become integrated. Also well known is the fact that migrant workers are very often obliged to accept work that national workers of the receiving country refuse to do, and for lower wages than what local workers would be paid, so they are also accused of supplanting the local work force. Some sectors of the receiving countries even accuse migrant workers of frequently committing serious crimes, such as drug trafficking or terrorism, but such cases would really be very exceptional.

Workers who migrate for economic reasons, not only undergo problems of this *status*, but others resulting from moving to a different social environment and that affect not only them but also the members of their families, either because of separation from them or because they are exposed to the same problems as the workers if they accompany them. Therefore, the very condition of the migrant phenomenon places its participants especially those with no identity papers, in an extremely vulnerable situation. Moreover, it must also be mentioned that if migration is a benefit for the countries of origin and destination alike, it cannot be a permanent solution for the high costs that are incurred in the economic and social aspects for the countries of origin; one of them, leaving the countryside which the vast majority of the workers leave behind in the case of the American countries. At the same time, the populations in the country of destination feel affected if the migrant workers gain spaces in the economic, cultural and even political sectors of society. Another negative consequence of migration is the loss of skilled workers who, if they are welcomed by the countries of origin, in addition to losing them they lose the large sums of money invested in their training.

In the light of the above, the governments strive to obtain as many benefits as possible from migration while at the same time reduce to a minimum the adverse effects, since it cannot be ignored that the developed countries need migrant workers to boost their economy because emphasis should be given to benefits that the migrant workers bring to the destination communities since these benefits are often ignored – or are wanted to be ignored – and so migration must be considered even forgetting the negative aspects in order to fight them or at least mitigate their effects.

Anyhow, the migration phenomenon is a responsibility – of course, in a different way -, of both country of origin and the country that receives: the former because it cannot grant the pertinent economic rights and must, consequently, do everything in its power to put a stop to the economic migration on the understanding that it cannot occur while unfair systems of international exchange continue; in turn, the receiving country must respect, while they are in its territory under its jurisdiction, the basic rights of the migrants and treat them with humanity and consideration since they also contribute to its economic progress.

On March 7, 2007, during the 70th regular session of the Inter-American Juridical Committee, in San Salvador, El Salvador, it was resolved to include the topic “the legal *status* of the migrant workers in International Law”, whose purpose is to detect the legal aspects of human mobility, especially human rights of the migrant workers and the members of their families. The idea is that these rights as well as the regulations protecting them are first of all known by the migrant workers and so they can demand them, and then by all sectors in contact with them, such as governmental, especially police, employers and the general public, of the countries of origin and those in transit and destination, since, as is known, in many cases the human rights are ignored or simply disrespected.

There are no special human rights for migrant workers and the members of their families but the situation of mobility unique to international migration can make it hard to identify the human rights that protect the different stages of international migration due, on one hand, to the requirements of security, food, transportation, work, and so on, which involves the migration process and, on the other, to the fact that it involves various countries, namely, country of origin, of final destination and in some cases, those in transit, which all increases the risk that in these circumstances, human rights of migrant workers and their families are not respected. The different stages in international migration, as provided in the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (hereinafter, CMW), negotiated under the auspices of the United Nations and adopted in New York on December 18, 1990, are: “The preparation for migration, departure, transit and the entire period of stay and practicing a paid activity in the State of employment, as well as the return to the State of origin or the States of normal residence” (the terms “State” and “country” will be used indiscriminately although the former is a legal term and the second a sociological term since it is considered in current language that the term country is used as a synonym of the State).

Article 2 of the CMW contains the following definition of a “migrant worker”: “The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. Also, pursuant to this Convention the term “members of the family” refers to “persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent

persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned" (here the terms "members of the family" and "family" will be used as synonyms).

Let us begin with this inevitable principle. Everyone has every human right and must be respected in every country; it is not necessary that they be written to be mandatory and if they are included in the internal legislation of the States and international laws, it is in order to specify and assure their compliance, namely, as guarantee; consequently, all States are obliged to respect human rights and in the event of punishing their violation and for this purpose measures required to impart justice must be established. In other words, human rights are rights and basic liberties of every human being has by the sole fact of their being, say, inseparable from humankind and are based on the very nature of the human being that is a rational and social being; hence these rights and liberties must be respected in any situation involving people.

To specify what human rights are, to facilitate their compliance, and accordingly punish their violation, the States began to include human rights in their internal laws; later, the International Community, both at a regional and global level, did the same in treaties, declarations and other international instruments but insists that the enforcement and validity of human rights do not depend on legal provisions of a country or on an international treaty, or on another international instrument, since they arise due solely to the existence of the human being and cannot be separated from it, and this is immediately applicable in the case of regular or irregular international migration, namely, with or without identity papers; therefore, no power can suppress these rights and all authorities of any country are obliged to fulfill them and comply with their provisions.

It should also be made clear that with the above there is no intention to foster irregular migration or with no identity papers; what is stated and intended is that if this migration occurs the human rights of their players must be respected.

In the Appendix reference is made to the key multilateral international instruments that were adopted to protect human rights and that are applicable to the phenomenon of international migration; the value of these instruments, that is, if they involve mandatory compliance for all States or only for those that accept them, such as the treaties, or if they are recommendations or contain regulations that are not yet legal regulations, are about to become such and are "almost law", commonly known as soft law, such as the regulations contained in the international declarations or other international instruments of a similar nature and that it is estimated that they can contribute to objectives of the San Salvador resolution.

The entire process of international migration is protected in general by the principles contained in articles 1 and 7 of the Universal Declaration of Human Rights (UD) that state the following:

> Art. 1 - All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> Art. 7 - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

These rights are also acknowledged by the American Declaration of Rights and Duties of Man (AD) and was repeated and developed by international declarations and treaties that complement the aforementioned Declarations.

The CMW contains the third and fourth chapters that state the human rights of workers with no identity papers and their families, and other rights that workers with identity papers and their families have, respectively. On this matter, it is convenient to explain that CMW does not encourage migration without identity papers, but if this happens, it recognizes the need to assure for its players the basic human rights as stated in a paragraph of its preamble:

> Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.

It should be insisted upon that migrant workers and the members of their families, even without documentation, have these basic human rights that should be respected, because experience shows that such workers consider the abuses committed against them normal in violation of the human rights, because they have no documentation, and they even think that they deserve these violations of their rights, such as the undue use of force, intimidation or extortion.

It may then be concluded that, in order to prevent irregular migration, the countries involved must jointly seek organized forms for migration in order that the countries of origin assure treatment worthy of their members and the countries of destination have the workforce necessary for their economic growth.

Human rights especially applicable to international migration:

- The right to leave any country, including the migrants' country of origin, and return to it;

This right is provided in UD, article 13, paragraph 2; in the International Convenant on Civil and Political Rights (Pact I), article 12, paragraph 2; in AD in article 8 and in CMW in article 8.

The right to leave any country, including their own, and return to it, is logically the first required right for international migration. This right is an application of the right to freedom that all human beings have, but in the case of people who, for economic reasons, wish to leave their country, with or without their family, to work in another, would not require it if the following provisions were reality:

- Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment (Article 23, paragraph 1, UD);
- Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (article 25, paragraph 1, UD);
- Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection (paragraph 2, of the same article).

If migrant workers for economic reasons in their country of origin were to have employment in the conditions mentioned in the above articles, migration would only be: a right to be freely decided and this would be ideal, that migration is a choice and not a need; hence, when someone decides to emigrate for economic reasons, even if voluntarily, -nothing can force an individual to leave his own country -, it should be borne in mind that it is because he or she fails to find employment there that offers a dignified life to him or her and family; in other words, that the country of origin has failed to offer this person "just and favorable conditions of work".

The main reason for non-compliance with the aforementioned provisions on economic development is that it does not depend solely on the will of each State to do so, but on its wealth and on conditions of exchange with other States; and although development is the prime responsibility of each State, it consists of an entire process tending to create "a fair economic and social order that permits and contributes toward full accomplishment of the human being", pursuant to article 33 of the OAS Charter. Also article 2 of the International Convenant on Economic, Social and Cultural Rights (Pact II) provides that the States agree to take economic and technical measures "to the maximum of its available resources to achieve progressively the full realization of the rights in this treaty"; in other words, they do not agree to immediately give their populations the rights mentioned in the Pact since overcoming underdevelopment does not depend solely on each State and besides it cannot be overcome from one day to the next.

It can also be concluded from the above that it would be enough for someone not to find work opportunities in their country of origin to be entitled to emigrate in order to find work to keep themselves and family; that is, it would be a right deriving from a vital requirement.

The right of a migrant worker and his family to leave his country of origin and return thereto is provided in article 8 of the CMW as follows:

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

When someone is getting ready to emigrate, with or without his or her family, in order to work in another country, and does not wish to leave without identity papers, he or she must first meet the requirements that countries impose on their nationals for this purpose, such as to obtain an ID document, normally, the passport, since this can facilitate the journey and his or her stay in the countries of transit and destination and also to prove his or her nationality on returning to the country of origin. Secondly, the right must be considered that all countries have to control their borders and by which migrants and their families must obtain permits required to travel through countries of transit and work in the country of destination; on the contrary, they are exposed to abuses and crimes at every stage of the journey: physical injuries, violations, theft or extortions, physical or psychological violence, such as insults, threats or intimidation. It should also be borne in mind that migrant women without identity papers traveling with their children are even more vulnerable to such offences.

There is the experience that on some occasions during the journey migrants have been forced, after having been robbed or suffered extortion, to leap from the moving means of transportation with the results that are easily imaginable. These aggressions are perpetrated by the forces of order or traffic wardens.

On other occasions, workers and their families are expelled from the country where they live and in this case it must be considered that in the event of expulsion, migrants and their families are entitled not to endure undue resources of force or mistreatment nor arbitrarily but should be treated with humanity and compliance with the laws in the country in question. These crimes are most often not reported out of fear.

In view of the above, the authorities of the migrant workers' States of origin must do their utmost to provide information to people who wish to emigrate about the requirements to be fulfilled in order to leave the country, the requirements of entering other countries and the convenience of obtaining permits to stay and work for them; the human rights that they and their families have, among them, work rights. On this point, it is worth repeating what is already well known: that the policy in some countries to refuse work permits forces the workers to emigrate without identity papers and incur all the already well-known consequences.

It is also very important to inform the migrants about the authorities in the country of origin, such as consuls, in the countries of transit and destination so that they can approach these authorities for information or help. There must also inform them about organizations that help migrants. At the same time, the authorities of the country of origin must inform the migrants about their duties that they have in the country of destination, for example, obey the laws, pay tax and not to participate in political activities.

Of course, preparation for the migrants' departure must include the necessary economic means for food, transportation, contingencies such as sickness or accidents, and since they generally have them, most of the migrant workers must travel without protection; in fact, on occasions they must during the journey stop to work and be able to continue. In some cases, the workers borrow from usurers to meet these needs. It would be recommendable, considering that the responsible authorities in the migrant workers' country of origin cannot offer jobs so as not to emigrate, for them to at least be able to setup aid systems, for example, of credit in convenient conditions for these requirements.

There are two offences, "trafficking in persons" and "illegal trafficking in persons" to which people about to emigrate are especially exposed, that are so serious that they can in fact endanger people's lives:

I. TRAFFICKING IN PERSONS

The Protocol to Prevent, Repress and Punish Trafficking in Persons, especially Women and Children, in 2000, defines this crime as follows:

> ... the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs (art. 3, a).

Trafficking is a crime often committed against people who wish to emigrate to another country, such as workers or members of their families who travel to join their spouses, but especially against women and children. The traffickers offer these people their services to provide transportation, facilitate their entry or offer them work and, instead of doing this, exploit them; they offer women, for example, work as domestic servants and then force them to be prostitutes on the basis of punishment or threats. In other cases they force people to work in conditions of slavery and unhealthy places and steal their wages on the pretext of paying transportation expenses.

II. ILLEGAL TRAFFICKING IN PERSONS

The 2000 Protocol against illegal trafficking of migrants by land, sea and air defines illegal trafficking in persons as "facilitating illegal entry of a person (workers or not) in a Party State (a State that accepted the Protocol), where such a person is not a national or permanent resident for the purpose of obtaining directly or indirectly a financial or other material benefit". Even if trafficking occurs with the consent of the person, accepting the services of a trafficker is very dangerous since many of them not only fail to fulfill what they offered but also rob them, abandon them and even, if necessary, murder them.

In the cases in question, multiple human rights are violated, some of which are the right to life, liberty and security of person, ban on slavery and the right to just and favorable work to which reference will be made herein below.

The authorities and societies of the countries that intervene in the migration process should remember to take into account that the migrant workers are looking for work to improve the living conditions for themselves and their families; for that reason, migration, whatever its condition, must be regarded as an activity deserving respect and not as an affront or even worse as crime.

On the other hand, since the vast majority of migrations in America are for economic reasons, the migrant workers' countries of origin cannot prevent migration unless they eliminate the causes for it, which, obviously, cannot be done in the short term. Migration is an escape valve for unemployment of the poor countries but implies many problems because the worker's countries of origin must do their utmost to retain the migrant workers in potential, in just and favorable conditions.

1. The right to life, liberty and security

These rights are provided in: UD, article 3; DA, article 1; CMW, article 9; Pact I, article 6; AC, article 4.

The UD and AD provide that: "Everyone has the right to life, liberty and security of person". The text of these provisions is explicit if taking into account that the primordial right to life is a right that cannot be fully applied if it is not completed with human rights for liberty and security of person; in turn, the American Convention protects the right to life, "in general, from the moment of conception" and both this Convention and the Pact I refer to the rights in countries that have not abolished the death penalty, since unfortunately this penalty still exists as punishment for some crimes; in this case, care must be taken not to impose it arbitrarily, that is, without judgment that carries out the due proceeding, namely, in accordance with applicable laws and all strict guarantees, and thereby provide the two aforementioned instruments; moreover, both order that "the sentence of death may be imposed only for the most serious crimes" and that in any case everyone sentenced to death has the right to request amnesty, reprieve or commutation of the capital punishment and provide that the death penalty cannot be applied to under 18 or over 70 year olds, nor to pregnant women. Nor can this penalty be applied to political offences.

Due to the conditions of the workers' international migration, the right to life is constantly exposed and must therefore be protected throughout the migration process since the migrant workers who leave their country for economic reasons are generally in a very vulnerable situation and even more so if they are accompanied by their families and without

the necessary identity papers, hence migrant workers and the members of their families are in danger of losing their lives, not only from accidents or disease but also from offences. The causes of danger of losing their life from accidents are explained since the migrant workers and their families travel under very precarious conditions: unsafe means of transportation, no or insufficient public security, extreme conditions of accommodation and unhealthiness, hazardous geographic and meteorological conditions due to tougher measures to prevent migration without identity papers, including obstacles, such as physical or virtual fences and walls, about which the OAS Secretary General said that "it is not a proper answer to emigration" and added: "bilateral and regional dialogue is the only feasible instrument to find realistic options to solve the problem of illegal migration". In turn, the UN Secretary General, Ban Ki-Moon, said at the Global Forum on Migration and Development, hosted by the Belgian government, about building the wall, that the measures taken regarding migration must respect the human rights of the migrants, one of which is security.

In fact, the migrants without identity papers in the countries of transit or arrival in the country of work are persecuted and obliged to take hazardous routes since even armed gangs of people unprepared for these purposes, also imperil the migrants' lives. "From 1995 to 2005 the number of migrant deaths increased by 500 percent, which indicates that control measures have not deterred migration, unless changes are made in the flows of persons through more inhospitable zones and including the increase in immigrants and criminal groups". (*El Financiero* newspaper, Mexico City, dated June 11, 2007). In the first six months of 2007 more than 275 people died in the desert. The mass media inform about migrant workers that die in accidents from transportation conditions.

The crimes most often committed against life, liberty and security of the migrant workers, especially those without papers, and their families, are armed robbery on the journey to rob or extort money from them, violence in transportation to prevent them from traveling, sexual abuse, extreme actions of border guards when clandestinely crossing a border.

To preserve and protect life, liberty and security of everyone in a country, whether nationals or not, is an obligation of the authorities of every country; in the case of international migration this obligation extends to all countries that are part of the migration process, such as the countries of origin, of transit and final destination. To preserve the right to life of migrant workers and their families implies that they have the necessary freedom to accomplish the normal activities that anyone, under the same circumstances, would accomplish and that they do so with security; in other words, that the State not only has the duty to respect the life of people who are in its territory, but also prevent other people from endangering it when violating rights that also protect the life of the migrants and members of their families, such as not being submitted to inhuman working conditions, slavery and physical and sexual abuse.

2. <u>The right to personal integrity, the right not to be subjected to torture or to cruel in human or degrading treatment or punishment and the right not to be held in slavery or servitude</u>

These rights are provided in: UD, articles 4 and 5; Pact I, articles 7 and 8; CMW, article 10; AD, article 1 and AC, article 5.

The Pact I, article 7, states: "No one will be subjected to torture or cruel, inhuman or degrading treatment or punishment"; article 8 of the same Pact provides: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited. 2. No one will be held in servitude"; the AC, article 5, stipulates: "Every person has the right to have his physical, mental, and moral integrity respected. In particular, no one will be subjected, without his or her free consent, to medical or scientific experiments". In article 11 of CMW it is also forbidden for migrant workers or their families to be obliged to do forced or obligatory labor although permitted in certain circumstances, for example, should the law of a country admit for certain crimes hard labor prison sentences on the condition that the decision is taken by a competent court.

The aforementioned rights protect migrant workers against forced labor, inhuman working conditions such as long working days, no rest, and so on, in slavery or servitude. In accordance with experience, these human rights are violated first and foremost in five sectors: prostitution and sexual services, domestic service, agriculture, industrial workshops and restaurants and hotels.

When employers keep the passports and other documents of migrant workers to force them not to move or change jobs, they violate their right to freedom, to travel and freely choose their own work.

3. Right to recognition of everyone as a person before the law

The UD, article 6; Pact I, article 16; AC, article 3; AD, article 17; and CMW, article 24, recognize this right to all human beings; in other words, they recognize their right to be subject of rights and obligations and to enjoy the basic civil rights.

The human being is the natural legal subject but it is the right that converts a human being as a person before the law, that is, it gives an individual aptitude or capacity to possess rights and obligations. In the case of international migration, it means that a migratory worker or his wife or children are persons before the law. The family, as such, in other words, as a collective person of natural origin, also has an aptitude to be subject of rights and obligations and both the individual and family have right to recognition as persons before the law.

Everyone is a rational being by nature; that is, he or she is capable of a considered, reflexive conduct and therefore capable of free conduct; moreover, an unborn but already conceived being is capable of having rights, such as acquiring by donations, but also has other legal effects in the demand for paternity. Even before an individual is born, he or she is protected by law, as provided in article 4 of the CA.

Being a person before the law means that a migrant worker does not need representatives to sign or terminate a work contract, rent or buy or sell a house. Nor accept or leave an inheritance, make or accept a donation, claim due to default of a contract or theft or fraud, and so on.

To have the right to be recognized as a legal personality also means that a person must be responsible for a free and rational act.

4. Right of equality before the law

This right is provided in UD, article 7; P I, article 26; DA article 2; CA article 24.

Equality before the law implies another human right, the right not to be discriminated.

The right of equality before the law is applicable to al stages of the migration process, that is, from the worker's departure from his or her country, during the journey, and staying in the country of destination, the work period and return to the country of origin and it is equally important that it is applied in all, but considering the period spent in remunerated activity is normally longer and than the consequences of this right reflect on the working conditions, it is considered that it is especially important to comply with this right at this stage.

Racism and xenophobia are two forms of violating the human right to equality and non–discrimination and the governments are obliged to adopt effective measures to protect everyone, especially the migrants and their families, from violation of such rights.

The right to equality and non-discrimination protects someone without preferring another with some characteristic such as race or skin color, to give a work agreement, or pay him more for the same job, or rent a house, sell or buy something, or previously attend in some service. In other words, this right is violated when there are no equal opportunities and the same job treatment as to the migrant workers even before the nationals of the country of destination.

On the other hand, migrants and their families who are responsible for understanding the laws and values of the society that welcomed them and the obligation to respect the rights of the others, especially their cultural identity. The welcoming society must in turn respect the cultural diversity of the migrants. Mutual understanding is the solution.

The governments must advocate the integration of the migrants, justice and equality as well as mechanisms for these conditions to be achieved.

The right to equality must not be violated even if questions of security or terrorism are alleged or because the worker has no documents. Such allegations, sometimes, are tinged with racism. A migrant worker, even undocumented, is also entitled to be treated equally as a national of the country in terms of human rights and in the case of migrant workers it is priority that these rights are adopted in carrying out a lawsuit in the correct manner.

Governments must also educate the native population to understand and assimilate the migrant workers.

In their turn, the migrant workers and their families are responsible for understanding the laws and values of the society where they arrive and the obligation to respect other's

rights and customs, cultural differences, and so on. The welcoming governments should also explain to their nationals the contribution of migrants' work to the country's development.

Special training in this field should also be given to public servants, who are in charge of applying the laws, since often they infringe the provisions deriving from this human right.

5. Right to work and social security

The right to work is provided in UD, art. 23 and 24; Pact II, arts. 6, 7 and 19. The right to social security in UD, art. 22, Pact II, art. 9.

Article 23, paragraph 1, of the UD, states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".

The following labor human rights are especially applicable to migrant workers: ban on forced labor and on child labor, rights specifically applicable to the working woman, trade union rights, social security, fair wages, adequate working conditions such as safety and hygiene, working hours and indemnity pay.

The right to work is a right that every human being has and permits everyone to carry on living. The migrant workers' human rights are violated if they work in conditions of exploration and danger.

The right to freedom protects the migrant workers from being isolated from the society in which they arrive since this prevents them from leading a normal life in contact with other people and also prevents them from forming societies with other workers or even trade unions – with which the right to freedom of meeting and peaceful association would be violated – and this prevents them from being able to complain or have means in their reach to prevent abuses in relation to work, which is nevertheless very frequent among the domestic workers who are mostly women. On other occasions the workers are victims of expressions of xenophobia or racism. Problems also arise between groups of migrants and the communities of destination due to social, cultural or religious questions, especially when there are major differences in these aspects. The aforementioned conditions increase when the workers are in an irregular situation since they are especially vulnerable to exploitation because they are afraid of appealing to the authorities. The employers therefore take advantage and pay lower wages or make them work longer hours, sometimes in hazardous conditions.

Women face more restraints with regard to men since the latter are more likely to find themselves in situations that restrict their development. The fact that they are more likely to be admitted as "family members for support" in family migration, their lack of access to the labor market when they are admitted as accompanying spouses; their marginalization toward traditional female and poorly paid occupations when they migrate as workers and their greater vulnerability to sexual exploitation, are legitimate reasons for concern and realities that all too often generate unsatisfactory results of women's migration, which depends basically on respect for the rights established in the principal instruments of human rights.

The best thing for everyone would be to integrate society in which the migrant workers arrive but it must be on an equal and non-discriminated level. On the other hand, we cannot but mention that the governments of destination also have difficulties for the employers to comply with the law, especially labor laws.

At the same time, and without it being interpreted as encouraging illegal migration, it should be considered that migrant workers and their families have, under any circumstance, and even undocumented, human rights that must be respected. An example is that of not being arbitrarily expelled, that is, in accordance with the law, and that due dignity of anyone must be considered because human rights must prevail in all countries under any circumstance.

The right to equality before the law also means that, in terms of working conditions, the migrants must be treated in the same way as the others, including the nationals of the country where they are working; in other words, the working hours, overtime, wages and other benefits, such as rest, paid vacations, housing programs, safety, health care, end of contract, minimum age, and so on. This right of equality before the law extends to the access to their children's education, social security benefits and medical care.

Undocumented migrant workers also enjoy the right of equality before the law, including labor rights, although some domestic courts have refused it.

On the human right to equality and non-discrimination, the Advisory Opinion of the Inter-American Court of Human Rights, on September 17, 2003, on the Legal *Status* and Rights of non-documented migrants, states the following:

4. That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens.*
5. That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.
6. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory *status* of a person.
7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory *status*. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.
8. That the migratory *status* of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship.
9. That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their *status* as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.
10. That workers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.
11. That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

The Advisory Opinion of the Inter-American Court does not oblige authorities to adopt it since it is not a law, but is valuable as an opinion based on human rights issued by a group of specialist jurists and, as such, a source of rules of international law. At the same time, it should be mentioned that it is mandatory for all States to respect human rights; for example, the human right to equality and non-discrimination as well as respect for individuals. It should be added that all constitutions of the countries in the American continent include the obligation to respect everyone's human rights.

In turn, article 6 of Pact II, which develops the principles contained in the aforementioned UD, provides:

> 1. The States Parties to this Pact recognize the right to work, consisting of everyone's right to have the opportunity to earn his living by a freely chosen or accepted job, and will take the proper measures to assure this right. 2. Some of the measures to be taken by each Member State herein to fully achieve this right shall be vocational guidance and professional technical training, preparation of programs, regulations and techniques toward cultural, economic

and social development and full productive occupation, in conditions that guarantee fundamental political and economic freedoms of the human being.

Article 22 of the UD provides: “Everyone, as member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”.

On the other hand, it is indispensable that governments permit the payment of pensions and whatever other benefits that the migrant workers can receive and, especially, that payment of pensions is permitted abroad. The WLO Convention 157 on social security refers to this point. Also governments should facilitate the transfer of remittances, pensions and benefits of migrant workers and retired migrant workers in their countries of origin.

6. Right to due litigation

UD, arts. 7, 8, 9,10, 11 and 17; AC, art. 8; Pact I, art. 3, 4, 9, 10, 11, 13, 14 and 26; Pact II, art. 3; AD, art. 2, 18 and 26; CMW, arts. 15, 16, 17, 18, 20, 21, 22 and 23.

The human right to due litigation, the right to justice, as it is also called, guarantees migrant workers and their families, whatever their migratory *status* may be, the right of equality with the nationals of the State, in a judgment before a court in which they participate either as plaintiffs or defendants; in other words, this full right in accordance with the established laws. This right protects the immigrant in any judgment, where labor, for example, on non-compliance with a work or migrant agreement.

When a migrant worker or a member of his family is arrested, they have the right to be immediately informed of the reason for his arrest in a language that they understand and are to be informed also of the legal resources available. The arrest of an immigrant or his family for checking his migrant *status* by an employee or any other police or public security authority can only be done if the legislation of the country permits; if so, the migrant aid organizations recommend keeping calm, not running and not insulting the person who arrests him.

In case of arrest, people have the following rights: first respecting for human rights, even in the case of being undocumented, for a translator and lawyer; to be put in touch with the consulate of his nationality and this has the obligation to provide the required proper consular services in any circumstance and advisory services should they go to court. On this point, it should also be borne in mind that, pursuant to article 36 of the 1963 Vienna Convention on Consular Relations, when the authorities of a country arrest someone, in this case a migrant worker or his family, the authorities themselves are obliged to inform him, without delay, of his right to communicate with the consulate of his nationality and his right to have consular assistance. They also have the right to communicate with a non-governmental organization for aid to migrants, to communicate with a family member or a person that can help them. If the arrested person is accompanied by minor children, it must not be permitted to separate them from each other since it is wrongful to arrest children and adolescents and for them to make a statement without the presence of a legal representative or adult responsible for them.

Arrested people also have these rights: to remain silent but should give their real name; not to sign, against his will, the voluntary exit or other paper; to have hygiene in the place of arrest, - which must not be prison -, and be given food and water. He also has the right against excessive force in custody, and the arrested person not to be insulted or attacked, harmed by handcuffs, and to be given medical care, and not to remove his money or other valuables. It is also advisable for the arrested not to lie, carry false documents – since this is an offense -, not to say he is a citizen of the country when he is not, not to drive without a license or documents. If he has a work permit he must show it if he is not a citizen of the country where he works.

If these human rights are violated he must denounce the agents who violated them; to do so he must note down the agent’s identity number, his name, etc., that is, he must have the data to identify them and even better if there are witnesses, to prove the violation of his rights.

If the arrested person is not released, an order is required by the competent authority to keep him in custody and start a migratory process; that is, a decision before a court where the minimum guarantees should be observed that the law of the country grants to the accused, some of which are the right to have proper defense in order for the accused to

have fair trial, in accordance with the prevailing laws and not arbitrarily; in other words, not in accordance with the free discretion of people who enforce them, but in compliance with the essential formalities of the law to be able to deprive someone of some right or be given a sentence. The decision regarding the migratory *status* of someone must be fully respected and guarantee given of the due legal proceeding and, when a sentence is given, humanitarian considerations regarding his migratory *status* must be taken into account.

The right to the due legal proceeding should also be applied to any lawsuit in relation to a job performed by an undocumented migrant worker when involving non-compliance of a verbal or written contract.

It should be considered that, in any case, the arrested person has the right to receive his wage earnings.

7. No retroactivity in criminal law

UD, art. 11; Pact I, art. 15; AC, art. 9 and CMW, arts. 16 to 20.

The UD refers to this right as follows: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”

Pact I, Art.15: “No one shall be held guilty of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed …”.

This right somehow complements the right to the due lawsuit that, if there is a proceeding based on a law that did not exist, this would be violating the right to a due legal proceeding since the fact or omission to be judged was not an offence and consequently there should be no legal proceeding.

This right is based on the general principle that the laws are made for the future and not for the past but if the new law benefits the accused, it should be applied.

8. Right to private and family life

CTM, arts. 14 and 44; UD, arts. 12 and 16; Pact I, arts. 3, 4, 17 and 26; AD, arts. 5, 6, and 7. Right to the protection of the family.

In its article 12, the Universal Declaration refers to the right to private and family life in the following terms: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”. The AC, in its article 17, sub-clause 1, provides: “The family is the natural and fundamental element of society and is entitled to protection by society and the State”.

In turn, article 16 of the same Universal Declaration refers to the right of men and women to marry and found a family and sub-clause 3 of this article recognizes the natural right of protection that is due the family, as follows: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”. It is also recognized by the CMW.

It is important to address this section on the family unit and protection for the family, the *status* of migrant women since, if they travel alone, or accompanied only by their children, because of their *status* as women they are more exposed to all kinds of mistreatment, harassment, violence and abuse both in the countries through which they pass and in employment even in their own country, and if they travel they are generally more vulnerable in terms of employment rights. If she is married and has children and the spouse emigrates, her situation becomes more difficult because along with the separation from her husband, she must look after the children. If she accompanies her husband and they have children, very often she must not only look after them but also work outside the home. The husband does not always help take care of and educate the children.

Based on human rights recognized in the aforementioned international instruments, the Pastoral Letter of the Catholic Bishops of Mexico and the United States, dated January 23, 2003, proclaims: “Immigration must be based on the principle of the family unit”. This principle would have to protect this natural institution, which is the family, and therefore the right of its members to live together: spouses and minor children which unfortunately is not always the case in international migration since not only not beneficial but also measures are taken against constitutional rights, such as not giving a child the nationality of the country in which it was born or postponing for years the reunion of the spouses in the case

where one of them migrates. The separation of husband and wife has a negative influence on the professional development of the couple and on the education of the minor children. Concerning unaccompanied minors, their situation is very often worrying since they are not given the proper care and are arrested or expelled and many of them travel alone to joint their family. Measures such as those described herein favor undocumented migration.

In this section two human rights should be quoted:

a) That of the inviolability of anyone's home, which gives right to its inhabitants not to permit entry even of an authority, to a home unless there is a written order from a relevant authority on such a matter and specifies what can be done in the home. This right extends to everyone who is domiciled there, that is, are nationals of the state or aliens;

b) The right to inviolability of private correspondence. This right applies to letters, telegrams, telephone calls, in other words, any kind of communication sent to someone. As in the preceding right, it is necessary to have an order from a relevant authority to see these communications.

Raids that have increased recently go against human rights and lead to terror.

9. Right to freedom of thought, conscience and religion

UD, art. 18; Pact I, art. 18; AD, art. 33; AC, art. 12; CMW, art. 12.

Pact, article 18: "Everyone shall have the right to freedom of thought, conscience and religion …" and 19 "No one shall be importuned because of his opinions". C A, article 12, "Everyone has the right to freedom of conscience and religion".

Everyone is free to profess the religious creed that they prefer and acts of worship.

10. Freedom of peaceful meeting and association

UD, art. 20; Pact I, art. 21 and 22; Pact II, art. 8; AC, arts. 15 and 16.

This freedom cannot be restricted but when addressing migrant workers or their families, in other words, aliens, meetings must not refer to political questions.

In Manitoba, Canada, seasonal alien workers obtained the right to join a trade union on July 2, 2007.

Freedom of opinion, (thought) and expression.

UD, art. 19; Pact I, 19; AD, art. 4.

11. Rights of the child

Pact I, art. 24.

AC, article 19: "Every child has the right to means of protection that his *status* as a minor requires by his family, society and the State".

UD, art. 15. AD, art. 24 children.

Children's human rights are violated:

a) if they are arrested and imprisoned together with their fathers and are treated as adult criminals;

b) if their father is arrested and separated from the children, if expels from the country unaccompanied minors

c) if they suffer at school racial or any other kind of discrimination

In the last case human rights of the family are also violated since it is the natural element of society.

They must look for alternative methods to care for them and not subject them to the same regulations as the adults.

12. Right to education.

Pact I, arts. 14 and 15 on Dignity and 22 on Dignity. Pact I, art. 19 on Dignity.

CMW art. 29. "Everyone has the right to a nationality".

CJI/doc.269/07

THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL LAW

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. RESOLUTION OF THE INTER-AMERICAN JURIDICAL COMMITTEE CJI/RES.127 (LXX-O/07)

The Inter-American Juridical Committee, at its 70th regular session (26 February to 9 March 2007) held in the city of San Salvador, El Salvador, approved resolution CJI/RES.127 (LXX-O/07) denominated "The legal status of migrant workers and their families in the international law", which considered that migration of workers and their families, whether documented or not, is a matter that interests all the States of the American Continent; that it is necessary to know the legal aspects of human mobility, especially as regards human rights, in order to reflect about migrant workers; and that it is worthwhile to consider the work carried out in the inter-American system in this respect.

In this sense, the Inter-American Juridical Committee, at its 70th regular session, decided to include it as a topic under consideration and designated Drs. Jorge Palacios Treviño, Ana Elizabeth Villalta Vizcarra, Ricardo Seitenfus and Galo Leoro Franco as rapporteurs.

In compliance with this resolution, as one of the rapporteurs of the topic, the undersigned presents the following report at this 71st regular session:

1. Legal condition of migrant workers and their families in the inter-American system

The migrant phenomenon is one of the most important social, political and economic topics in the American Continent, since many of the member States of the Organization of American States (OAS) have become states of origin, transit and destination for migrants not only of the region but also of the whole world, which is why it is necessary to guarantee and assure the human rights of migrants.

This has led to the inter-American system now having available an "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, including Migrant Workers and their Families"; a "Special Rapporteur for Migrant Workers and Their Families" and jurisprudence emitted by the Inter-American Court on Human Rights to protect the human rights of migrant workers through advisory opinions on the matter.[1]

1.1 Inter-American Program

Its antecedent is the Third Summit of the Americas held in Quebec, Canada, in April 2001, when the "Declaration of Quebec City: Plan of Action" was approved, containing the mandate to create an "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families". This Summit accepted the commitment adopted at the First Summit of the Americas held in Miami, Florida, in December 1994, with regard to "guaranteeing protection of the human rights of all migrant workers and their families", a commitment taken up again at the Second Summit of the Americas, held in Santiago de Chile in 1998.

The subsequent Summits also ratified this commitment, as well as the Special Summit of Monterrey, Mexico, in 2004, which repeated this commitment in the "Declaration of Nuevo León", and in the Fourth Summit of Mar del Plata in 2005, which reaffirmed the intention of fully supporting the "Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families".

The Organization of American States assigned the preparation of this program to a Working Group set up by the Committee on Juridical and Political Affairs. The General Assembly of the OAS approved the "Inter-American program for the promotion and protection of the human rights of migrants, including migrant workers and their families", through resolution AG/RES. 2141 (XXXV-O/05).

The importance of the topic was emphasized at the General Assembly of the OAS in Panama in June 2007, through resolutions AG/RES. 2289 (XXXVII-O/07), called "The

[1] OEA/Sec.Gral.ODI/doc.06/07. *El papel de la OAS en la protección de los derechos humanos de los migrantes*.

human rights of all migrant workers and their families", and AG/RES. 2326 (XXXVII-O/07), "Migrant populations and migration flows in the Americas".

This program, one of the key tools available to the OAS for protecting and guaranteeing the human rights of migrants, aims basically at promoting the exchange of practical developments and cooperation among states of origin, transit and destination with a view to respecting and protecting their human rights.

1.2 Special Rapporteur for Migrant Workers and Their Families

The antecedent of this initiative, which was set up in the framework of the Inter-American Committee on Human Rights (CIDH) in 1997 are resolutions AG/RES. 1404 (XXVI-O/96), "Annual report of the Inter-American Commission on Human Rights", and AG/RES. 1480 (XXVII-O/97), "The human rights of all migrant workers and their families".

The purpose of this Rapporteur is to lend proper attention to an especially vulnerable group exposed to eventual violations of their human rights.

Its objectives are as follows:

- To generate awareness of the duty of States to respect the human rights of migrant workers and their families;
- To present specific recommendations to the member States of the OAS on issues related to the promotion and protection of the human rights of these persons, so that measures can be adopted on their behalf;
- To draft specialized reports and studies on the situation of migrant workers and on topics related to migration in general;
- To act promptly in respect to petitions or communications signaling that the human rights of migrant workers and their families are violated in some Member State of the OAS. [2]

1.3 Jurisprudence of the Inter-American Court of Human Rights

a) Advisory Opinion OC-18/03, "Juridical Condition and Rights of the Undocumented Migrants" (September 17, 2003)

According to this Opinion, the Inter-American Court of Human Rights understands "migrant workers" to be any person who engages, is going to engage or has engaged in a remunerated activity in a State other than their original State, and "undocumented or illegal migrant worker" to be any person who is not authorized to enter, remain in and exercise a remunerated activity in the State of employment, in accordance with the laws of that State and the international agreements to which the State is Party, and who nevertheless performs such activity.

In this sense, it is obligatory that the States respect and guarantee human rights in keeping with international instruments on the matter, as manifested by the Inter-American Court of Human Rights in Advisory Opinion OC-18:

> ... All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure."[3]

Therefore, according to said international instruments and the respective international jurisprudence, the States have the general obligation to respect and guarantee fundamental rights, and to avoid taking initiatives that limit or infringe upon the exercise of those rights.

Following the same line of thinking, recognition of equality before the law prohibits all discriminatory treatment as being in violation of human rights in such a way that States are obliged to respect and guarantee full, free exercise of rights and liberties without any discrimination whatever, and non-compliance on the part of the State, through any discriminatory treatment, of the obligation to respect and guarantee said rights, entails international responsibility, since States have a universal duty to respect and guarantee human rights as set forth in the principle of equality and non-discrimination.

[2] Inter-American Commission on Human Rights. Special Rapporteur for Migrant Workers and their Families.
[3] OAS. Inter-American Court on Human Rights. *Advisory Opinion OC-18/03*, par. 73.

For this reason the States have the obligation to refrain from introducing discriminatory rules in their legal systems, to eliminate such rules from their systems, and to combat discriminatory practices.

Discrimination is understood as making a distinction that lacks objective and reasonable justification; a *contrario sensu*, if the difference in treatment is legitimately oriented and does not lead to situations against the justice, reason or the nature of the cases, there is no discrimination.

The United Nations Commission on Human Rights defines discrimination in the following way:

> …any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[4]

In this sense, this United Nations Commission has pointed out that the Party States must strive to guarantee the rights recognized in the "International Covenant on Civil and Political Rights"[5] for all the individuals who find themselves in their territory and are liable to their jurisdiction.

Consequently, this guarantee must apply equally to foreigners and nationals, since foreigners are entitled to the protection of the law on equal terms, which implies that the States must respect and guarantee human rights in the light of the general and fundamental principle of equality and non-discrimination, since any discriminatory treatment as regards protection and execution of human rights entails international responsibility by the States.

In Advisory Opinion OC-18/03, the Inter-American Court of Human Rights considered that the principle of equality before the law and non-discrimination are part of the norms of the *jus cogens* and also part of general international law.

The Inter-American Court of Human Rights established the "principle of equality and non-discrimination", which by its very character and juridical nature is *jus cogens*, since this concept has now been developed for its doctrine and international jurisprudence. It is not limited solely to the right of the treaties, but rather its scope has extended to international law in general, embracing all juridical acts and also being manifest in the right of responsibility of States and affecting the very foundations of the international juridical system.

Therefore, as the "principle of equality and non-discrimination" became part of general international law, and due to its actual evolution, it entered the domain of *jus cogens*, that is, norms of obligatory compliance.

For this reason, the States have the general obligation to respect and guarantee human rights, without any discrimination whatsoever and on the basis of equality, abstaining from performing actions that in any way directly or indirectly create situations of discrimination, whether *de jure* or *de facto*. Furthermore, States are obliged to adopt positive measures to revert or change discriminatory situations existing in their societies that jeopardize a certain group of people, which in turn implies the special duty of protection that the State should exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, believe, maintain or favor such discriminatory situations.

States can only establish objective and reasonable distinctions when these are made with due respect for human rights and in keeping with the principle of application of the norm that best protects the human person.

Pursuant to the above, the States must ensure that all persons have unrestricted access to a simple and effective resource that protects and guarantees their rights regardless of their migratory status. The right to due process of law must be acknowledged in the framework of minimum guarantees that should be afforded to all migrants.

As the "principle of equality and non-discrimination" is part of the domain of *jus cogens*, its effects reach all member States of the Organization of American States, besides

□□

[4] UN. Commission on Human Rights. *General Comment No. 18: Non-discrimination, 10/11/89,* par. 7.

[5] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966; entry into force on 23 March 1976, in accordance with Article 49.

establishing *erga omnes* obligations of protection that bind all the States and produce effects with regard to third parties, including private individuals.

As a consequence, it is the general obligation of the States to respect and guarantee human rights, regardless of any circumstances or consideration, including the migratory status of persons.

It must be taken into account that migrants find themselves in a vulnerable situation *vis-à-vis* nationals and residents, a situation that leads to differences being established in their respective access to public resources administered by the State, besides other situations that exacerbate this situation of vulnerability, such as cultural and ethnic prejudice, xenophobia and racism.

This has led the international community to adopt special measures to guarantee protection for the human rights of migrants, which is why the States cannot discriminate or tolerate discriminatory situations that put migrants in jeopardy.

That is why States cannot discriminate or tolerate discriminatory situations that affect migrants, which does not mean that the States can treat documented migrants differently from undocumented migrants, or migrants differently from nationals, whenever this differential treatment is reasonable, objective and proportional and does not violate human rights.

The Inter-American Court of Human Rights has considered that the right to due process of law should be recognized in the framework of minimum guarantees offered to all migrants, regardless of their migratory status.

The "International Convention of the United Nations on Protection of the Rights of all Migrant Workers and their Families"[6] has established the situation of vulnerability in which they find themselves, due among other things to their being absent from their State of origin and the difficulties they face being present in the State of employment.

Despite the above, the Inter-American Court of Human Rights considers that a person who enters a State and starts to work acquires their labor human rights in this State of employment, regardless of their migratory situation, since the respect and guarantee of enjoying and exercising those rights should entail no discrimination whatsoever.

Accordingly, a person's migratory quality can by no means constitute a justification for depriving him or her from enjoying and exercising their human rights, including labor rights. On assuming a working relation, the migrant acquires rights as a worker that should be recognized and guaranteed, regardless of whether his or her situation is regular or irregular in the State of employment. These rights are the consequence of the labor relation.

In this same sense, the Inter-American Court of Human Rights states that:

> The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.[7]

Nowadays, States and private individuals set up labor relations with migrants in irregular circumstances, which immediately converts them into holders of labor rights as workers, without there being any possibility of discrimination on account of their irregular situation. These labor relations are established both in the sphere of public and private law.

It is in this sense that the Inter-American Court of Human Rights affirmed that:

> … employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways. First, States are obliged to ensure that, within their territory, all the labor rights stipulated in its laws – rights deriving from international instruments or domestic legislation – are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and practices of third parties that prejudice migrant workers, either because they do not

6 UN. Commission on Human Rights. Resolution 1996/18.
7 Inter-American Court on Human Rights. *Advisory Opinion OC-18/03*, par. 148.

recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.[8]

The Inter-American Court of Human Rights further affirmed that:

151. ... in labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector. The obligation to respect the human rights of migrant workers has a direct effect on any type of employment relationship, when the State is the employer, when the employer is a third party, and when the employer is a natural or legal person.

152. The State is thus responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination.[9]

In the case of any doubt as to which norm to apply to establish the rights of migrant workers, according to the Principle of *indubio pro-operario* this should be the most favorable; since internal practices or norms favor the worker more than international norms, the former should be applied. If an international instrument benefits the worker by granting rights not guaranteed or recognized by the State, these should also be respected and guaranteed.

The Court also establishes in its Advisory Opinion OC-18 that:

The Court considers that undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Workers, as possessors of labor rights, must have the appropriate means of exercising them.[10]

A State's migratory policy is constituted by all acts, measures or institutional omission that deal with the entry, exit or permanence of the national or foreign population inside its territory.

But the Inter-American Court of Human Rights establishes that the objectives of these migratory policies should respect human rights and that these should be carried out by respecting and guaranteeing such rights.

In this same line of ideas, the Inter-American Court of Human Rights determines that:

…the State may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature. This general principle must be respected and guaranteed always. Any act or omission to the contrary is inconsistent with the international human rights instruments.[11]

The unanimous decision of the Inter-American Court of Human Rights on this matter is as follows:

For the foregoing reasons,

THE COURT,

DECIDES

unanimously,

that it is competent to issue this Advisory Opinion.

AND IS OF THE OPINION

unanimously,

1. That States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.

□□

8 Inter-American Court on Human Rights. *Advisory Opinion OC-18/03*, par. 153.
9 Inter-American Court on Human Rights. *Advisory Opinion OC-18/03.*
10 Inter-American Court on Human Rights. *Advisory Opinion OC-18/03*, par. 160.
11 Inter-American Court on Human Rights. *Advisory Opinion OC-18/03*, par. 172.

2. That non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility.

3. That the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law.

4. That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens.*

5. That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.

6. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.

7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.

8. That the migratory *status* of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed These rights are a result of the employment relationship.

9. That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

10. That workers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.

11. That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

[...]

Done at San José, Costa Rica, on September 17, 2003, in the Spanish and the English language, the Spanish text being authentic."[12]

b) Advisory Opinion Oc-16, "The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law" (October 1, 1999)

This Opinion establishes that the Court has the competence to interpret, in addition to the "American Convention on Human Rights", other treaties concerning protection of human rights in the American States.

In conformity with its consultative jurisprudence, the Inter-American Court of Human Rights interprets that a treaty can concern protection of human rights, whatever its principal object may be. Accordingly, the principal object of the "Vienna Convention on Consular Relations" is "to establish a balance between States", but it also concerns protecting a national's fundamental rights in the American Continent, since it is a primordial consular function to lend assistance to nationals of the sending State in defense of their rights before the authorities of the receiving State.

In this sense, article 36 of the "Vienna Convention on Consular Relations" deals with consular assistance in a particular situation: deprival of freedom. This article also expressly

[12] Inter-American Court on Human Rights. *Advisory Opinion OC-18/03*.

regulates “the rights to information and consular notification”, which is a notable advance in respect to the traditional concepts of International Law on the matter.

The exercise of the rights established in this article is limited only by the will of individuals, since only they can expressly object to any intervention of the consular officer to help them, once again reaffirming the individual nature emphasized in this article of the Convention together with the corresponding duties of the receiving State.

The relation that exists between the rights conferred by article 36 and the concepts of “due process of law” or “juridical guarantees” concerns protection of human rights.

A foreigner’s right to be informed opportunely that he or she can count on consular analysis is part of the set of minimum guarantees that make up due process of law.

Notification of the right to communicate with one’s consular representatives will contribute considerably towards improving the possibility of defense, since the processual acts in which they intervene are performed with greater consideration for the law and respect for people’s dignity. The right to information on consular assistance constitutes a way of defending detainees, whereas non-observance or obstruction of their right to information affects their legal guarantees.

In this Advisory Opinion, the Inter-American Court of Human Rights establishes:

> … that nonobservance of a detained foreign national’s right to information, recognized in Article 36 (1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the guarantees of the due process of law; in such circumstances, imposition of the death penalty is a violation of the right not to be “arbitrarily” deprived of one’s life…[13]

In this line of thinking, the Inter-American Court of Human Rights decided unanimously that it is competent to emit this Advisory Opinion, and also unanimously expressed:

> 1. That Article 36 of the Vienna Convention on Consular Relations confers rights upon detained foreign nationals, among them the right to information on consular assistance, and that said rights carry with them correlative obligations for the host State.
>
> Unanimously,
>
> 2. That Article 36 of the Vienna Convention on Consular Relations *concerns* the protection of the rights of a national of the sending State and is part of the body of international human rights law.
>
> Unanimously,
>
> 3. That the expression “without delay” in Article 36(1)(b) of the Vienna Convention on Consular Relations means that the State must comply with its duty to inform the detainee of the rights that article confers upon him, at the time of his arrest or at least before he makes his first statement before the authorities.
>
> Unanimously,
>
> 4. That the enforceability of the rights that Article 36 of the Vienna Convention on Consular Relations confers upon the individual is not subject to the protests of the sending State.
>
> Unanimously,
>
> 5. That articles 2, 6, 14 and 50 of the International Covenant on Civil and Political Rights *concern* the protection of human rights *in the American States*.
>
> Unanimously,
>
> 6. That the individual’s right to information established in Article 36(1)(b) of the Vienna Convention on Consular Relations allows the right to the due process of law recognized in Article 14 of the International Covenant on Civil and Political Rights to have practical effects in concrete cases; Article 14 establishes minimum guarantees that can be amplified in the light of other international instruments such as the Vienna Convention on Consular Relations, which expand the scope of the protection afforded to the accused.

[13] Inter-American Court on Human Rights. *Advisory Opinion OC-16/99*. par. 137.

By six votes to one,

7. That failure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life "arbitrarily", as stipulated in the relevant provisions of the human rights treaties (*v.g.* American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to the State's international responsibility and the duty to make reparation.

Judge Jackman dissenting.

Unanimously,

8. That the international provisions that concern the protection of human rights in the American States, including the right recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, must be respected by the American States Party to the respective conventions, regardless of whether theirs is a federal or unitary structure.

....

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on October 1, 1999.[14]

With regard to the above, the conclusion may be drawn that article 36.1.b) of the "Vienna Convention on Consular Relations" constitutes a norm that protects human rights and a minimum guarantee of due process of law. In this sense, article 36 of the "Vienna Convention on Consular Relations" was converted to another treaty concerning protection of human rights in the American States, on which the Inter-American Court of Human Rights, in accordance with article 64.1 of the American Convention on Human Rights, can emit a Advisory Opinion.

Both Advisory Opinions OC-16 and OC-18, emitted by the Inter-American Court of Human Rights, refer to protection of migrant workers. OC-18 is more specific in that it refers to the juridical status and rights of undocumented migrants, with express reference to protection of the rights of undocumented migrant workers, while OC-16 refers to the right to information on consular assistance in the framework of guarantees of due process of law, protecting at the same time the rights of all foreigners detained abroad, who may perfectly well be documented or undocumented migratory workers, since the right to information on consular assistance constitutes a minimum guarantee of due process of law, with article 36 of the Convention of Vienna on Consular Relations being converted to a treaty on protection of human rights, notwithstanding its principal object and purpose.

Both Advisory Opinions are not only part of the Jurisprudence of the Inter-American System concerning human rights but also part of the *corpus juris* of the International Law of Human Rights, serving at one and the same time as a precedent on which to base decisions of other international jurisdictional courts. One example is the International Court of Justice, which recently resolved a petition of the United States of Mexico against the United States of America for violation of articles 5 and 36 of the "Vienna Convention on Consular Relations" in its decision dated 31 March 2004, in the case of Avena and other Mexican nationals in which Advisory Opinion OC-16 of the Inter-American Court of Human Rights played a relevant role.

Both Advisory Opinions contributed significantly to the progressive development of the international law of human rights in protection of the rights of migrants, since they are both related to the legislation and measures adopted by some States that could restrict the human rights and fundamental liberties of migrants, so these States should meet the obligations imposed by international law on human-rights questions in order that the fundamental rights of migrants be fully respected.

In this sense, constructive dialogue should be continued among the States with a view to improving their migratory policies and practices and offer adequate protection to all migrants (including documented and undocumented migrant workers).

[14] Inter-American Court on Human Rights. *Advisory Opinion OC-16/99*.

It is appropriate that States should adopt integral migratory policies that take into account what is set forth in the "Inter-American program for the promotion and protection of the human rights of migrants including migrant workers and their families", and that these should be implemented by institutions of the State specially tasked for this purpose, such as the Salvadorian Ministry of Foreign Affairs, where a "Vice-Ministry for Salvadorians living Abroad" was set up on 1 June 2004, one of its principal functions being to attend to the human rights of Salvadorians abroad, including migrant workers and their families, whether documented or undocumented.[15]

With this first report on "The legal status of migrant workers and their families in international law", the undersigned, as one of the rapporteurs of the topic, hopes to underscore the contribution of the inter-American system to the progressive development of same, which is why consideration was given to the Resolutions and Declarations emitted in the framework of the Organization of the American States, as well as the jurisprudence of the Inter-American Court of Human Rights on the issue.

A subsequent report will deal with the theme from a universal point of view, with special emphasis on the United Nations "International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families"[16], since it is the priority duty of the States to guarantee and assure protection of the human rights of migrants.

Bibliography

1. Resolutions of the Inter-American Juridical Committee

2. Resolutions of the General Assembly of the OAS

3. Inter-American Court on Human Rights Advisory Opinion OC-16

4. Inter-American Court on Human Rights Advisory Opinion OC-18

CJI/RES.131 (LXXI-O/07)

THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND resolution CJI/RES.127 (LXX-O/07), entitled "The Legal Status of Migrant Workers and their Families in International Law" approved during the 70th regular session of the Inter-American Juridical Committee held in San Salvador, El Salvador, in March 2007;

TAKING INTO ACCOUNT that, during the 71st regular session in August 2007, Dr. Jorge Palacios Treviño presented the preliminary document CJI/doc. 266/07 "The Legal Status of Migrant Workers and their Families in International Law" in which he makes reference to the human rights to which migrant workers and their families are entitled, as a minimum, independently of immigration status, in all situation of mobility, that is, at all stages in the migratory process, from their departure to their return, with the intermediary stages of transit through third party countries, during the period of employment and their integration in the country of destination, and that when identifying these rights, the principal sources used were the Universal Declaration of Human Rights and the Third Chapter of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, approved in New York in 1990;

CONSIDERING that Dr. Ana Elizabeth Villalta Vizcarra presented the document CJI/doc. 269/09 on the contribution of the Inter-American system to the progressive development of the "The Legal Status of Migrant Workers and their Families in International Law", based on the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and their Families, the special report of the Inter-American Commission of Human Rights on the topic and the jurisprudence issued by the Inter-American Court of Human Rights in order to protect the human rights of the migrant workers through Advisory Opinions OC–16 (1999) and OC-18 (2003),

[15] Since its creation to the present date, Ambassador Margarita Escobar is Vice-Minister for Salvadorians Abroad.

[16] UN. General Assembly. Resolution 45/158, December, 18, 1990.

RESOLVES:

1. To take note with satisfaction of the reports CJI/doc.266/07, “The Legal Status of Migrant Workers and their Families in International Law”, presented by Dr. Jorge Palacios Treviño, and CJI/doc.269/09 “The Legal Status of Migrant Workers and their Families in International Law”, presented by Dr. Elizabeth Villalta Vizcarra.

2. To request the co-rapporteurs, Drs. Jorge Palacios, Ana Elizabeth Villalta and Ricardo Seitenfus to present a consolidated report before the next regular session of the Inter-American Juridical Committee, to be forwarded to the Committee Secretariat.

3. To accept the proposal of the co-rapporteurs to prepare a draft brochure or handbook that delineates the rights of migrant workers and their families, based on international law, with the objective of allowing migrants to demand compliance therewith.

This resolution was unanimously approved at the session held on August 9, 2007, in the presence of the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

9. Administration of Justice in the Americas: judicial ethics and access to justice

Resolution

CJI/RES.126 (LXX-O/07)	Administration of justice in the Americas: judicial ethics and access to justice

Document

CJI/doc.238/07	Principles of judicial ethics (presented by Dr. Ana Elizabeth Villalta Vizcarra)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), the Director of the Department of International Legal Affairs pointed out that a past initiative of the Juridical Committee had disappeared from its agenda: the administration of justice. He mentioned that the Inter-American Commission on Human Rights was looking at this area, but exclusively from the perspective of safeguarding human rights and limited to criminal law. He then opined that there are a number of aspects that the IAJC could work on, such as consumer protection, labor law, small lawsuits, demarcation of small landholdings, etc., all of which are subjects taking on greater importance in the Organization. He pointed out that OAS is in contact with national Supreme Courts and is working on ways to best cooperate.

At the same regular session, Dr. Ana Elizabeth Villalta Vizcarra presented report CJI/doc.238/07, "Principles of judicial ethics", covering the advances made by various Ibero-American Summits of Supreme Courts of Justice. She also expressed the opinion that the IAJC could put the topic of access to justice back on its agenda. She recalled that the agenda item under discussion was derived from the subject area of Administration of Justice in the Americas and had also been the object of a mandate of the General Assembly, which recommended that the Committee cooperate with other organs in the development of the subject area. In her report Dr. Villalta referred to the principles adopted in the Bangalore Code on judicial conduct of 2001, the Code of Ethics of the USA, the Statute of Ibero-American Judges of May 2001, the Charter of the Rights of Persons in the Justice System in the Ibero-American Judicial Area of 2002, and the Ibero-American Code of Judicial Ethics of 2006. She pointed out that the objectives of said instruments include safeguarding the principle of judicial independence as a part of democratic governance and the rule of law, as well as that of the financial independence of the judiciary. The report recommends that, if the IAJC wants to draft a code expressly for the Inter-American system, it should base it on the Ibero-American Code of Judicial Ethics, to which many OAS Member States are parties. Another possibility that Dr. Villalta mentioned was the possibility of preparing a draft code the scope of which would go beyond judges to encompass all persons working in the administration of justice.

Dr. Jean-Paul Hubert thanked Dr. Villalta for her report and said that the matter should be pursued taking into account any progress made by other organs. He expressed the opinion that innumerable instruments, both national and international in scope, had already been created, and that it was not that important to have one more. He added, however, that if the Committee should decide to keep the item on the agenda, it should accept the challenge of elaborating a Draft Inter-American Code that would take into account member States having a common law system, as these countries have not participated in the Ibero-American summits.

Dr. Galo Leoro Franco underscored the significance that a code would have for the Inter-American system. Despite many countries already having their own codes, an Inter-American one would add value and strengthen enforcement. He recommended that the rapporteuse continue her work and submit a draft code of judicial ethics so that the political organs could decide how to proceed. In his opinion, that would be the only way to respond to the General Assembly mandate.

Dr. Mauricio Herdocia Sacasa stressed that the question of judicial ethics is a core one that the IAJC could pursue as it is an element of the rule of law. For him the idea is to strengthen the system of separation of powers, and it would be natural to think that the Juridical Committee would have something to say about the matter as it is essential to the consolidation

of democracy and related to access to justice. He recalled that the Inter-American Democratic Charter and the Charter of the OAS itself recognize the separation of powers as a core principle. He said that the Committee should continue its work, and requested that the rapporteuse proceed with a draft Inter-American code of ethics, if feasible in collaboration with the JSCA, also including the experience-rich common law countries. Such a document could take advantage of common law modalities to put forward either a model law or a model code with the purpose of helping countries that have no norms in this area or that want to bolster what they already have.

Dr. Freddy Castillo Castellanos stated that the Committee should not ignore this matter as the countries of the Americas face problems of judicial independence and effective implementation of decisions. A code of ethics or a model law would represent great progress.

Dr. Hyacinth Evadne Lindsay stated that she saw much merit in common law judges having in hand a document such as the Ibero-American Code of Ethics, and offered to send to the rapporteuse relevant material from CARICOM countries.

Dr. Ricardo Seitenfus added that one of the objectives of a code is to render the acts of the judiciary more effective. To him, the financial independence of the judiciary is also extremely important, but must go hand in hand with financial accountability, or in other words, transparency of expenditure.

The Inter-American Juridical Committee passed resolution CJI/RES.126 (LXX-O/07), "Administration of Justice in the Americas: judicial ethics and access to justice". Said resolution appointed Drs. Ricardo Seitenfus and Freddy Castillo Castellanos as co-rapporteurs to work alongside Dr. Ana Elizabeth Villalta Vizcarra. It also underscored the critical link of judicial ethics and access to justice on the one hand, and the administration of justice and the strengthening of the rule of law in the Americas on the other. It declared that the topic is to be maintained on the Committee's agenda under the heading: "Administration of justice in the Americas: judicial ethics and access to justice". The co-rapporteurs were asked to continue to update the report with the purpose of drafting a text that would encompass the principles of judicial ethics of the inter-American system.

At its 37th regular session, the OAS General Assembly (Panama, June 2007) made no request of the Inter-American Juridical Committee in this area.

During the 71st session of the Inter-American Juridical Committee (Rio de Janeiro, August 2007), the Chairman remarked on the history of this topic within the Committee and on the reports that the rapporteurs had filed on the subject, proposing to the membership a method or procedure to following when addressing this topic in the future.

Dr. Ana Elizabeth Villalta Vizcarra summarized the report she authored and which she had presented at the Committee's previous regular session, document CJI/doc. 238/07 "Principles of Judicial Ethics". That report took into account the documents already adopted on the subject, both at the global and regional levels. Those documents spelled out principles of ethics, but always for judges. Taking a more inclusive perspective, however, Dr. Villalta Vizcarra observed that access to justice encompassed all those instrumental in the realm of justice, including prosecutors, police and defense attorneys. She concluded that the same principles could be adapted to suit each level of the administration of justice, although she observed that some principles applied to only one level, such as the principle of judicial independence, which applied to judges. In conclusion she suggested that if the Committee wanted to explore this topic at greater length, it could develop principles for operators at every level of the justice system.

Dr. Mauricio Herdocia Sacasa also suggested that the topic not be confined to judges, but instead opened up to include all actors involved in the administration of justice. He observed that regional differences should be taken into account, as should the types of situations typically found in Latin America, such as small communities that must find other avenues to access justice. Dr. Herdocia Sacasa recalled the project that the Nicaraguan Supreme Court conducted in rural areas where there were no judges: facilitators were proposed by the community itself, so that those facilitators might collaborate on finding solutions to problems. He indicated that in its future activities the Committee would have to more closely scrutinize the way people live. He suggested

that alternative mechanisms for accessing justice could be explored within the framework of international law, taking account of the problem of communities that have their own justice systems; in other words, a practical approach could be taken to specific phenomena that tie in with international law.

Dr. Freddy Castillo Castellanos, for his part, supported the idea of broadening the concept of judicial ethics, since almost all the more traditional codes narrow the issue of judicial ethics to judges. More modern codes, like Venezuela's, prescribe ethics for the judicial system as a whole – not just judges-, and span the entire gamut of professionals involved in the administration of justice: judges, attorneys, representatives of civil society, and the simplest agents of the justice system. Dr. Castillo suggested that some thought might be given to a model code, i.e., a compilation of core principles that should be part of any code of ethics for the judicial system. He also suggested that the problem of slow-moving and onerous systems as impediments to access to justice might also be addressed. He also opined that the focus of the Juridical Committee's attention should be on suggesting alternatives more than preparing diagnostic studies. Dr. Castillo observed that a mechanism was already in place for settling legal problems related to the exercise of citizenship and democracy. The work of the Committee, therefore, should be geared at reinforcing alternatives, improving the immediate application of rules, ensuring that the justice system reflects society by taking cultural differences into account provided those differences are not at odds with the core principles. In Venezuela, he observed, efforts were being made to include indigenous peoples and take their customs into account when setting the community's problems. In this way, he pointed out, areas that the formal justice system does not reach have access to a justice system run by rules that the members of the community understand and accept.

Dr. Hyacinth Evadne Lindsay seconded the views summarized above and remarked that the issue of judicial ethics and access to justice was of the utmost importance in the countries of the English-speaking Caribbean, which was why she was so interested in serving as co-rapporteuse for this topic. She added that the greater the access to justice the greater the confidence in the judicial system. As examples of the new restorative trends in access to justice, Dr. Lindsay cited night courts, the trend favoring rehabilitation over punishment, small-claims courts that dispense with the presence of a judge, all of which opens up access to justice.

Dr. Ricardo Seitenfus added the *pro bono* legal service offered by the law schools in Brazil to help settle disputes involving family law, social rights, and others. He observed that in some regions of Brazil, it was established a mobile legal service rendered by the so-called "citizenship bus", as the means to afford low-income persons in the more remote cities access to justice.

Dr. Jean-Paul Hubert, for his part, mentioned the creation of small-claims courts. In some cases heard by such courts, neither plaintiff nor respondent had to be represented by an attorney.

Dr. Eduardo Vio Grossi wondered about what type of contribution the Inter-American Juridical Committee could make in that regard, as there were other agencies and institutions within the system that had addressed judicial ethics and access to justice, and that had produced considerable material on the subject. As the mandate of the Inter-American Juridical Committee was in international law, Dr. Vio Grossi's view was that it should focus on those rules of international law that impaired access to justice or were at odds with principles of judicial ethics. He observed that there were many codes of judicial ethics and instruments in various national legal systems and thought that the Committee's contribution might be to analyze whether they had been influenced in any way by principles of international law.

Dr. Jaime Aparicio mentioned the studies done by the World Bank and USAID. Although not studies in law, he observed, some connection to international law could be inferred from them.

Dr. Antonio Fidel Pérez concurred with Dr. Vio Grossi's observations regarding domestic legal practices that might bear the hallmarks of principles of international law. That, he said, would fall within the Juridical Committee's mandate regarding the progressive development of law, as had happened in the case of human rights, protection of foreign investments, and so on. He also stressed how important it was that the Committee should continue to study the topic.

Finally, the Inter-American Juridical Committee decided to instruct the rapporteurs to present a report at the next session concerning the scope of the topic of judicial ethics and access to justice in the context of international law, including alternative forms.

CJI/RES.126 (LXX-O/07)

**ADMINISTRATION OF JUSTICE IN THE AMERICAS:
JUDICIAL ETHICS AND ACCESS TO JUSTICE**

THE INTER-AMERICAN JUDICIAL COMMITTEE,

CONSIDERING that at its 66th regular session (Managua, Nicaragua, from February-March, 2005), the Inter-American Juridical Committee included, among the topics under consideration, the topic of "Principles of Judicial Ethics";

TAKING into account that the OAS General Assembly, at its 35th regular session (Fort Lauderdale, June 2005), through resolution AG/RES. 2069 (XXXV-O/05) "Observations and recommendations on the Annual Report of the Inter-American Juridical Committee", resolved to encourage the initiatives that the Committee may adopt to carry out studies with other organizations of the inter-American system in various aspects concerning the strengthening of the administration of justice and judicial ethics;

RECALLING that at its 69th regular session (Rio de Janeiro, August 2006) Dr. Ana Elizabeth Villalta Vizcarra was appointed rapporteur;

CONSIDERING the report presented by Dr. Ana Elizabeth Villalta Vizcarra, contained in document CJI/doc.238/07, "Principles of judicial ethics", at the 70th regular session of the Inter-American Juridical Committee,

RESOLVES:

1. To welcome report CJI/doc.238/07 presented by Dr. Ana Elizabeth Villalta Vizcarra, rapporteur on the subject.

2. To put emphasis on the close link between judicial ethics and access to justice as paramount topics for the administration of justice in the Americas and the strengthening of the Rule of Law in the Americas.

3. To keep in the agenda of its next regular session the present topic under the title "Administration of justice in the Americas: judicial ethics and access to justice".

4. To designate also Drs. Ricardo Seitenfus and Freddy Castillo Castellanos as co-rapporteurs on the subject.

5. To request the rapporteurs on the subject to continue going deeper into the submitted report with aims at the preparation of a text that collects the principles of judicial ethics in the inter-American system.

The present resolution was adopted unanimously at the session held on March 7, 2007, in the presence of the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco and Jean-Paul Hubert.

CJI/doc.238/07

PRINCIPLES OF JUDICIAL ETHICS

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATES

During its 66th regular session, held in Managua, Nicaragua from February 28th to March 11th, 2005, the Inter-American Juridical Committee approved the inclusion of "Principles of Judicial Ethics" in the topics under consideration, deciding to postpone the selection of its rapporteur for the next regular session.

During its thirty fifth regular session held in Fort Lauderdale, the United States of America, in June 2005, by resolution AG/RES. 2069 (XXXV-O/05), denominated "Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee", the General Assembly of the Organization of American States-OAS, resolved to

encourage initiatives that the Juridical Committee could adopt to carry out studies with other organizations of the Inter-American System, and especially with the Justice Studies Center of the Americas (JSCA), in varied manners tending to strengthen the administration of justice and judicial ethics.

In compliance with the above resolution, during its 67th regular session, held in Rio de Janeiro, Brazil, in August 2005, the Inter-American Juridical Committee received Drs. Juan Enrique Vargas Viancos, Secretary of the Justice Studies Center of the Americas (JSCA), and Rodolfo Vigo, Minister of the Supreme Court of the Santa Fe Providence, Republic of Argentina, Representative of JSCA, with whom there was dialog and exchange of ideas related with the topic, establishing that judicial ethic is one of the means for strengthening the Judicial Powers, and that this subject had been addressed in the Ibero-American Summits of Presidents of Supreme Justice Tribunals and Courts. Thus, in the VI Summit held in Santa Cruz de Tenerife, Canary Islands, Spain, in May 2001, the Statute of the Ibero-American Judge was adopted; in the VII Summit, held in Cancun, Mexico, in November 2002, the Charter of Rights of Persons Before Justice in the Ibero-American Context was adopted, and in the VIII Summit, held in Copan; Honduras, and San Salvador, El Salvador, in June 2004, the Copan-San Salvador Declaration was emitted, constituting one of its subject areas, Judicial Ethics.

In that meeting with the representatives of JSCA, the Inter-American Juridical Committee decided to establish the general principles of law in the matters of judicial ethics for the States, waiting for JSCA to have a more concrete document on the "Principles of judicial ethics" on which it could pronounce itself.

During its 68th regular session, held in Washington, D.C., United States of America, in March 2006, the Inter-American Juridical Committee designated Dr. José Manuel Delgado Ocando as rapporteur of the topic “Principles of judicial ethics”, to present their report during the 69th regular session of the Juridical Committee, in Rio de Janeiro, Brazil, in August 2006.

In view that Dr. José Manuel Delgado Ocando could not be present at the 69th regular session of the Inter-American Juridical Committee, because he resigned his membership to the aforesaid due to health reasons, the Chairman of the Committee proceeded to make a verbal summary of the report that Dr. Delgado Ocando prepared, with the title “Preliminary Notes on Principles of Judicial Ethics” (CJI/doc.221/06), in the work session of August 11, 2006, where this topic was analyzed, presenting the background of the referred, emphasizing the effort involved in the collection of the international instruments on judicial ethics. He explained the rapporteur’s approach to the concepts of ethics and morality, as well as the principles and rules that govern in the topic, and the manner in which the internationally accepted principles of judicial ethics were dealt with. He also explained the results obtained in the VI Ibero-American Summits of Presidents of Supreme Justice Tribunals and Courts, and further explained the rapporteurs analysis regarding the principles of judicial ethics and the Codes in the matter existing in some of the American countries. After, he spoke about Dr. Delgado Ocando’s conclusions, which were in his report, with special emphasis on the analysis of the effect of promulgating the Judicial Codes of Ethics may have or not on the Independence of the Judicial Power.

Once the report was presented, the Chairman gave the opportunity for dialog regarding the topic among the Committee members. When it concluded, it was said that, due to the resignation of Dr. Delgado Ocando, it was necessary to designate a new rapporteur of the topic, and consequently Dr. Ana Elizabeth Villalta Vizcarra was designated as rapporteur of the topic in that meeting.

In compliance with that designation and the aforementioned resolutions, is that the subscribed as the rapporteur of the topic, presents the following report in this 70th regular session of the IAJC:

II. BACKGROUND

a) Principles of judicial ethics

The aforesaid have their main precedents in the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, September 1985, where the Basic Principles relating to Judicial Independence were established and confirmed by the General Assembly of the United Nations in its resolution A/RES/40/32, of November 29, 1985.

Those principles were subsequently taken up by the Judicial Forums and Congresses and included in the Codes of Judicial Ethics adopted by some of the American Countries.

The Code of Ethics of the United States of America is based on the following principles:[1]

- The judges must maintain the integrity and independence of the judicial power.
- The judges must avoid impropriety and the appearance of impropriety in all their activities.
- The judges must carry out the duties of their charge in an impartial and diligent manner.
- The judges can carry out extrajudicial activities to perfect the law, the juridical system and the administration of justice.
- The judges must put the extrajudicial activities in order with the objective of reducing the risk of conflict with their judicial duties to a minimum.
- The judges must submit reports periodically on the compensation received for legal and extrajudicial-related activities; and
- The judges must abstain from political activities.

These Principles from the Seventh United Nations Congress were also confirmed in the 2001 Draft Bangalore Code on judicial conduct, which have been related with Dr. José Manuel Delgado Ocando's report, named "Preliminary Notes on Principles of Judicial Ethics"[2].

In the VI Ibero-American Summits of Presidents of Supreme Justice Tribunals and Courts, held in Santa Cruz de Tenerife, Canary Islands, Spain, in May 2001, where the Statute of the Ibero-American Judge was adopted, and in which it was considered that the judicial power must evolve toward the attainment or consolidation of its independence, not as a privilege for the judges, but as a right of the citizens and guarantee of the proper functioning of the Constitutional and Democratic State of Law that will ensure an accessible, efficient and foreseeable justice, and where these principles are also reintroduced in the Chapter treating "Judicial ethics", in its articles 37 - Service and respect for the Parties; 38 - Obligation of independence; 39 - Due process; 40 - Limitations in determining the truth; 41 - Motivation; 42 - Resolution within a reasonable term; 43 - Principle of Equity; and 44 - Professional Secret, the text of which are:[3]

Art. 37 - Service and respect for the parties

In the context of a constitutional and democratic State of Law, and in the exercise of their jurisdictional function, the judges have to go beyond the field of exercise of the said function, trying to give justice in conditions of efficiency, quality, accessibility and transparency, in respect of the dignity of the person demanding the service.

Art. 38 - Obligation of independence

The judge is obligated to maintain and defend his/her independence in the exercise of the jurisdictional function.

Art. 39 - Due process

Judges must carry out and make carry out the principle of due process, becoming guarantors of the rights of the parties and, in particular, ensuring they are given an equal treatment avoiding any imbalance motivated by the difference of material conditions between them and, in general, any defenceless situation.

Art. 40 - Limitations in determining

Judges shall only use the legitimate means that the system makes available for them in the persecution of the truth of the facts in the cases for which they are competent.

Art. 41 - Motivation

Judges have the inexcusable obligation, in guarantee of the legitimacy of their function and of the rights of the parties, to duly motivate the decision they dictate.

---

1 KENNEDY, Anthony. *La ética judicial y el imperio del derecho.* Justice of the Supreme Court of the United States of America

2 DELGADO OCANDO, José Manuel. *Preliminary notes on principles of judicial ethics*, CJI/doc.221/06.

3 *Statute of the Ibero-American Judge*. VI Ibero-American Summits of Presidents of Supreme Justice Tribunals and Courts. Santa Cruz de Tenerife, Canarias, Spain, May 2001.

Art. 42 – Resolution within a reasonable term

Judges must obtain that the procedures they are in charge of get resolved in a reasonable delay. They shall avoid or, in any case, sanction time-wasting or contrary activities to the good procedural faith of the parties.

Art. 43 - Principle of equity

In the resolution of the conflicts coming to their attention, the judges, without any detriment to the strict respect of the current legislation and having the human background of the said conflicts always present, they shall try to temper with equity criteria the personal, family or social disfavourable consequences.

Art. 44 - Professional secret

Judges have the obligation to keep strict confidence and professional secret in relation to ongoing trials and to the facts or known details in the exercise of their function or in relation with this one.

They shall not consult or assess in cases of present or possible judicial conflicts.

The relevance of the Statute of the Ibero-American Judge is to regulate the fundamental principles of judicial ethics, which are: the independence, impartiality, objectivity, probity, professionalism and excellence in the exercise of judiciary powers.

In the VII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, held in Cancun, Mexico, in November 2002, the Charter of the Right of Persons Before Justice in the Ibero-American Scope, considering that it is a fundamental right of the population to have access to an independent, impartial, responsible, efficient, effective and equitable justice.

This *Charter* ascertains that individuals have the right to a modern justice that is accessible to all, which is transparent, comprehensible, attentive to all, responsible to the citizens, technologically advanced, that protects the weak (victims, indigenous populations, children and adolescents, persons with disabilities).''[4]

b) Code of judicial ethics

In the VIII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts held in Copan, Honduras and in San Salvador, El Salvador in June 2004, where the Copan-San Salvador Declaration was adopted, and the matter of "Judicial Ethics was included in its list of topics, it was reiterated that the fundamental principles that inspire the ethical attitude of the judges are judicial independence, impartiality, objectivity, probity, professionalism and excellence in the exercise of judiciary powers through the cultivation of judicial virtues. In that manner, the VIII Summit reiterated as the Basic Principles of Ethics for all the Ibero-American judges, those which were already established in the II Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, and that has its echo in the Statute of the Ibero-American Judge, and in the Charter of Rights of Persons before Justice in the Ibero-American Judicial Context, and all the necessary efforts must be made for the aforesaid principles to be approved and implemented in the domestic regulations of all the Ibero-American countries, especially in those where a code of ethics still does not exist, thus promoting its creation in the latter.

In the States where these codes exist, it is convenient to review the language of the same, to promote that the regulations that govern ethics for the judges to adapt to the Principle of Independence, and to disseminate the principles of ethics that are established in these Codes into the existing training programs and to promote the preparation of an Ibero-American Model Code of Judicial Ethics.[5]

Those codes are necessary for integrally strengthening the Judicial Power, and indispensable for its proper function as well as for restoring its credibility and legitimacy.

It was in the XIII Latin-American Judicial Summit, held in Santo Domingo, Dominican Republic, in June, 2006, where the Ibero-American Code of Judicial Ethics was approved, which in Part I established the Ibero-American Principles of Judicial Ethics, these being: independence, impartiality, motivation, knowledge and training, justice and equity,

[4] Charter *of rights of persons before justice in the Ibero-American judicial context.* VII Ibero-American Summit of Presidents of Supreme Courts and Supreme Tribunals of Justice, November 2002.

[5] VIII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, San Salvador, El Salvador, 24-25 June 2004.

institutional responsibility, courtesy, integrity, transparency, professional secret, prudence, diligence, and professional honesty. And in Part II of the referred Code, the Ibero-American Commission of Judicial Ethics is established with nine members and one Executive Secretary, elected for a period of four years with possibility of reelection, and these positions are honorary.

This Commission has the functions of: advising the various Ibero-American Judicial Powers and Judiciary Councils, or to the Judicial Summit in the matter of Judicial Ethics; facilitate discussion, dissemination and development of judicial ethics, through publications or the implementation of courses, seminars, accredited courses, and other academic encounters, and the strengthening of Ibero-American law-enforcer's judicial ethical conscience.[6]

Regarding what is relevant to judicial independence in this Code, it is established that:

> The institutions which, within the framework of the State, ensure judicial independence are not designed to place the judge in a privileged position. Their purpose is rather to guarantee citizens the right to be judged with legal parameters, as a means of preventing arbitrariness, realizing constitutional values and safeguarding fundamental rights.
>
> Regarding impartiality, it states:
>
> Art.9th - Judicial impartiality is based in law on the right of those to be judged to receive equal treatment and therefore not to be discriminated against in respect of the implementation of the judicial function.
>
> Art. 10 - An impartial judge is one who pursues objectivity based on the evidence and truth of the facts, maintaining throughout the whole process an equivalent distance from the parties, their lawyers and avoiding any type of conduct which could indicate favouritism, bias or prejudice.

This Commission had its constituent meeting in the city of Buenos Aires, Republic of Argentina, on the first of September 2006, in which the final declaration denominated "Constituent Meeting of the Ibero-American Commission of Judicial Ethics". This meeting was made up by the Permanent Members of the First Ibero-American Commission of Judicial Ethics and by its Executive Secretary.

In that meeting, the referred Commission assumed the challenge of faithfully complying with the obligations assigned them by the Ibero-American Model Code of Judicial Ethics, of disseminating it, enriching it, as well as strengthening the judicial ethical conscience of the law-makers of Ibero-America. Commitment was also made to promote the initiatives and projects approved in that constituent meeting, that were consistent with the creation of an Ibero-American virtual library of Judicial Ethics, the establishment of the Ibero-American Judicial Merit Award, the promotion of a contest of works concerning the Ibero-American Code of Judicial Ethics, and the creation of internet and personal courses on judicial ethics for the training of judges.

That Commission is made up by representatives of: the Federative Republic of Brazil, the Republic of Costa Rica, the Republic of Chile, the Republic of El Salvador, the Kingdom of Spain, The United Mexican States, the Republic of Portugal, the Commonwealth of Puerto Rico, the Republic of Uruguay and, as Executive Secretary, Dr. Rodolfo Luis Vigo, from the Republic of Argentina.

That Commission also wrote the provisional regulations for its operation, that is relative to the quorum, their regular as well as special meetings and their agreements, and procedural regulations.

III. THE PRINCIPLE OF JUDICIAL INDEPENDENCE

By means of this principle, the judges are independent in the exercise of their jurisdictional functions, and are only subordinate to the Constitution and the Law, with strict respect of the principle of regulatory hierarchy, and the other Powers of State in general, all the authorities, national and international institutions and organizations, as well as all the social, economic and political organizations are obligated to respect and implement that Principle.

[6] XIII Ibero-American Judicial Summit, Santo Domingo, Dominican Republic, 21-22 June 2006.

At the same time, the Judicial Power must evolve to the consolidation of its independence, not as a privilege for the judges, but as a right of the citizens and guarantee of the proper functioning of the Constitutional and Democratic State of Law that will ensure an accessible, efficient and foreseeable justice.

Judicial Independence also constitutes a guarantee for those subject to the law of being judged within juridical parameters, and their fundamental rights are safeguarded, due to which justice must be in the hands of judges that have clear technical, professional and ethical suitability, and it is necessary that the have an instrument that regulates their rights, duties, conditions and requirements that must accompany and guide them in the exercise of their sensitive tasks.

Judicial Independence, the effective and impartial administration of justice and the confidence of the citizens in their judicial system contribute to the consolidation of the democratic fundaments of our society. By promoting an independent judiciary, it is guaranteed that the judges will be defenders of constitutionalism and the principle of legality.

The canons for judicial ethics are minimal norms of conduct that must by carefully complied by those who have been entrusted to impart justice, serving as the structure for regulating judicial conduct, giving priority to strengthening judicial independence as a pillar of democratic society, guaranteeing the efficient performance of justice upon stimulating them to be: laborious, impartial, independent, prudent, serene, sensitive, studious and careful in the interpretation of the law.

To guarantee effective autonomy and independence (functional and financial) of the Judicial Power, it is advisable that all the countries to foresee in their Constitutions the allocation of a percentage of the General Budget for the Judicial Power, according to the characteristics of each country, to cover its necessities and thus guaranteeing the economic independence of the Judicial Power.

In article 172, of the Republic of El Salvador 1983 Constitution, the Principle of Judicial Independence is expressly regulated when in its third paragraph it states: “The Magistrates and Judges, in as much as the exercise of their jurisdictional function, are independent and are only subordinate to the Constitution and the laws".[7]

In that same article of the Constitution of El Salvador concerning the judicial organ, and with the objective of guaranteeing the effective autonomy and independence of the same, a percentage of the General Country Budget is allocated to the referred Organ, and thus the final paragraph of article 172 literally states: “The Judicial Organ shall have at its disposal an annual allocation not less than six percent of the Country Current Budget Revenue".[8]

In article 186 of the Constitution of El Salvador, in which the Judicial Career is established, also relates to the Principle of Judicial Independence in the appointment of the Magistrates of the Supreme Court of Justice, as well as to their activities, its textual language being:

> Art. 186. The Judicial Career is established [9]
>
> The Justices of the Supreme Court of Justice shall be elected by the Legislative Assembly for a period of nine years; they may be reelected and shall be replaced every three years by third parts. Justices may be removed from office by the Legislative Assembly for specific causes, previously established by law. As much for the election as for the removal a vote in favor must be taken at least by two-thirds of the elected Representatives.
>
> The election of Justices of the Supreme Court of Justice shall be from a list of candidates, which shall draw up the National Council of the Juridicature in accordance with the terms established by law; half of the candidates shall come from the nominations of the organizations representing the attorneys of El Salvador and where must be represented the most relevant currents judicial thought.

[7] *Constitution of the Republic of El Salvador,* 1983, Chapter III – Judicial Branch, Art. 172.
[8] *Ibid.*
[9] *Ibid.*

> Judges of the Courts of Appeals, Lower Court Judges, and Judges of Peace, who are members of the Judicial Career, shall enjoy stability in their positions.
>
> The law shall have to ensure judges the protection in order to execute their duties freely and impartially with no influence whatsoever in the matters under their consideration; and the means that guarantee them due remuneration and a standard of living adequate to their responsibilities in office.
>
> The law shall regulate the requirements and ways of admission to the Judicial Career, promotions, advancements, transfers, disciplinary sanctions to the officers who are members thereof, and other matters inherent to said career.

According to the Principle of Judicial Independence, the judge must declare that he is not subject to direct or indirect influences from any other power, be it public or private, internal or external to the Judicial Power, due to which the Judge has the right and duty to denounce any intent to disrupt his independence, and is at the same time must be supported by the superior organs of the government or Judicial Power.

The social communications media may attempt against the Principle of Judicial Independence by influencing the content of judicial resolutions, under conditions that exceed the legitimate right to freedom of expression and information.

In that sense, the judicial system as well as the social communications media must be independent and impartial, and govern their actions with acceptable levels of professionalism and ethics, thus contributing to democratic governability.

Because of the above, the norms of judicial ethics that govern the administrators of justice must not only adapt to the Principle of Judicial Independence, but also strengthen it, thus consolidating the democratic society.

At no moment must Judicial Independence impede the access to justice, perceiving the latter as a "fundamental right of every person to access and promote the activity of the organizations in charge of providing the public service of administrating justice with the purpose of obtaining the juridical tutelage for their interests through a speedy, complete and impartial resolution, because it is a fundamental right of the persons to have access to an independent, impartial, responsible, efficient, effective and equitable justice".[10]

This relation of balance between Judicial Independence and access to justice was treated in the VII Ibero-American Summits of Presidents of Supreme Justice Tribunals and Courts, in November 2002, where the Declaration of Cancun was emitted in which the concept of access to justice and the Charter of the Right of Persons Before Justice in the Ibero-American Context were approved.

IV. RECOMMENDATIONS

For the Codes of Judicial Ethics to be truly efficient they must be written by the judiciary itself, with equity and independence in order to confront and solve its own problems, only in that manner, the canons of judicial ethics will not affect the "Principle of Judicial Independence".

In that same sense, it is the judiciary itself that must execute and supervise compliance with the Codes of Judicial Ethics, so they may be efficient and effective.

It is also important that any mechanism that censures and reprimands the judges, be in the hands of the judiciary, and it must exercise sufficiently strong ethics for its correction.

The Judicial Ethics projected to the Judge is a complementary means of law for the purpose of excellence in judicial service, and appeals mainly to the conscience of the Judge to rationally commit him to become better.

A Judicial Power that has a Code of Ethics is more legitimized to demand, from the other professions that are linked to its service, an equivalent response from its members. The Codes of Ethics also constitute a tool in the hands of society, to ethically evaluate the judges to reproach their conduct or to acknowledge their judicial excellence.

Presently in the region, the political authorities in a general context, as well as the judicial authority in particular, are facing a visible legitimacy crisis, requiring that the citizens recuperate their confidence in their institutions. Why does the adoption of a Code of Judicial Ethics imply a message that the same Judicial Powers send to society acknowledging the

[10] *Declaration of Cancún.* VII Ibero-American Summits of Presidents of Supreme Justice Tribunals and Courts, November 2002.

unrest that this crisis provokes, and the effort to assume a strong commitment for excellence in the provision of justice services, as well as facing the ethical responsibility of the members of the Judicial Power.

The XIII Ibero-American Judicial Summit, held in the Dominican Republic, in June 2006, formed by the Judicial Powers and the Ibero-American Juridical Councils, approved and promulgated the Ibero-American Code of Judicial Ethics, that includes the ethical heritage of the Ibero-American identity, and that commits the judges to excellence with the purpose of strengthening the service quality of public justice.

This Code is focused on regulating the "Principles of Ibero-American Judicial Ethics" and the "Ibero-American Commission of Judicial Ethics".

Considering that an Ibero-American code of judicial ethics already exists, and that many States of the American Continent form part of it, it would be convenient to use it as a foundation for the making of a code that regulates the Principles of Judicial Ethics in the inter-American area.

This Code, as well as the Ibero-American Code could regulate the principles of judicial ethics only for the Judges, that is, at the jurisdictional level, and it must be written and promulgated by the judiciary itself, as well as implemented and supervised by the same with the purpose of ensuring and guaranteeing its independence and impartiality.

If it is considered convenient to have a code of Judicial Ethics in the Inter-American System, it would be convenient to have the cooperation of the Justice Studies Center of the Americas (JSCA), during its preparation, due to its direct relation with the Judicial Powers or Organs of the Member States of the Organization of American States (OAS).

A Code of Judicial Ethics of the Americas would strengthen the Judicial Powers or organs of the OAS Member States, if it maintains and there is balance with Judicial Independence, additionally it would contribute toward a Constitutional Democratic State of law in the region.

Now therefore, we could also consider the convenience of preparing a Code of Judicial Ethics, which would not only govern the Judicial Powers, but that would regulate all the other administrators of justice in the judicial system, due to which it would regulate Attorneys, District Attorneys and the rest of the agents involved in the sector of Justice.

The existence of a Code of Judicial Ethics in the region would also contribute to the prevention and fight against corruption, because it would strengthen the probity of the judicial system, making the task of administrating justice more transparent.

In view of the above, if the Inter-American Juridical Committee so decides regarding the “Principles of Judicial Ethics” topic, it would be convenient to prepare a Code of Judicial Ethics for the Inter-American System jointly with the Justice Studies Center of the Americas (JSCA), because of its relation with the Judicial Powers or Organs in the Region, so the latter may contribute directly to the preparation of the same.

Bibliography

Charter of the right of persons before justice in the Ibero-American context. VII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Cancun, Mexico, 27-29, November 2002.

Ibero-American Code of Judicial Ethics. XIII Ibero-American Judicial Summit, Santo Domingo, Dominican Republic, 21-22, June 2006.

DELGADO OCANDO, José Manuel. *Preliminary notes on principles of judicial ethics*, CJI/doc.221/06, May, 23 2006

Statute of the Ibero-American Judge. VI Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Santa Cruz de Tenerife, Canarias, Spain, 23-24, May 2001.

KENNEDY, Anthony. *Judicial ethics and the rule of law*. (Note: Judge of the Supreme Court of the United States of America)

Declaration of Copan-San Salvador. VIII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts. Copán, Honduras, 27 January 2002. Final declaration of the VI Ibero-American Meeting of Juridical Councils, and VIII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts.

Declaration of the Canary Islands. VI Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, May 2001.

Declaration of Cancun. VII Ibero-American Summit of Presidents of Supreme Justice Tribunals and Courts, Cancun, Mexico, November 2002.

Ibero-American Code of Judicial Ethics. XIII Ibero-American Judicial Summit, Santo Domingo, Dominican Republic, 21-22, June 2006

10. Inter-American Court of Justice

	Resolutions
CJI/RES.121 (LXX-O/07)	Some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary
CJI/RES.134 (LXXI-O/07) Annex: CJI/doc.283/07	Inter-American Court of Justice (IACJ) Reasoned vote: Inter-American Court of Justice (presented by Dr. Eduardo Vio Grossi)
	Documents
CJI/doc. 241/07	Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary (presented by Dr. Eduardo Vio Grossi)
CJI/doc. 267/07	Inter-American Court of Justice (IACJ) (presented by Dr. Eduardo Vio Grossi)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Eduardo Vio presented document CJI/doc. 241/07, "Inter-American Court of Justice (IAC): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary". Introducing the document, Dr. Vio pointed out that in other OAS organs, such as the General Assembly and the Permanent Council, the essentially political views of states are expressed. The Juridical Committee, however, enjoys broad technical autonomy and a solid foundation in juridical science, allowing it to adapt to the times and pose new challenges not just for itself but also for the OAS as a whole. This very process has led to his proposal for the creation of an Inter-American Court of Justice.

He recalled that the Inter-American Juridical Committee played an important role over the years in regard to, *inter alia*, human rights, territorial waters and democracy. He pointed out that those topics needed time to mature, and as they did they helped transform the basic rules of the system. He said that the idea of an Inter-American Court of Justice was not a new one; it had been brought up in the V International Conference of the Americas in 1923, and again in the VIII Conference in 1939. The topic was also discussed by the IAJC itself back in 1993, taking up prior work done in 1990 and 1991. At that time a proposal was put forward to establish a criminal law chamber within the Inter-American Court of Human Rights, but the idea did not prosper. The rapporteur indicated that his initial idea was to create a court that would resolve disputes between American states that could not be resolved by other courts, including questions of interpretation of the Charter of the OAS. This function, he stressed, is not the exclusive domain of the political organs. Such a court would have to be equipped with built-in flexibility so as to be able to adapt according to the function assigned it. If it were asked to interpret the Charter, it could operate on the basis of one or two sessions per year. If an interpretation were needed urgently, it could convene a special session. Thus it need not be a permanent court. The same would go for disputes; it would convene in accordance with what the parties agreed or committed to. Dr. Vio went on to mention two alternatives. One would be the creation of a new organ with its own infrastructure, if the member States were to so decide. The other solution, which would avoid augmenting the bureaucracy and costs of the OAS, would be to transform the Juridical Committee into an Inter-American Court of Justice – either temporarily or in an ongoing fashion. It would be temporary when asked by the General Assembly or Permanent Council to interpret the Charter. It would be ongoing if States were to ask the Committee to act as a court to resolve a dispute. In the latter case, the states would finance all costs, as is done with courts of arbitration. Said transformation would give the Inter-American Juridical Committee major international relevance with no additional cost to the OAS, and it would result in better use of existing administrative and technical structures.

Dr. Jean-Paul Hubert mentioned that establishing a court was once considered a revolutionary act and perhaps still would be today. To transform the Inter-American Juridical Committee into a court, and its members into judges, is a revolutionary idea on which all should express an opinion.

Dr. Galo Leoro said that it was an interesting idea but would be very difficult to carry out. He recalled other proposals within the OAS involving questions of jurisdiction that never progressed. He stressed that an Inter-American Court with jurisdiction no broader than that of the Court in The Hague would have no real purpose, if that were indeed the idea. He expressed sympathy with the idea of making the Committee into a Court, but he added that he didn't see it as an effective solution as members would have to possess different qualities than is currently the case, otherwise states would be very reluctant to submit cases in the absence of legal guarantees on decisions. He thought that it would be necessary to first have a draft text defining the scope of the attributes of the Juridical Committee in the future, its new organizational structure and the requirements for members. This would form the basis for further discussion on the possible creation of an Inter-American Court.

Dr. Mauricio Herdocia said that the document introduced a topic long due for in-depth discussion within the Inter-American system – dispute resolution mechanisms and their more frequent and better use - and not simply the possible creation of an Inter-American Court. He recalled that Articles XXI and XXXII of the Pact of Bogotá established recourse (within the Inter-American System) to the International Court of Justice when the parties of a dispute have not agreed to an arbitral procedure. The proposal to grant jurisdictional function to the IAJC implied amending the Charter of the OAS, as well as the dispute resolution mechanisms of the signatory states of the Pact of Bogotá. He expressed agreement with Dr. Leoro's comments on the significance of obligatory jurisdiction of the Court of Justice, which could mean that the jurisdiction of a court in the Inter-American system would not necessarily be accepted. He suggested that before looking for alternatives that could produce jurisdictional discrepancies or fragmentation, more thought was needed on ways to increase the use of the existing Inter-American dispute settlement mechanisms, be they provided for by the Charter or the Pact of Bogotá. He ended by recalling the universal nature of the International Court of Justice.

Dr. Ana Elizabeth Villalta thought it best to take more time for reflection and cited the cases taken before the Court in The Hague in which El Salvador was a party. In those cases, judges with European training were not well versed in certain principles accepted in Latin America. With that in mind, she expressed appreciation for the idea of creating an Inter-American Court. She echoed Dr. Leoro's views on jurisdiction, but expressed concern with the double function that the Juridical Committee would have, which could affect its standing as a main organ of the OAS.

Dr. Freddy Castillo said that the matter raised complex questions of jurisdiction and that he agreed with Dr. Herdocia's statement that an effort should be made to promote the use of existing dispute settlement mechanisms.

Dr. Ricardo Seitenfus posed the question of whether a regional or universal court would provide better results. He pointed out that there are varying perspectives. On the one hand, a regional court would be more familiar with matters coming before it, while a universal court could examine matters with greater distance and be in a better position to rule. He stated that as a member of the Committee, however, his function was not to judge disputes between states, but to act as a consultant. He advised caution to prevent this proposal from being seen as being in the self-interest of the Juridical Committee – namely that it was abrogating for itself powers of jurisdiction which the Charter of the OAS had not granted it. He added that, in his opinion, such a proposal should emanate from the General Assembly, Permanent Council or Secretary General.

Dr. Jorge Palacios Treviño emphasized the importance of strengthening existing dispute settlement mechanisms. He added that in his opinion a body outside of the system was better as a judge operating within the Inter-American system might feel uncomfortable deciding against a country with which s/he maintains good relations.

Dr. Antonio Pérez said that if the Member States think that the International Court of Justice is not the most appropriate instance for solving the problems of the region, it would be better that these States jointly propose amendments to the Statutes of said Court aiming at reserving a room in the Court in which the language used and the judges are representive of the continent.

Dr. Eduardo Vio summed up the debate by pointing out that they were all in agreement that there was a vacuum in the system. He indicated that if on the one hand this was an

extremely difficult theme, on the other he considered that no organ of the OAS other than the Inter-American Juridical Committee could perform that function with scientific and more neutral criteria in order to improve the Inter-American system. He pointed out that the core and procedure themes obviously still had to be discussed. This implied reforming the Charter, which can be a little more difficult. He underlined that although dispute-settlement systems exist, it was important to find a different, innovative solution. In order for the Juridical Committee to study the theme, he did not find it necessary to consult the Member States or the Permanent Council; it sufficed to announce that the theme was on the Committee´s agenda.

Before closing the discussion of the theme, Dr. Ricardo Seitenfus suggested that a sub-topic of this point could include juridical cooperation on Haitian affairs, and to this end he committed himself to present a document on the matter at the next regular session of the Juridical Committee.

Finally, the Inter.-American Juridical Committee approved resolution CJI/RES.121 (LXX-O/07), "Some Considerations on the Challenges of the Inter-American Juridical Committee on the occasion of its Centenary", which designates Drs. Eduardo Vio and Ricardo Seitenfus as rapporteurs of the theme and assigns them to present at the next regular session a report that, in the light of the exchange of opinions that had taken place, would not only complement and develop the content of Dr. Vio´s report, but would also deal with the possibility of cooperating with the efforts of the OAS in jurifical matters with the Republic of Haiti.

At the Inter-American Juridical Committee 71st session (Rio de Janeiro, August 2007) the Chairman of the Committee, Dr. Jean-Paul Hubert recalled how this topic was introduced in the Committee: at Dr. Eduardo Vio Grossi's suggestion, it had been included under the item on the challenges facing the Committee as it celebrated its centennial.

At the same session, Dr. Eduardo Vio Grossi presented a new report, CJI/doc. 267/07, titled "Inter-American Court of Justice (IACJ)", wherein he again made the point that his goal was that the Inter-American Juridical Committee's work should more closely parallel the issues that the Organization as a whole was pursuing. He pointed to the vacuum within the inter-American system: the OAS did not have an inter-American court, whereas the United Nations system had the International Court of Justice. Dr. Vio Grossi was of the view that the Inter-American Juridical Committee should revisit the idea of creating an inter-American court of justice. It would figure in the OAS Charter as an autonomous body whose purpose would be to settle disputes and issue advisory opinions. In the opinion of Dr. Vio Grossi, the Inter-American Juridical Committee could take on the role of a court serving both functions. The Committee's advisory opinions would be its legal interpretation of the questions put to it. Advisory opinions would have greater force than the reports or studies the Committee prepares. Dr. Vio Grossi acknowledged that the issue of the inter-American court's jurisdictional role was more problematic, as evidenced by the reluctance to accept the compulsory jurisdiction of the Inter-American Court of Human Rights or even the terms of the Pact of Bogotá, which refers disputes between American States to the International Court of Justice for adjudication. Dr. Vio Grossi opined that no amendment of the Charter would be needed to establish an inter-American court to perform this function. Instead, the Inter-American Juridical Committee need only be empowered to serve as a court in disputes between member States of the OAS. He also said that the time was right, since legal certainty and juridical security was one of the major concerns in relations between and among the countries of the Americas. Mechanisms, he said, were needed to settle differences. The rapporteur went on to say that this was a function that the Committee ought not to back away from; taking on this role would keep the Committee in step with the times and give it a modern dimension and a practical sense of the hemisphere.

Dr. Galo Leoro Franco thanked the rapporteur for his effort to make the case for establishing a jurisdictional or quasi-jurisdictional body within the inter-American system. Other such attempts in the past had met with no success. He reminded the members of the States' reluctance to accept the compulsory jurisdiction of the International Court of Justice at The Hague, or of the Inter-American Court of Human Rights, or even when the Permanent Council was given the authority to use its good offices to settle disputes. His view was that given the history, this issue did not have the support of the States.

Dr. Jorge Palacios Treviño supported Dr. Eduardo Vio Grossi's proposals for the reasons that the rapporteur had already explained. He agreed with that reasoning, and considered the motion to be very realistic and timely, calculated to fill a void within the inter-American system. In Dr. Palacios' view, the proposal was also an attempt to give the Inter-American Juridical Committee a more relevant role. By extending the authorities given to the Committee under the Charter, the proposal would also obviate the need to create another body to fill the jurisdictional void. Dr. Palacios was also in favor of the OAS having a court of this kind, composed of judges closer to the parties, although he still feared that no country would ultimately turn to the court, as had happened with other international courts. He also suggested that if Dr. Vio Grossi's proposal prospered, some thought should be given to a provision allowing the judges to recuse themselves should a case involve any issues that might affect their impartiality.

Dr. Freddy Castillo Castellanos was also favorably inclined toward Dr. Vio Grossi's proposal, as he believed it would lend added weight to the Juridical Committee's advisory function within a jurisdictional or quasi-jurisdictional framework, and because he felt it would afford something else that he believed to be vitally important, which was a mechanism for settling disputes where, at the parties' request, it would act as an arbitration tribunal.

Dr. Jean-Paul Hubert expressed the view that it was not very likely that the member States would be amenable to the idea of creating an inter-American court, and even less amenable to the idea of making the Juridical Committee an *ad hoc* court. The differing opinions notwithstanding, he suggested that the next step in the project would be to advise the other OAS organs of the proposal that the Juridical Committee had under discussion.

Dr. Mauricio Herdocia Sacasa congratulated Dr. Eduardo Vio Grossi for having introduced this new dimension to the Juridical Committee, with a view to revitalizing and strengthening it. He felt that these were important proposals, first because their purpose was to strengthen the Committee's authority to answer inquiries and also to serve as an arbitration tribunal. He was of the view that the proposal was legally sound, although some additional time would be needed for the proposal to materialize, since it touched upon issues of a political nature. Dr. Herdocia Sacasa remarked that even if the Committee was unable to work in that direction, it should still do something to strengthen its advisory function, even if indirectly. In his view, the avenue to follow for the Juridical Committee to begin receiving inquiries on points of law went through the Secretary General's door.

Dr. Antonio Fidel Pérez shared the opinion expressed by Dr. Jean-Paul Hubert. He was of the view that however relevant the proposal, the OAS Member States were unlikely to be very receptive. He therefore asked Dr. Vio Grossi to draft a page summarizing the proposal, and attaching the reports that the Committee adopts on the subject. Dr. Pérez also believed that it might be good to request the Secretary General's opinion on the matter and find out whether the political mechanisms could be used to carry this idea forward.

Dr. Eduardo Vio Grossi recalled that the first time he raised this topic was on the occasion of the Inter-American Juridical Committee's one hundredth anniversary. He said that however utopian the proposal might seem, its objective was achievable, since the Inter-American Juridical Committee's *raison d'être* was to contribute to the progressive development of law. He observed that while an inter-American court of justice's time may not have come and the difficulties within the inter-American system notwithstanding, this boiled down to a question of using the talent and expertise of the members of the Juridical Committee. He went on to say that the Committee already had advisory authority. As for the matter of adjudicating disputes and serving as an arbitration tribunal, the message to be conveyed to the member States would be that the Committee was available to serve those functions. On the matter of political viability, he said that, indeed, the proposal might not prosper. But he went on to point out that the process would have to be set in motion within the framework of the OAS; in other words, the issue would have to be raised with either the Permanent Council or the General Assembly. He therefore suggested a resolution welcoming the proposal; that resolution would then be transmitted to the political bodies, to apprise them of the fact that the Juridical Committee had this topic under study.

Dr. Hyacinth Evadne Lindsay acknowledged that the proposal had merit. As to the question raised by Dr. Palacios concerning the impartiality of the judges, Dr. Lindsay was of the view that it was not necessarily true that a judge who was a national of a member State could not objectively adjudicate a case in which his or her country was involved. If the proposal moved forward, she believed that a clause should be included to allow a judge to recuse himself or herself, but that recusal should not be mandatory. She observed that this was the practice in the Caribbean Court of Justice; in that case, no clause had ever been adopted requiring judges to recuse themselves if a case was brought in which either party was a country of which they were nationals. The expertise of the judges and observance of the principle of judicial independence, she said, ensured full faith and confidence in the judgments.

Dr. Ana Elizabeth Villalta Vizcarra emphasized how important it was for the hemisphere to have its own court of justice, composed of judges versed in the principles of law current in the Americas. This would avoid expense and be very advantageous to the States. However, in order for the Juridical Committee to set itself up as a judicial body, its Statutes would have to be amended to give it that jurisdiction. Dr. Villalta said that she was not opposed to the idea of the Committee becoming a court, but she was of the view that the draft amended Statute did not fully reflect that proposal.

Dr. Antonio Fidel Pérez pointed out that the problem with the International Court of Justice, in his view, was that some of its procedures were improper and the Court itself had little knowledge of substantive inter-American laws, no insult to the Court intended. One solution to the problem, he believed, would be to explore the possibility of amending the International Court's "Rules of Procedure". However, creating an inter-American court to settle disputes between American States that have already recognized the compulsory jurisdiction of the International Court of Justice, he pointed out, would create another problem: i.e., the possibility of multiple judgments issued by different courts on the same subject, thereby complicating matters and undermining juridical certainty. Given this fact, he emphasized that any decision the Committee would adopt at this session should explicitly state that it was preliminary in nature, since the issues and concepts this topic involves needed to be explored at length; the political bodies should be advised that for now, the Committee regarded the proposal as a possibility, not inevitability.

Dr. Galo Leoro Franco remarked that the OAS already has a judicial body, and it is global in nature. The scope of its jurisdiction notwithstanding, that jurisdiction is only compulsory if the States Parties recognize it as such through an express declaration that is legally binding. Dr. Galo Leoro Franco went on to observe that the Juridical Committee did not have the authority to expand its own jurisdiction; were that the case, any organ could endow itself with that kind of jurisdiction. He pointed out that were the Juridical Committee to send this proposal to the Permanent Council and, through it, to the General Assembly, it could be said that the Juridical Committee was endowing itself with greater authority than the OAS Charter had vested in it.

Based on these discussions, the Inter-American Juridical Committee approved resolution CJI/RES.134 (LXXI-O/07), "Inter-American Court of Justice (IACJ)*",* wherein it takes note of the report prepared by Dr. Eduardo Vio Grossi and decides to continue to study this topic, taking into account the reasoning developed in the documents already presented. If he deemed it advisable, the rapporteur for the topic was also asked to present another report prior to December 31, 2007, without prejudice to any other reports that the co-rapporteurs might choose to present. Dr. Eduardo Vio Grossi submitted an explanation of his vote on this resolution.

CJI/RES.121 (LXX-O/07)

SOME COMMENTS ON THE CHALLENGES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON OCCASION OF ITS CENTENARY

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING the contents of document CJI/doc. 231/06 of August 17, 2006, titled "Some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary", presented by Dr. Eduardo Vio Grossi;

TAKING INTO ACCOUNT that in its 69th regular session, the Juridical Committee requested Dr. Vio to submit in the present sessions an additional document establishing specific guidelines for the Committee to continue considering the topic;

CONSIDERING that, in compliance with the referred mandate, Dr. Vio presented document CJI/doc. 241/07 of February 14, 2007, titled "Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary";

HAVING PRESENT the exchange of opinions that took place at the present regular session, and

IN VIEW OF the willingness expressed by Dr. Ricardo Seitenfus to collaborate as co-rapporteur in the development of this topic,

RESOLVES:

1. To thank Dr. Eduardo Vio Grossi for the presentation of document CJI/doc.241/07, of February 14, 2007, titled "Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary".

2. To appoint Drs. Eduardo Vio Grossi and Ricardo Seitenfus as rapporteurs of the topic "Some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary".

3. To entrust the rapporteurs with the presentation at the next regular session of a report that, in the light of the exchange of opinions on the subject that took place during the current regular session, not only complement and develop what has been outlined in the referred document CJI/doc. 241/07, but also refers to the possibility of cooperating with the Organization of American States efforts in juridical matters with the Republic of Haiti.

The present resolution was adopted unanimously at the session held on March 2nd, 2007, in the presence of the following members: Drs. Eduardo Vío Grossi, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, Jean Paul Hubert and Antonio Fidel Pérez.

CJI/doc.241/07

INTER-AMERICAN COURT OF JUSTICE (IACJ): SOME COMMENTS ON THE CHALLENGES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON OCCASION OF ITS CENTENARY

(presented by Dr. Eduardo Vio Grossi)

INTRODUCTION

Document CJI/doc.231/06 of August 17, 2006, called **SOME COMMENTS ON THE CHALLENGES OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON OCCASION OF ITS CENTENARY**, indicates as a matter of conclusion that

> In short, we suggest that the Inter-American Juridical Committee, on the occasion of its centennial commemorations, should do its utmost, based on how it was conceived in relation to the OAS, to draw up a creative and daring chart on how it should act in the near future.
>
> And that in
>
> And this intent should consider, on one hand, the unique nature and role of the Inter-American Juridical Committee to permit it to do work that no other organ in the Inter-American System can do and, on the other, that this challenge implies at the same time a conditioning factor, namely, that the Inter-American Juridical Committee should not behave as diplomatic or administrative organs, doing what they can or acting in the same way as they do.

In this sense, in the text that I refer to, it is suggested that the Inter-American Juridical Committee (IAJC) should act, in fact, as the main organ of the Organization of American States (OAS), which is already contemplated in the Charter of the Organization, and therefore, linked to its specific tasks; as a consultative body, that is, without binding power

but with great scientific and even moral authority; and as autonomous body, that is, independent and not integrated by representatives of the Member States but by international agents elected by the General Assembly of the entity, and therefore, solely and exclusively representing the group of Member States.

And within the proposals, which were outlined so that the IAJC assume its particular functions in this way and at the present time, reference was made to the possibility of creating an Inter-American Court of Justice (IACJ). In this regard, it was pointed out that

> … it is probably now time to study whether to propose the establishment of an **Inter-American Court of Justice**, available to the former to settle their economic and political disputes, which could not be taken before other jurisdictions.

Certainly, this is not a new idea in the Inter-American System or in the works of the IAJC. But now that the OAS Secretary General has reintroduced the matter, it may seem that the climate is favorable to raise a suggestion that is different from the previous and existing ones.

I. INTER-AMERICAN SYSTEM BACKGROUND

1. In the 14th Session of the V International American Conference held on May 3, 1923, the following resolution was adopted, **CONSIDERATION OF THE BEST MEANS TO GIVE WIDER APPLICATION TO THE PRINCIPLE OF THE JUDICIAL OR ARBITRAL SETTLEMENT OF DISPUTES THAT MAY ARISE BETWEEN THE REPUBLICS OF THE AMERICAN CONTINENT**, included under No. 58 of the Final Minute:

> The Fifth International Conference of American States,
>
> 1. Is gratified to note the progress attained in recent years by conciliation, judicial settlement and arbitration, as means to settling conflicts between the nations of the Continent, principles will always be greater, and that their application in the near future may be as general and ample as possible.
>
> In connection with the previous resolution, the Argentine Delegation stipulates the following reservation:
>
> "The Argentine Delegation, during the debate on this topic clearly indicated that the aspirations of its country were that the Conference might have recommended the adoption of the principle of ample arbitration, such as exists in the treaties subscribed with Uruguay, Chile, Brazil, Paraguay, Bolivia and other countries".
>
> 2. Expresses the hope that the nations may adopt the system of Conferences such as those of Washington 1922, and the Committees of Investigation for all matters of fact, before proceeding to an armed conflict, as a means of establishing the nature of their controversies, to avoid the influence of monetary passions, to verify facts, and to bring to the controversy the light of international opinion, all of which may induce the parties to submit their cases to arbitration when contemplated.
>
> 3. Resolves to forward to the Congress of Jurists which is to meet at Rio de Janeiro in 1925, for the Codification of International Law, the proposal presented by the Delegation of Costa Rica, regarding the creation of a Permanent Court of American Justice, as well as all other proposals that the various American Governments may formulate in this respect.

2. On its part, the Eight International American Conference held on December 22, 1938, adopted the **DECLARATION ON THE INTER-AMERICAN COURT OF INTERNATIONAL JUSTICE**, as follows:

> WHEREAS:
>
> The establishment of an Inter-American Court of International Justice is closely linked with the problems of peace in America, because justice is one of the elements that insures the free exercise of rights and serves to maintain a feeling of continental harmony between the American States, based on the predominance of juridical standards;
>
> Due to the universal character of the principles of law and the natural desire that a tribunal of justice should settle, in accordance with the various juridical systems of the American continent, the difficulties that may arise, the establishment of this judicial organization meets with sympathetic consideration

on the part of nearly all the States of this Hemisphere, notwithstanding that the majority of these States continue to be Members of the Permanent Court of International Justice at The Hague, which has a more extensive jurisdiction; and

If at present is not possible to realize the establishment of this institution to administer justice in America the idea and the purpose of creating it when those conditions imperatively demand its establishment should not be abandoned, but on the contrary the American States should reaffirm their intention and determination to achieve this end, by keeping in mind their unanimous aspiration of creating an Inter-American Court of International Justice, in which all the States of the Continent and all its juridical systems shall be represented.

The Eighth International Conference of American States,

DECLARES:

That is the firm purpose of the States of the American Continent to establish an Inter-American Court of International Justice, whenever these States may recognize the possibility of doing so with complete assurance of success; and that in the meantime the study of an adequate statute on which the international justice in America may rest, should be encouraged.

II. INTER-AMERICAN JURIDICAL COMMITTEE BACKGROUND

Resolution CJI/RES.II-21/93 of August 25, 1993, called **RESOLUTION ON THE MATTER OF THE CREATION OF AN INTER-AMERICAN CRIMINAL COURT**, provides the Inter-American Juridical Committee background:

THE INTER-AMERICAN JURIDICAL COMMITEE,

HAVING SEEN that in its regular session of August 1990, it incorporated in its agenda the matter relative to the "Creation of an Inter-American Criminal Court" (CJI/SO/II/doc.11/90);

BEARING IN MIND, that the co-rapporteurs of the matter, doctors Jorge Reinaldo A. Vanossi and Manuel A. Vieira, submitted in the regular session of August 1991 a "Draft Declaration of the Inter-American Juridical Committee on the creation of an Inter-American Court of Justice to include a Criminal Branch" (CJI/SO/II/doc.2/91);

TAKING into account that in its regular session of August 1992, the Committee extensively examined this matter, and as a result of this study, adopted a resolution by which it decided to consult with the governments of the Member States of the Organization with regard to the convenience and opportunity of establishing in the American region an Inter-American Court of Justice or a Criminal Branch within the Inter-American Court of Human Rights (CJI/RES.II-26/92);

HAVING thoroughly examined the content of the opinions of the governments of the three Member States, who so far have responded to the consultation formulated by the Committee;

IN VIEW of the progress made by the study of the various aspects comprised by this matter within the context of the Organization of the United Nations;

HAVING analyzed this matter in its regular session of August 1993, particularly in the light of the convenience and opportunity to continue the study in consideration to the development that the matter has shown within the context of the United Nations as well as by virtue of the scarce number of responses of the governments of the OAS Member States and the consultation made by the Committee through resolution CJI/RES.II-26/92,

RESOLVES:

1. To withdraw from its work Agenda the matter relative to the "Creation of an Inter-American Criminal Court".

2. To express its willingness to reintroduce the study on this matter in case it receives a sufficient number of positive response from the governments of the Member States to the consultation made by this Organ, which would allow the adoption of a declaration based on the orientations and criteria expressed by the Member States in this regard."

III. SUGGESTION OF THE SECRETARY GENERAL

The Juridical Matters section of the 2005-2006 Annual Report of the OAS Secretary General (Official Records - OEA/Ser.D/III.56-English) states that:

> One institution that was proposed but never materialized was an Inter-American Court of Justice. The first draft resolution dates from 1923 (Fifth International Conference of American States), when the creation of a Permanent Court of American Justice was proposed; the second harks back to the Eighth International Conference of American States in 1938. The latter resolution says quite forthrightly, something not always common: "If at present it is not possible to realize the establishment of this institution to administer justice in America the idea and the purpose of creating it when those conditions imperatively demand its establishment should not be abandoned," and in conclusion declares that, "It is the firm purpose of the States of the American Continent to establish an Inter-American Court of International Justice, whenever these States may recognize the possibility of doing so with complete assurance of successes…" (resolution XXV, adopted on December 22, 1938).
>
> It was at that time that the International Court of Justice of The Hague, the successor to the Permanent Court, was established. The states of the Hemisphere then comprised almost 50 percent of the United Nations and therefore carried considerable weight in the new Court. A new request made at the Tenth Conference, in 1954, did not bear fruit. Now the situation has changed completely: the states of the Americas have much less heft on the International Court and might perhaps be able once again to consider the possibility of a establishing a regional court as a suitable complement to the present inter-American system. We may be nearing the "opportunity" envisaged in 1938, which is well worth examining in our specialized bodies.

IV. PROPOSAL FOR THE ESTABLISHMENT OF A IACJ

With the aforesaid backgrounds, which have been literally transcribed and are self-explanatory, the possibility of establishing a IACJ[1] could be explored again, particularly taking into consideration the existence of other jurisdictional instances. With these in mind, it is legitimate to indicate that it can be concluded that there is no jurisdictional authority fulfilling the function that would be assigned to such Court.

1. Current Hemispheric Juridical Authorities

A. In fact, while it is true that the Permanent Arbitration Court (PAC) in The Hague exists, it is not less accurate that it is not a permanent court but a list of prospective arbitrators, a procedure and a secretariat in case that the States involved in a controversy decide to resort to the arbitration for which this Court was established. But, it should be recalled that not all the States of the Inter-American System are members of this Court[2].

B. Something similar but not exactly the same occurs with the **International Court of Justice**. Not only not all the States of the Inter-American System have accepted its jurisdiction[3], but also not all of them have ratified the American Treaty on Pacific Settlement or Pact of Bogotá[4] which submits to this Court with regard to judicial proceedings for matters concerning juridical controversies.[5] It should be kept in mind that the aforesaid Treaty is subscribed by virtue of the provisions contained in article 27 of the OAS Charter.[6]

C. Even more specific is that the **International Criminal Court or Tribunal**, of which not all the States of the Inter-American System are part of[7] and its jurisdiction is limited to the field of certain crimes.

D. Within the scope of the Inter-American System, the **Inter-American Court of Human Rights** presents a peculiar situation. Only twenty-four States of the Inter-American

---

1 We will call it like this to make a distinct differentiation from the International Court of Justice (IACJ/IACJ/IACJ) in The Hague.
2 Twenty-four States of the Inter-American System are part of the CPA.
3 Fourteen American States have formulated the declaration recognizing the mandatory jurisdiction of the Court.
4 At present, only thirteen American States are part of the Pact of Bogotá.
5 Article XXXI.
6 "A special treaty will establish adequate means for the settlement of disputes and will determine pertinent procedures for each peaceful means such that no dispute between American States may remain without definitive settlement within a reasonable period of time."
7 Only 22 States of the Inter-American System are part of the Rome Statute of the International Criminal Court.

System are part of the American Convention on Human Rights or Pact of San José, Costa Rica, which creates it; twenty-one have recognized its jurisdiction, and several by doing so, formulated reserves or interpretations. Additionally, the Inter-American Court of Human Rights, based on the provisions established in Chapter XVIII of the OAS Charter, is only considered a specialized organization; in other words, an organization that notwithstanding its "specific functions with respect to technical matters of common interest to the American States", that has been created by a treaty, does not appear in it, and therefore, is not an organization of the hemispheric entity. On the other hand, and obviously, its jurisdiction is limited to matters concerning human rights.

E. And maybe this is not the time to refer to the **subregional courts** (Central American Court of Justice, Court of Justice of the Andean Community of Nations, Permanent Court of Mercosur Review) or to the bilaterally established or planned **arbitration courts**, since as it is natural, they have a special limited scope, and in some cases even with regard to the matter.

In **summary**, to the systematic argument consisting in that it would not be timely to propose a new jurisdictional authority since it would probably not be accepted by all the Member States on the grounds that jurisdictional authorities at an inter-American level or with incidence on the inter-American environment already exist; and on the other hand, provisions of the OAS Charter relevant to the settlement of controversies and a special treaty on that[8], we can add the undeniable fact that as of now there is no court with comprehensive jurisdiction that is effectively at the disposal of all the OAS Member States, without exception, and which is also closely related to it.

2. Basis for a proposal

With the above in mind, it could be said that the eventual constitution of a IACJ could be based on the following, which would be complemented by others to be further agreed during the gradual preparation by the IAJC of a final proposal on the matter:

A. Being a main organ of the OAS. What is important so far is that it be included in the OAS Charter, that is, that it be a main organ, not a specialized or a subsidiary organ created by another main body, under Article XXXII of the Charter.

With all this, the IACJ would be granted the relevance it deserves to carry out its functions in an autonomous or independent way as well as in a binding manner. Therefore, such Court should be created through a treaty that modifies the OAS Charter in order that it contemplates it.

B. Functions

a. Interpretation of the OAS Charter. Based on the above, the competence of the IACJ should be the interpretation of the OAS Charter[9] at the request of the General Assembly or Permanent Council of the OAS. With this, great progress would be made in the consolidation and improvement of the Inter-American System by establishing an independent authority to determine the sense and scope of an obscure or doubtful rule of such Framework Text.

Certainly, it would not affect at all the authority of the Member States to interpret such framework text either directly or through authentic interpretation. However, for the first case it would be necessary to do so expressly through a convention specifically adopted to that effect; while in the second case, it would be the IACJ who would determine whether there have been acts of the Member States or organs of the Organization that demand authentic interpretation.

Hence the principle of juridical certainty or security would be guaranteed in the Inter-American System and the OAS would be provided with a tool that has been extensively explained in the internal or national legal regulation, which undoubtedly would be of great assistance to its development and would place the entity a step ahead of the international organizations.[10]

[8] See the two preceding notes.

[9] The authority to interpret would be limited to the OAS Charter and would not comprise other agreements or texts of the Inter-American System, so that, at least for now, such jurisdictions would be more likely to be accepted by the OAS Member States. In this sense, the IACJ, as part of a coordinating organization such as the OAS, would not have the faculties that, for example, the Central American Court of Justice or the Court of Justice of the Andean Community of Nations have as organs of an integration or supranational organization.

[10] Something similar but not exactly the same occurs with the Central American Court of Justice which has jurisdiction to hear

b. Settlement of controversies. Obviously, the IACJ would also be charged with the settlement of controversies among OAS States, freely agreed to by them through express consent, prior to or after a conflict has arisen.

Given the existence of the International Criminal Court or Tribunal, the jurisdiction of the IACJ would not deal with criminal matters.

c. Flexible structure. In this sense, the IACJ would not have a rigid structure, that is, it would adjust to the functions that would be assigned.

a. Thus, for exercise the **competence to interpret** OAS Charter, it would function as several OAS organs and linked organizations[11], it could be said, in at least two **regular periods of sessions** with a duration of two or three weeks each.

b. But for the exercise of the **legal competence,** it would meet as the **parties** to the conflict **would stipulate** in the respective Agreement that they may subscribe.

c. Likewise, for the exercise of the **competence** relating to the **interpretation** of the Charter, the IACJ **would meet in full court**, while for the exercise of the **legal competence** it could do so in open court or in full court, as the parties to the agreement may agree.

d. With regard to the procedure relating to the exercise of the legal competence, it could be what the parties in controversy may have agreed in the Agreement that they subscribe to that effect or the agreement established for the IACJ.

a. Non-increase in bureaucracy or costs. On the other hand, given the financial situation of the OAS, it seems advisable to establish a jurisdictional system that would not significantly increase the financial burden of the Member States.

b. For the same reason, and unless it is deemed convenient to create such **jurisdictional authority** along with the current OAS structure, it is probably convenient **to establish it on the basis of something that already exists**. From this viewpoint is that document IAJC/doc.231/06, of August 17, 2006, expressed that

also, it is foreseeable that the Inter-American Juridical Committee itself fully or partially becomes, when required, an Inter-American Court of Justice.

i. In effect, the situation in which for the exercise of the **competence to interpret** the OAS Charter, the **IAJC** transitorily becomes and consequently meets, **in full court, as the IACJ,** could be visualized.

ii. It could also be considered that in the exercise of the **legal competence,** it transitorily becomes and **meets**, **in full court or in open court,** as the **parties** in controversy may **agree,** as the IACJ.

iii. And with regard to **funding**, the operation of the IACJ concerning its authority to **interpret** the OAS Charter will be funded by the **OAS regular budget,** while in the exercise of its **legal competence** it would be funded by the **parties in controversy.**

In the referred hypothesis, that is, that in specific cases the IAJC will transitorily become the IACJ, it would continue existing, and therefore, exercising its other faculties, that is, be the consultative body of the Organizations in juridical matters and promote the development of International Law.[12]

c. Likewise, the possibility, for all effects, that the **IAJC** be clearly and simply **permanently replaced by the IACJ** or that **the latter be created without making the other disappear,** could also be considered.

CONCLUSION

Based on the preceding summary, we propose, therefore, that the IAJC itself gradually builds, based on partial and progressive agreements, an alternative for the establishment of a jurisdictional authority of the OAS.

□□□

nullity or noncompliance actions regarding agreements of the organizations of the System.

[11] Such as the Inter-American Commission of Human Rights, Inter-American Court of Human Rights and the Inter-American Juridical Committee.

[12] Maybe, to exercise competences as IACJ, the most stringent ineligibilities or incompatibilities for IAJC members should be established to ensure independence from the governments of its national States.

In this sense, what we suggest is not to consult *a priori* to the OAS Members State on the convenience and/or opportunity of creating a IACJ but to keep them informed through permanent reports to the Permanent Council and the General Assembly on the works and agreements reached in this regard, without doubt opened to the observations that such organs may have or formulate in each opportunity that they may deem convenient.

Only by doing so, the IAJC is going to be able to fulfill its role as it was conceived, that is, as a main autonomous organ, sustained in its scientific and moral authority, not conformed by representatives of the States, and therefore, only and exclusively responding to the common interest of the group of the OAS Members State.

Only by doing so, the IAJC will submit proposals that, in addition to intending to be realistic, that is, that may be acceptable to the OAS Members State, are innovative, modern and even daring, and that maybe no other Organization can formulate.

CJI/doc.267/07

INTER-AMERICAN COURT OF JUSTICE (IACJ)

(presented by Dr. Eduardo Vio Grossi)

INTRODUCTION

In the document CJI/doc.241/07, entitled "Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary", it is suggested to make that jurisdictional instance the framework of the inter-American system.

The following text refers to that document and proceeds to formulate a more specific suggestion, bearing in mind the comments made by the members of the IAJC at the 70th regular session held in March 2007, as stated in document OEA/Sec.Gral. ODI/doc.05/07.

I. BACKGROUND

This is obviously not a new idea. As early as the 14th Session of the 5th American International Conference held on 3 May 1923, the resolution "Consideration of the best means to give wider application of the principle of judicial or arbitral settlement of disputes that may arise between the Republics of the American Continent", in which it was decided to "forward to the Congress of Jurists which is to meet at Rio de Janeiro in 1925, for the Codification of International Law, the proposal presented by the Delegation of Costa Rica regarding the creation of a Permanent Court of American Justice, as well as all others proposals that the various American Governments may formulate in this respect".

Later on, at the Eighth International Conference of American States held on 22 December 1938, approval was given to the "Declaration on the Inter-American Court of International Justice", which states the convenience of setting up a continental jurisdictional instance, asserting that "it is the firm purpose of the States of the American Continent to establish an Inter-American Court of International Justice, whenever the States may recognize the possibility of doing so with complete assurance of successes and that it should proceed to study a suitable statute on which to base international justice in the Americas".

Bearing in mind such antecedents, the IAJC adopted on 25 August 1993 the resolution CJI/RES.II-21/03 entitled "Resolution on the matter of the creation of an Inter-American Criminal Court", in which, after referring to the study of a project on the matter presented by two of the members only to confirm the prevailing scant interest of the Member States of the OAS in the issue, it was decided to remove it from the agenda, but nonetheless manifesting its willingness to continue to study it in the future, provided the project had more opportune responses from the Member States to the requirements formulated on the matter.

And when the new opportunity appeared, referred to by both the 5th American International Conference of 1938 and the IAJC in 1993, it is mentioned by the current Secretary General of the OAS, José Miguel Insulza, who, in the Legal Matters section of the Annual Report 2005-2006, after recalling the above precedents, affirms that the Member States of the OAS "might perhaps be able once again to consider the possibility of establishing a regional court as suitable complement to the present inter-American system", and that probably "We may be nearing the 'opportunity' envisaged in 1938, which is well worth examining in our specialized bodies."

II. NEW ATTEMPT

Based on all the antecedents mentioned above, the undersigned suggested to the IAJC the suitability of undertaking the task of examining afresh the possibility of setting up an Inter-American Court of Justice, considering the existence of other jurisdictional instances available to the Member States of the OAS but which have been unable to fulfill the function assigned to the Juridical Committee.

Indeed, the Member States of the OAS could now appeal to the Permanent Court of Arbitration at The Hague or the International Court of Justice to settle its disputes. However, while only twenty-four of the thirty-five States in the Inter-American System belong to the former, only fourteen have recognized the obligatory jurisdiction of the latter. Furthermore, although the American Treaty of Pacific Settlement (Pact of Bogotá) refers to the International Court of Justice, only thirteen American States have ratified it. Consequently, neither of the two jurisdictional instances is presently available to the body of States in the Inter-American System.

In more specific spheres, the American States also have available the Court or International Criminal Court and the Inter-American Court of Human Rights. But, just as before, only twenty-two of these States are Parties of the Statute of Rome as regards the former, twenty-four belong to the American Convention on Human Rights (Pact of San José de Costa Rica) which establishes the latter, twenty-one have recognized its jurisdiction and several, by doing so, expressed reservations or interpretations. One would have to add to all this that in any case the jurisdiction of both courts is restricted, the former to criminal situations and the latter to matters concerning human rights.

Moreover, one might add the sub-regional courts (Central-American Court of Justice, Court of Justice of the Andean Community of Nations, the Mercosur Permanent Court of Appeals) and bilaterally constituted or proposed arbitration courts, which nevertheless have a limited scope, not only spatial but in some cases even with regard to the questions discussed.

And as a general observation, emphasis could also be given to the fact that, unlike what happens in the Charter of the Organization of the United Nations, in the Charter of the OAS there is no reference to any court as being a main organ of the Organization.

In synthesis, and in the opinion of the proponent, against the argument that it would be inopportune to propose a new jurisdictional instance, seeing that it is unlikely that it would be accepted by all the Member States of the OAS because on the one hand jurisdictional instances already exist on the inter-American level or within the inter-American sphere, while on the other hand the Charter of the OAS contains dispute-settlement provisions and even a special treaty in this respect (Pact of Bogotá), against this argument one could present the unquestionable fact that nowadays there is no court with extensive competence effectively available to all the Member States of the OAS without distinction and with a close relationship with the Organization.

III. BASES TO CONSIDER IN THE EVENTUAL CREATION OF AN IACJ

The suggestion formulated before the Inter-American Juridical Committee indicated that the eventual creation of an IACJ should be based on the following principles, which can undoubtedly be improved and complemented by others that arise during the process of gradual preparation of a definitive proposal on the matter.

First of all, the IACJ should be conceived as a principal body of the OAS, which means that for the time being it should be provided for in the actual Charter of the OAS, that is to say, that it should be a principal organ, not a specialized nor a subsidiary entity created by another principal organ. This would give it the relevance that it deserves to discharge its functions autonomously or independently and according to mandate. Such a court should be contemplated in the Charter of the OAS in this sense.

Secondly, it would be possible and desirable for the IACJ to have explicitly recognized competence to interpret the actual Charter of the OAS, obviously at the request of the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs or the Permanent Council of the Organization. Of course, this function should be part of the OAS´s coordinating organization, in order not to parallel the functions of, for example, the Central-American Court of Justice or the Court of Justice of the Andean Community of Nations, which belong to or are part of integration or supra-national organizations.

By recognizing the preferential capacity of the IACJ to interpret the Basic Text of the OAS, a new, transcendental and modern step would be taken towards consolidating and

improving the inter-American system, because from that point onward it would be an independent instance, similar to what exists in the States as regards their respective constitutions, to determine the sense and scope of an obscure or dubious norm of the above-mentioned constitutive treaty.

However, in the case of the OAS, it is certainly more realistic to attribute to the IACJ this interpreting function as part of its consultative competence, which to some extent is at present exercised by the Inter-American Juridical Committee, that is to say, as a competence that does not generate binding or obligatory resolutions for the OAS, let alone for its Member States.

Well, granting the IACJ this competence would certainly not have the least effect on the competence of the Member States of the Organization to also interpret this basic text either directly or by authentic interpretation, that is, to act the same as all the others with regard to the application of any particular norm. In other words, if the interpretative competence of the Charter of the OAS is granted to the Inter-American Juridical Committee, the States could also interpret it, but whereas in such an eventuality they should do so by means of a convention specifically adopted to this end, on the other hand it should rather be up to the IACJ to determine whether the Member States or the bodies of the Organization have practiced or not acts that imply authentic interpretations.

It is absolutely essential to underscore that if the IACJ can interpret the Charter of the OAS, consequently it can determine the sense and scope of the norms of the Charter that refer to the obligation of the Member States to settle their disputes peacefully. In this way, the dispute-settlement means provided for in this constitutive text would be allowed such application that the States themselves probably do not allow directly.

With regard to the latter, in the third place it should be stated the IACJ should certainly have the competence to know and judge disputes among States of the OAS freely agreed upon through express consent prior to or after the appearance of the dispute in question.

With regard to this point, it should be stated that establishing the obligatory jurisdiction of the IACJ for such cases would certainly be ideal, seeing that in this way it would constitute an enormous advance as far as improving the Inter-American System, and the dispute-settlement mechanism in particular, are concerned.

Nonetheless, if, on the contrary, this obligatory jurisdiction is not accepted, the only circumstance for providing the IACJ in the Charter of the OAS available to all the Member States would bear consequences similar to what happened with the International Court of Justice as a body of the Organization of the United Nations, which also lacks obligatory jurisdiction but which nevertheless has actually become the jurisdictional instance *par excellence* in the universal system.

Fourthly, the IACJ should be conceived as an instance of sufficiently flexible structure so that it can adapt to each case where its intervention is required. In this sense, perhaps three alternatives should be considered for constituting the court. One, to set up the IACJ as a new instance within the OAS together with those already in place. Two, to contemplate permanently transforming the Inter-American Juridical Committee into an IACJ. And three, to assign temporarily to the Inter-American Juridical Committee the functions of the IACJ in cases where it is required.

IV. REALISTIC SUGGESTION: THE INTER-AMERICAN JURIDICAL COMMITTEE ACTING AS AN INTER-AMERICAN COURT OF JUSTICE

Based on the above, and in particular bearing in mind the difficulties that would be presented to establish the IACJ by means of changes to the Charter of the OAS, as well as the comments made by some members of the IAJC contained in the document OEA/Sec.Gral. ODI/doc.05/07, the last alternative outlined, albeit not the most perfect and/or complete, would at least appear to be the most feasible, since it only involves changing the Statute of the Inter-American Juridical Committee on the part of the General Assembly of the OAS without any consequent need to alter the Charter of the latter.

Thus, it would suffice to make the following changes to the normative text[*] in order to enable the Inter-American Juridical Committee to act temporarily as an IACJ:

[*] In italics and bold type. The text between parentheses should be suppressed.

A. Functions

Article 3:

The purpose of the Committee is 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.

The Committee will be enabled to act as Inter-American Court of Justice in emitting the Consultative Opinions required concerning interpretation of the Charter of the Organization and in settling the disputes submitted to it.

The inter-American Court of Justice will act in accordance with a procedure established in the Regulations approved by the General Assembly on the Committee's proposal. In the case of disputes submitted to the Court, the Parties involved will be enabled to determine, in the Commitment that they undersign, the applicable law, the procedure and other pertinent matters.

Additional comment: The competence to emit consultative opinions is already contemplated in the current juridical system. So, what is being discussed is granting this competence express recognition and special solemnity in the eventuality that it is exercised in respect to interpretation of the *Charter of the Organization of the American States*. In this way, the aim would in the final analysis be to strengthen the latter with the basic juridical text of the Inter-American System.

As regards competence of acting as a Court in dispute-settlement, what would be introduced to the *Statutes of the Committee* is the possibility, not prohibited by International Law but rather encouraged by it, of acting as arbiter.

B. Members

Article 6:

A Member State may propose nationals of other Member States on its panel of three candidates. The candidates shall be of high moral character,(possess the scientific knowledge and the experience required for the best performance of their duties), ***have the requisites to exercise the highest judicial functions of the postulating State, be entirely independent from all Government of a Member State*** *and be able to devote themselves exclusively to the work of the Committee during its meetings.*

The Committee member who is a citizen of one of the States Parties of the dispute submitted to his knowledge as the Inter-American Court of Justice will abstain from intervening in it*.*

Additional comment: In the event that the Committee has the power to act as the Inter-American Court of Justice, it is certainly evident that its members should have the normal status of judges. It would also seem reasonable that in the case of there being one or more members who are citizens of the States Parties involved in the dispute under question, these should abstain. For practical reasons, namely the high number of members and financing, the institution of *ad hoc* judges should not be considered.

C. Capacity to act

Article 12:

The Inter-American Juridical Committee has the following principal functions and powers:

a) To provide advice on juridical matters requested of it by other organs of the Organization; ***in particular the Consultative Opinions required by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs or the Permanent Council, and to dictate the awards in disputes among Member States of the Organization that are submitted by them***;

Additional comment: The possibility of obtaining a consultative opinion is limited to the three main bodies of the Organization; in the case of disputes, these can only be

submitted to the Inter-American Court of Justice by the Member States of the OAS that are involved in them.

D. Organizational aspects

Article 17:

When the Inter-American Juridical Committee decides to hold a meeting away from its seat, to hold a special meeting, to extend a regular meeting, or to engage in any other activity involving expenditures, it shall request the Secretary General of the Organization to take the necessary measures to provide the corresponding funds, in accordance with the financial and budgetary regulations in force. ***In the case of holding sessions to know and decide on a dispute submitted to it, the pertinent costs will be financed by funds provided by the Parties involved in same****.*

Article 22:

The Committee may invite the organs and agencies of the Organization, world or regional international institutions, and the national entities referred to in article 12 e) of these Statutes to be represented in its discussions by observers. The observers may take the floor when the Chairman invites them to do so.

The expenses occasioned by the participation of observers shall be paid by the observers themselves or by the entities they represent.

Article 23:

The Committee may invite specialists in a certain subject to take part in its discussions on that subject. In the event that such an invitation involves expenditures, it shall make the corresponding request for funds to the General Secretariat.

Article 24:

The Inter-American Juridical Committee may, during its sessions, hold joint meetings with bar associations and other associations of lawyers, groups of law professors, or authors or entities that specialize in the study of international juridical problems.

The purpose of these joint meetings will be:

a) To study topics on the agenda of the Committee;

b) To strengthen cooperative relations between the Committee and the natural or juridical persons referred to above; and

c) To afford these professional persons an opportunity to become familiar with the activities of the Committee and to cooperate with it.

If the joint meetings involve any expense, the Committee shall request the funds from the General Secretariat.

The provisions of this article and the two preceding ones will not apply to cases in which the Committee acts as the Inter-American Court of Justice.

Article 29:

When the Inter-American Juridical Committee considers it necessary to utilize the services of specialists who are to be paid by the Organization, it shall make the corresponding request to the General Secretariat. ***In cases where it acts as the Inter-American Court of Justice in settling disputes, it will act in accordance with the budget financed by the Parties involved.***

Additional comment: With regard to the changes to the articles pointed out above, these would conform to the situation if the Inter-American Court of Justice were in reality a Court of Arbitration.

Article 30:

The General Secretariat shall publish the ***Consultative Opinions****, studies, reports, drafts, and resolutions of the Committee in the four official languages of the Organization.*

It shall likewise give due publicity to the activities of the Committee among law faculties and schools, bar associations and other associations and federations of lawyers, communications media, international agencies and other

institutions, and professors and other interested persons, unless an authoritative request to restrict such information is received.

Article 33:

*The **Consultative Opinions, Awards** and reports prepared by the Committee in response to inquiries or that contain studies or preparatory works assigned by the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs, and also those prepared on its own initiative and intended for either of those organs, shall be presented to the General Secretariat for appropriate action.*

The works, studies, opinions, or drafts prepared by the Committee in accordance with the plans it prepares for the progressive development and the codification of international law, for studying the legal problems related to the integration of the developing countries of the hemisphere, and for the possibility of attaining uniformity in or harmonizing legislation of the American States, shall be circulated in accordance with the procedures established in those plans.

Article 34:

*The expenditures for the functioning of the Committee shall be included in the program-budget of the Organization, **including those financed by the Parties in a dispute submitted to it.***

CONCLUSIONS

The proposal outlined herein as an alternative to be perfected will comply with the requirements pointed out before the constitution of an Inter-American Court of Justice, while at the same time being a realistic suggestion.

The objective would consequently be to generate a process of enhancing the juridical structure of the Inter-American system, especially through a juridically established possibility that a currently existing and valid instance can assume, in practice and according to the will that the Member States of the OAS demonstrate, the functions of an Inter-American Court of Justice. And this, moreover, at the least possible political, juridical or financial cost for the Organization.

The suggestion, then, is for some mechanism to show its utility in practice; only if there is manifest need to advance to a higher level should a change to the *Charter of the OAS* be considered.

The relevance of the proposal in question is that, among other considerations, it is based on the fact that at the moment it is not suitable to close *a priori* the possibility of having such an Inter-American Court of Justice available.

The challenge for an organ such as the Inter-American Juridical Committee is not only to propose setting up such a Court whenever the will of the Member States of the OAS decides in its favor, but consists rather in persevering to foster, incentivize, facilitate or permit this will to take form by contributing probable juridical alternatives.

To sum up, the ideas sketched out herein are based on the fact that the main challenge for the Inter-American System in the sphere of Law is to offer sufficient juridical security. To this end, constituting an Inter-American Court of Justice obviously plays a key role.

This undertaking should not be renounced, however difficult or utopian it may appear. To perform tasks such as the one indicated, which might be more complex for other organs in the system, the inter-American body has precisely been conceived as a consultative branch of the Organization in juridical matters, endowed with sufficient technical autonomy and comprised of people with moral and scientific authority who represent, not their respective national States, but all the Member States of the OAS.

CJI/RES.134 (LXXI-O/07)

INTER-AMERICAN COURT OF JUSTICE (IACJ)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that in the document CJI/doc.231/06 dated August 17, 2006, entitled "Some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary", presented by Dr. Eduardo Vio Grossi, one of these challenges mentioned was the possibility of creating an Inter-American Court of Justice (IACJ);

SEEING that in the report CJI/doc.241/07, dated March 1, 2007, entitled "Inter-American Court of Justice (IACJ): some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary", drafted by Dr. Vio Grossi in compliance with the mandate generated during the 69th regular session, guidelines are presented on the proposed creation of the IACJ;

BEARING IN MIND that, in compliance with resolution CJI/RES.121 (LXX-O/07), dated March 2, 2007, Dr. Vio submitted for consideration of the Inter-American Juridical Committee the study CJI/doc.267/07 dated July 25, 2007, entitled "Inter-American Court of Justice (IACJ)";

RECALLING that the aforementioned documents make reference to earlier background of the Inter-American System concerning the eventual creation of the IACJ, especially the decision at the 5th International American Conference in 1923, at the 8th International Conference of American States in 1938, and the resolution of the Inter-American Juridical Committee dated August 25, 1993, entitled "Creation of an Inter-American Court in Criminal Matters";

HIGHLIGHTING, moreover, that the last two aforementioned reports reproduce the statement made in the section on Legal Matters of the Annual Report of 2005–2006 of the Secretary General of the Organization of American States, with a that "... perhaps (OAS Member States) might again consider the possibility of establishing a regional court as a suitable complement to the present Inter-American system" and that probably we are "... nearing the opportunity envisaged in 1938, which is well worth examining in our specialized bodies", and

HAVING SEEN the provision in articles 99 and 100 of the OAS Charter and in letter c) of article 12 of its Statutes,

RESOLVES;

1. To closely examine with interest the report CJI/doc.267/07, dated July 25, 2007, presented by Dr. Eduardo Vio Grossi, entitled "Inter-American Court of Justice (IACJ)".

2. To continue studying this topic, particularly in the next regular session, bearing in mind the contents of the aforementioned documents.

3. To request the rapporteur on this topic, Dr. Eduardo Vio Grossi, should he consider it necessary, and without detriment to possible presentations by the remaining co-rapporteurs on the topic, to submit a new report before December 31, 2007, date at which his term as member of the Inter-American Juridical Committee concludes.

This resolution was adopted unanimously at the session held on August 9, 2007, by the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Galo Leoro Franco, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra. Dr. Eduardo Vío Grossi presented a reasoned vote in favour of this resolution.

Annex: CJI/doc.283/07 – Reasoned vote. Inter-American Court of Justice
(presented by Dr. Eduardo Vio Grossi)

CJI/doc.283/07

REASONED VOTE

INTER-AMERICAN COURT OF JUSTICE

(presented by Dr. Eduardo Vio Grossi)

I vote in favor of the resolution on the "Inter-American Court of Justice (IACJ)" CJI/RES.134 (LXXI-O/07), on the understanding that it would be convenient for the Inter-American Juridical Committee (IAJC) to continue analyzing the topic, should be considering at least at this stage he following methodological guidelines:

1. The purpose of analysis should be to determine the feasibility of the formal acceptance of the capacity of the Juridical Committee to act temporarily as the Inter-American Court of Justice, with contentious or non-contentious or advisory jurisdiction, and without this title dispensing or privileging one another;
2. The non-contentious or advisory jurisdiction of the Inter-American Juridical Committee acting temporarily as Inter-American Court of Justice should be based on its status as an advisory body of the OAS on legal matters, pursuant to article 99 of that same Charter;
3. The contentious jurisdiction of the Inter-American Juridical Committee (IAJC) acting temporarily as Inter-American Court of Justice (IACJ) will be solely and exclusively based on the faculty acknowledged by International Law of the Member States of the Organization and parties to a dispute between them, to submit it for their information and resolution as an arbitration court;
4. Establishing the Inter-American Juridical Committee as a temporary Inter-American Court of Justice should not mean derogation or impairment of any of the current existing jurisdictional capacities at the disposal of the OAS Member States;
5. Nor should this alternative imply modifying the Charter of the Organization of American States (OAS) or constituting a new organ within it; and
6. In view of the above, the study would proceed in particular on each specific proposal to amend the Inter-American Juridical Committee Statutes in the aforementioned report CJI/doc.267/07, "Inter-American Court of Justice (IACJ)", in the light of the discussion during the present regular session and observations and comments that the Member States may make at their convenience.

11. Juridical-institutional cooperation with the Republic of Haiti

Resolution

CJI/RES.133 (LXXI-O/07) Juridical-institutional cooperation with the Republic of Haiti

Document

CJI/doc.275/07 Keeping the peace and the lessons learned of Haiti: collapse or rebuilding of the State?
(presented by Dr. Ricardo Seitenfus)

At the Inter-American Juridical Committee's 71st session (Rio de Janeiro, August 2007), the Committee's Chairman, Dr. Jean-Paul Hubert, recalled that at the request of the rapporteur for this topic, Dr. Ricardo Seitenfus, this matter was first introduced as a subtopic of a broader topic titled "Thoughts on the challenges of the Inter-American Juridical Committee". The Chairman invited the rapporteur to explain his report titled "Keeping the Peace and the Lessons Learned of Haiti: Collapse or Rebuilding of the State?", document CJI/doc.275/07.

Dr. Seitenfus pointed out that the OAS has played an important role in Haiti since 1986. The OAS' hope was that after a history marked by violence, Haiti might finally become a democratic State of laws.

He said that, although preliminary in nature, his report was intended to provide a more balanced vision of Haiti's extraordinary history, given its very negative image and the fact that it was so unfamiliar to almost everyone in the hemisphere. He recalled that in the 1960s and 1970s, the vast majority of the Latin American countries were living under some kind of state of emergency (martial law, state of siege, and so on); ultimately, however, the people of Latin America agreed to a social compact based on democratic governance. The Haitian case is important because the people want to participate, want to elect their representatives and want to be masters of their own destiny. The rapporteur concluded that inter-American society had an enormous responsibility *vis-à-vis* Haiti.

The rapporteur singled out one specific area in which the Inter-American Juridical Committee might play a role in this matter, which is to closely monitor the rebuilding of the Haitian State, its judicial system, and its prison system. These are all profound problems that need to be addressed with great care. One course of action might be for the Committee to agree to a request from Haiti to provide advisory services. In this regard, the rapporteur reported that he would be visiting Haiti as a member of a project being carried out. He asked whether he might represent himself as a member of the Juridical Committee. Finally, for all these reasons he asked that the topic be kept on the agenda.

Dr. Jean-Paul Hubert proposed that this be a separate item on the Juridical Committee's agenda, given its importance and the opportunity it gives the Committee to have some involvement in the process of rebuilding the institutions of democratic government in Haiti.

The members supported the idea of keeping this idea on the agenda and gave its approval for Dr. Seitenfus to visit Haiti as a representative of the Inter-American Juridical Committee. It approved resolution CJI/RES.133 (LXXI-O/07), "Juridical-Institutional Cooperation with the Republic of Haiti", and instructed the rapporteurs for the topic, Drs. Ricardo Seitenfus and Freddy Castillo Castellanos, to prepare a report on Haiti's requests and needs, from the standpoint of their authority to undertake a juridical-institutional cooperation program. It asked the rapporteurs to make all the appropriate overtures to the Haitian authorities and other public institutions and civil society organizations.

CJI/RES.133 (LXXI-O/07)

JURIDICAL-INSTITUTIONAL COOPERATION WITH THE REPUBLIC OF HAITI

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND that the topic on juridical cooperation with the Republic of Haiti was included in the working agenda of the Inter-American Juridical Committee in its 70th regular session (March 2007);

HAVING received the report from Dr. Ricardo Seitenfus, (CJI/doc.275/07), entitled "Keeping the peace and the lessons of Haiti: collapse or rebuilding of the State?", highlighting the importance of involving the Inter-American Juridical Committee in juridical-institutional cooperation with an OAS Member State currently undergoing hardships that require cooperation and solidarity from all other countries in the Americas.

RESOLVES:

1. To urge the rapporteurs of the topic, Drs. Ricardo Seitenfus and Freddy Castillo Castellanos, to write a report on the requirements and needs of Haiti, from the viewpoint of its authorities to initiate a program on juridical-institutional cooperation program.

2. In light of the foregoing, request the rapporteurs to undertake all relevant procedures with the Haitian authorities and other public bodies or organizations of civil society.

The resolution herein was unanimously approved in the session held on August 9, 2007, in the presence of the following members: Drs. Jean-Paul Hubert, Hyacinth Evadne Lindsay, Eduardo Vio Grossi, Galo Leoro Franco, Ricardo Seitenfus, Freddy Castillo Castellanos, Jorge Palacios Treviño, Antonio Fidel Pérez, Mauricio Herdocia Sacasa, Jaime Aparicio and Ana Elizabeth Villalta Vizcarra.

CJI/doc.275/07

KEEPING THE PEACE AND THE LESSONS OF HAITI: COLLAPSE OR REBUILDING OF THE STATE?

(presented by Dr. Ricardo Seitenfus)

Regarding the confused tangle of Haitian politics – resulting from rupture and not a pact – only absolute power can be imposed.

Ricardo Seitenfus

INTRODUCTION

This presentation is as follows. I will first approach rarely studied aspects of the characteristics resulting from the flight and exercise of political power in Haiti. As we will see this is a complex society *sui generis* that has by no means ordinary challenges. Analytical grades conceived by political sciences are not very effective when applied to the reality of the Haiti's past experience. This situation partly explains the difficulties (and failures) encountered by international mediations.

In the second chapter, I will discuss the participation of the international community and particularly Latin America in the attempt to solve the present crisis. Lastly, in conclusion, I will attempt to show that the Haitian situation must be placed in a broader context because of the huge difficulties of a variety of systems encountered by the group of Less Developed Countries (LDC).

1. POLITICAL FOUNDATIONS OF THE CURRENT HAITIAN CRISIS

The situation of political crisis is a constant in Haitian history. This is one of its intrinsic characteristics that were only mitigated when a dictatorship was instated. Since the early days of independence the struggle for power adopted specific features in what once was the *Pearl of the Antilles*.

There is no democratic tradition in Haiti. However, its first Constitution, decreed by President Alexandre Pétion in 1816, stipulated that the country's governors would be voted by all citizens, "except women, criminals, idiots and people in a servile condition". The list of requirements implied discarding 97% of the population so that the choice of the governors was monopolized by the elite and military.

The principle of majority government was never applied, and the governors gained power by plotting, *coups d'état*, assassinations, military uprisings, rebellions and revolutions. And they were deposed by means of the same procedures.

The first presidential election was in 1957.[1] The universal vote was introduced granting this right to all Haitians over 21 years old. However, fraud was widespread: the use

[1] This is the election of François Duvalier, who stayed in power until 1971 when he transferred it to his son Jean-Claude. The

of washable ink to identify who had already voted; purchase of votes; setting up electoral blockades; and the omnipresence of the Armed Forces. The latter's consent took François Duvalier to victory, imposing – this is a unique fact – the peasants' wishes on the so far invincible Port-au-Prince.

The recent fall of Aristide, which originated the current crisis, must be included in long-term Haitian political history and not just in the years after Jean-Claude Duvalier. This is the recurring failure of implanting democracy. In other words, instability has continuously dominated Haitian politics, as shown in the following table:

Steps in the History of Haiti

01/01/1804	Independence of the French colony of Saint-Dominguez renamed Haiti[2] under the leadership of Dessalines.
1805	Dessalines proclaims himself Emperor.
1806	Assassination of Dessalines.
1806-1820	The country is divided between a Northern (black) and Southern (mulatto) government.
1820-1842	Unification of Haiti. On the pretext of help for independence of the Eastern part, Haiti occupies the entire island of Hispaniola.
1843-1915	Tyrannies, revolutions and disorder with 22 dictators one after the other during the period.
1915-1934	With US occupation, Haiti becomes a protectorate of Washington.
1934	F. D. Roosevelt's so-called Good Neighbor policy leads to withdrawal of US troops.
1934-1941	Vincent's dictatorship. Overthrown by a coup d'état.
1937	Operation "Perejil". Massacre of more than 20,000 Haitians by Dominican dictator Trujillo.
1941-1946	Lescot's dictatorship. Overthrown by a coup d'état.
1946-1950	Estime's dictatorship. Overthrown by a coup d'état.
1950-1957	Magloire's administration. Overthrown by a coup d'état.
1957-l971	Election and dictatorship of François Duvalier.
1971-1986	Dictatorship of Jean-Claude Duvalier (hereditary).

Haiti therefore took a long time before its first electoral experience, and the country's political instability since 1986 must be considered standard since its independence. Its contrary, that is, political stability, could be achieved with a dictatorial regime since, given the confused tangle of Haitian politics – resulting from rupture and not a pact – only absolute power can be imposed.

The recent Latin American political transitions transferring power from the military to the civil to result in abandoning the dictatorial system and to implement representative democracy, adopted models, suffered tensions - that in certain cases caused armed disputes – and different rates. However all of them had a common denominator: an agreement for governability was signed stipulating respect for the rules of the democratic game and conducive to political coexistence.

The Haitian transition had no other similar development. To the contrary. The defeats traditionally tend to question the legitimacy of the elections and the winner misused his power in an attempt to subjugate the opposition. The idea of "crisis" has an unusual dimension in the case of Haiti. Resorting to authoritarianism and the use of force appear to be habitual mechanisms for settling disputes. The fight for power and keeping it implies the elimination of the adversary, even physically. Moreover, violent public practices, such as *Père Lebrun* or *tire torture*, are also given as an example.

□□□

latter, in turn, carried on the work of his late father until 1986 when the period of implementing democracy began and continues to date.

[2] Haiti means "country of the mountains" in the Arawak language (Indian inhabitants of the island in 1492).

It is not conceivable to accept the differences and coexistence between contradictory viewpoints. The solution of the crisis requires the practice of power so that this logic is the core of the actual crisis to be settled, once again, by exercising power.

When crises are settled by the use of power and not by conciliation of interests, the system suffers permanent political instability. However, this is a political *system* and its instability is now part of the system itself and becomes its basic standard. Namely, in Haiti the political crisis is part of the *modus vivendi*.

Moreover, the historic phenomenon of foreign interventions must not be forgotten – legal unilateral or multilateral or not – supported in many cases on wielding power. The recurrence of such interventions causes them to become an integral part, or at least in this role, of the global dispute settlement system.

Like any system, the Haitian tends to modulate and adapt the projects seeking to change or transform it. One of the outstanding features of this system model is the fact that any player, including international players, focus on only one direction of settlement linked to the idea of eliminating, preventing, forbidding, blocking and destroying the past elements considered negative, instead of exploring, analyzing, incorporating, creating, planning and building common meanings and directions for the group of political players.

It seems that the system keeps its general balance in response to the basic interests of the key-players, who hold the power, both in and outside the country. These key-players have become accommodated to the situation and *function* in this permanently unstable context by finding ways and means to safeguard their interests.

In Haiti, the State either practically does not exist or is extremely fragile. The organization of civil society is poor. Yet the country has a deep consciousness of its history, a living and original culture, a strong identity that easily leads to nationalism. A huge mass of people submitted to basic human needs and who are subjugated by the search for answers to the basic requirements. They are fatalists when they analyze the past and forecast the future.

The interventions designed to transform the general system to settle social disputes must take into consideration the complexity and sophistication of the system. Although there are no polarities permitting identification of a determining antagonism, there is a wide diversity of the lines of conflict: rich/poor; countryside/town; black/mulatto; Catholic/voodoo; theology of liberation/traditional church; political parties/civil society; employers/workers; conservative/progressist; right/left; warriors/pacifists; for/against *colonizers*.

Haiti is a space where players have poor consistence and survive against all odds. This situation explains the fact that the protagonists allude to history and the matters still to be resolved. They somehow look in the past for a meaning for the future.

The past conditions the present, it determines it and does not permit a political forecast of the future[3]. From this situation, it is essential to understand the past from the present, taking into consideration current needs, in order to maintain a shared language that can make social dialogue possible.

One of the basic problems lies in identifying who plays the role of energy and what promises are contained in its possible elimination. This identification does not exist and therefore there is no focal point to be faced.

What does exist is only an imaginary space in opposition to the present situation and its reproduction that is expressed in force-ideas, such as injustice and subordination. Former president Aristide tried to occupy this space in its symbolic dimension (he would use the slogan “our identity will free us”), although nothing was actually achieved.[4]

Aspiring to democracy, in terms of the classic Latin American rhetoric about poverty and justice, is accompanied by another claim just as or even more rhetorical, on electoral citizenship and institutions. The absence of discourse is conspicuous among the main players in terms of the Haitian elite, which would bind the topics of democracy and security to the economic and social topics. These are the poor cousins of the predominant discourse

[3] Most political and social players tend to rewrite history. It expresses the perception that the current crisis is rooted in the fight for independence and assassination of Dessalines in the early 19th century. In other words, there is some confusion between the historian’s duties (responsible for the obligations of memory) and the political and social player (responsible for rebuilding the nation).

[4] In Haiti 76% of the population (6,200,000 of people) live below the poverty line and 56% (4,450,000 of people) live below the misery line. The Latin American average living below the poverty line is 42.2%.

in Haiti. The central focus of politics leads to restricting the country's dilemmas to rights or wrongs between the main players of the national politics. The outstanding example of this situation is the difficulty of dialogue and national reconciliation, recommended by the political players as a merely rhetorical game.

There is no shared analysis of the nature of the crisis and its causes beyond rhetoric. There are few efforts to find a common view that would sustain a joint action. The absence of a truly functional State (institutions, rules of the game, public force and apparatus, transparency and control) occupies a smaller place in national debates.

To create a space where different wishes, aspirations and interests meet – very often not expressed – the central idea is of trust. Trust between political players, the powers of the State, civil society and between national and international players is a basis for governability and indicates the possibility of preparing a national project, so far impossible in Haiti.

To contribute to the pursuit of solutions for the recurring, intricate and complex Haitian crisis, Latin America, for the first time in its history, participates collectively in an operation of short term political stabilization and is ready to technically and economically help Haiti in the mid and long term. This is what I call "diplomacy with solidarity".

2. MEDIATION OF LATIN AMERICA: EXERCISING DIPLOMACY WITH SOLIDARITY

Two major challenges mark current international relations. On one hand, the indispensable reinforcement of the multilateral system that must be reformed in order to make it more *legitimate*, thereby reflecting the characteristics of today's international reality, very different to those facing the editors of the "United Nations Charter" in 1945. On the other hand, it is necessary that the dispute settlement system – which is still a political-diplomatic construction and therefore juridical – can be as *effective* as possible. This requirement is as important for the southern nations of the planet inasmuch as the bellicose disputes in the world in post-1945 especially penalized developing countries – scenarios of the worst atrocities committed for many internal and international reasons.

The frustrated mediating efforts to settle such disputes are explained by the structure of international power: developed countries, which logically have means to dissuade and intervene, do so from perceptions of their presumed national interests, resulting in casuistic solutions applied ad hoc that erratically took the roads to double standards. So, the Great Lakes dispute was treated differently to the Kosovo dispute. This is, of course, not forgetting a clear detailed perception on the particularities of each dispute. What is being discussed here is, in fact, in the viewpoint of the developed countries, therefore, with the means to intervene, certain disputes are very important and others considered totally secondary and unimportant.

To attempt to break the cycle marked by indifference and/or ineffectiveness of the solutions suggested for disputes afflicting the developing countries, it is essential to rethink their own dispute mediation and settlement mechanisms. In other words, in order to give them a level of capacity of intervention in disputes affecting them, it is necessary for them to show that they are able to prepare a new ideological and operational matrix to provide an alternative to the current system of dispute settlement.

2.1. Impasse between unilateralism and multilateralism

The concept of *solidarity* can be understood in historic terms. Interference and diplomacy with solidarity are forms that express something more general than actual solidarity. A basis can therefore be taken from the discussion on the concept of solidarity that provides support for the principle.

In 1648 the "Peace of Westphalia"[5] gave rise to what is called *Westphalian sovereignty*, formal, non-material equality between States. This equality is legal, not de facto, and it is the birth certificate of the modern Public International Law. This concept was historically used to shape and consolidate the national States.

As soon as the land was divided between States self-appointed as sovereign beings, the central question of international relations revolved around the identification of juridical-political mechanisms that would permit, if not the cooperative coexistence between the States, at least the existence of a certain degree of tolerance in their reciprocal relations. Namely, both the current scenario of international relations and the political philosophy and

[5] The text of the "Westphalian Treaty" is in SEITENFUS, Ricardo. (Org.). *Legislação Internacional*. São Paulo: Manole, 2004. p. 1914-17.

International Law are dominated by the unending impasse between the unilateralism of the State's wishes, marked by the war between everyone, and multilateralism – creating rules and regulations that promote dialogue and peace and can offer the international system predictability.

During the period extending to the first quarter of last century, the registered trademark of international relations was characterized by unilateralism. The creation of rules, such as, for example, those originating in the rights of the treaties, was restricted to the content and scope that did not question the prevalence of unilateralism. Of course, boundaries were demarcated, alliances concluded and international organizations outlined. However, the former could – and were constantly – being contested; the second aimed to dominate common enemies, since they contained secret clauses of a military nature, and the third were mere spaces for state supplementary action through incipient parliamentarian diplomacy.[6]

In 1928, when the Kellogg-Briand Pact was signed, some States recognized the illegality of the war of conquest and considered it against the fundamentals of International Law and principles regulating international relations. For the first time a legal document appeared – open to the adhesion of the other States – foreseeing behavioral rules and, consequently, establishing restrictions in advance against the external role of the States. However, it was when the United Nations was created in 1945 that multilateralism began its path leading to supplanting the deep-rooted unilateral power of the States.

The Cold War, which dominated international relations in the years after the Second World War and extending to the end of the 1980s, prevents the fair understanding of the importance of the UN Charter to place an agreement for the unilateral wishes of the States in their external role. The predominant role of the UN Security Council (SC) of keeping the peace, plus the universalization of the United Nations, makes multilateralism able to overcome the unilateralism that so far marked international relations.

It is not necessary to stress, of course, that the conditions in which the UN was created and consequent power of the SC give a restricted number of States – the *Pentagon* with right to a permanent representation on the Council – a superior and transcendent role, inasmuch as a collective decision may never be taken, if there is no individual and collective agreement. Despite this original sin, a new international system arises – certainly imperfect – that removes from the horizon the risks of a total war.[7] The SC is responsible for keeping international peace and security. It may also act preventively. It was granted the option to evaluate the convenience of military intervention sustained solely on its perception of the existence of a dispute or mere *threat* to peace.

The bipolarity caused two major consequences. On one hand it paralyzed the dispute settlement system. In fact, more than two hundred wars in the past fifty years have caused approximately a hundred million victims, among dead, wounded and refugees.

On the other hand, for the first time in the history of humankind, there was a concentration of bellicose disputes in the southern part of the planet, while in the North relative stability was being achieved. The developed world was protected from the destructions of war for many reasons: although fragile, as the Missile Crisis in Cuba showed, there is an effective protection against the risk of a nuclear hecatomb achieved thanks to the balanced system through terror: the integration and economically interdependent processes that tend to give international economic relations supremacy over those of a political and strategic nature; the fact that all States with a permanent seat on the SC are situated in the northern hemisphere; the major powers are satisfied with restricted competition – principles of peaceful coexistence – transferring their impasses whose physical location is on the edge of the system such as, for example, the decolonization process.

The end of the Cold War permitted resurgence of the dispute settlement system created in 1945. An optimistic view could lead to believing that the system could function

□□

[6] Except for the European Union and World Trade Organization, the intergovernmental character is still the registered trademark of the International Organizations. Cf. SEITENFUS, Ricardo. *Manual das organizações internacionais*. 4. ed. Porto Alegre: Livraria do Advogado, 2005.

[7] The SC currently is strongly and rightly criticized by most specialists. The recent proposed reform of the United Nations presented by Kofi Annan is a reflection of the will to change the system. However, the decision-making model adopted in 1945 must be inserted in the context of immediate post-war and be especially perceived as a kind of mutual insurance that the winners of the war sign with each other. This system succeeded in preventing that a permanent member State benefit from the SC permission to directly oppose, through weapons, another permanent member State.

although it was out of step with the current reality of power. Now, even the apparent success of the intervention during the second Gulf War in 1991 immediately demonstrated its limitations with the rise of the national interests of the intervening States, especially the USA and UK.

The deterioration of the Iraqi crisis reached its peak with the terrorist attacks of September 11, 2001, in the USA. Two resulting basic consequences deeply affected the current dispute settlement system: the first consists of affirming the link between intervention and national interest; the second is the degradation of the multilateral system when Washington adopted the theory of preventive and unilateral intervention.

The briefly summarized situation shows how important it is for the southern countries to build a supportive intervention theory, should they otherwise continue at the mercy of the model adopted by the developing countries. This is why the Haitian crisis is significant beyond its boundaries and can act as a model for future mediations.

2.2 Self-determination *versus* intervention

In the decline of the colonial period, the principle of the *self-determination of the peoples* consists of reinterpreting and update of the principle of sovereignty from the viewpoint of who is not yet sovereign, that is, the colonized. The peoples, then, raise the banner of self-determination and after decolonization, proceed to search fro their self-realization. This policy creates a new concept – that of *non-intervention* – that becomes the respect for the principle of formal equality, namely, *de jure* equality. At the multilateral level this principle is protected especially in discussions and recommendations of the General Assembly of the United Nations.

Until 1945 war is fair or unfair. Since then, it is lawful or unlawful. There is a radical change in perspective. Since 1945 there is the consolidation of the principle of cooperation – which already existed since it was prior to the UN – but after this it becomes a basis for multilateralism of the United Nations. However, this cooperation was successful only until 1948. After this the Cold War arrived, at a time when the SC was latent, which was unable to take major decisions due to the bipolarity.

Since the end of colonization, the former colony is protected by the principle of non-intervention. However, there is the reality of intervention, especially in the case of intervention promoted by the ex-metropolis. Here it is important to distinguish the historic from the dogmatic sovereignty.

In short, there is a reality of intervention, which is expressed by various types, which permits drawing up a typology of intervention, where interference with solidarity is included. This is not the contrary of the principle of non-intervention, but is an exception to it and, dialectically, consolidates it when it states its boundaries when asked about which sovereignty must be protected: that of the people or the dictator?

Cooperation is a new paradigm because of the importance that it assumes in the post-war years. First, cooperation existed until 1948. After that, until 1989 there is only an intra-bloc cooperation, which precisely for that reason is not cooperation but rather *alignment* (defensive collective alliance), and as a rule whoever is aligned with one bloc does not cooperate with one aligned to another. So, cooperation can only again be possible after 1989, but it is not the same cooperation as in 1945-48. The question, therefore, is: what kind of cooperation is it? To answer this question, the following hypothesis is raised: since the end of bipolarity – and consequently the end of the latency of the SC, in 1991 – cooperation can be understood as *solidarity*. True cooperation is now again possible, and no longer a limited intrabloc cooperation (alignment).

The highpoint of this earlier model was the ineffectiveness of the international system in the question of the Tutsis, when 900,000 people were massacred in the late 1980s, with UN connivance, and the consent of major powers, with the participation of Western mercenaries. The genocide in the Great Lakes region showed not only the limits but also the disgraceful and diabolic aspect of interested intervention and non-intervention.

Another important element is that Latin America, compared to the other *Southern* continents – and even in the *North*, especially Europe – shows an incipient conflictive level. There is a practice in our region since the 18th century and even more so in the 19th century of mediating territorial disputes. The African, Asian and European continents resorted to bellicose means in attempts to settle such disputes.

In short, law played a leading role and the diplomat had a fundamental function, compared to the military in the history of Latin America. Here there is a historic juridical

experience, which the other continents do not have. In addition to this element rooted in regional political culture, it so happens that in the recent processes of transition to democracy in the Latin American states various models have been tested. Consequently, the region has know-how of transition of authoritarian systems to democracy that may act as an inspiration for the current Haitian crisis.

2.3 Fundamentals of diplomacy with solidarity

Diplomacy with solidarity may be defined as the concept and application of an international collective action, under the auspices of the UN Security Council (SC), by third party intervening States in an internal or international dispute, without motivations resulting from their national interest and being moving only by a duty of conscience. The lack of material and/or strategic interest is the registered trademark of this model of external action of the subject-State. In order that such a lack of interest is uncontested, it is also necessary for the subject-State not to have had in the past any special relation with the State under intervention.

In addition to the hypothesis discussed herein, there is another question, essential for a possible theorization of diplomacy with solidarity. Is the justification for interference with solidarity moral or also juridical?

A possibility of facing this question lies in Kant's thinking, which distinguishes the moral from the law. The moral is spontaneous and incoercible, while law is coercible. The spontaneity of the act of a moral nature is the result of the motivation of the individual who practices it: he is convinced deep down that his action is good. The legal act depends, in turn, on a duty, something outside the individual. This can be a way to asking whether the interference of solidarity (which may be assimilated in the practical application of the principles of diplomacy with solidarity) is undertaken by the States through their own conviction or whether there is some regulation, although very general, in which it has its roots.

When does a State – something with no feelings – decide to intervene in another State? There are two sets of principal factors: on one hand, the presumed existence of specific interests: financial, military, strategic, political, or diplomatic or of prestige that put pressure for the States to intervene. On the other hand, there is their public opinion that requires an answer from the subject-State in order to agree to a situation considered morally unacceptable.

What happened in the case of the current Haitian crisis? None of these two groups of interests pressured the subject-State to act. It did so for its own reasons, lacking pressure from public opinion and without defining to say the least the interests to be protected. Therefore, there was no moral (of the public opinion) or material (of interests) action that would impel the subject-State to intervene. In this case, it did so against the bases of the realistic theory of international relations.

It is extraordinary to see how the State, through its major exponents, took an unprecedented decision – some would say that it was a risky or reckless decision, unlikely to succeed – and now there is the contrary movement, the State refers to public opinion, to Parliament, the parties and groups. Therefore, this interference with solidarity can be interpreted as a Kantian moral act.

The Brazilian Chancellor, Ambassador Celso Amorim, provided a valuable and original contribution to the theory of diplomacy with solidarity when he stated that Brazil is "deeply committed to Haiti, political and *emotionally*,[8] and this in the long term". On doing so he indicates that the parameters on which Brazil took the decision to intervene must be understood in the light of criteria other than those arising from cold reason (or interest) of a State.

However, it does not exclude the hypothesis of basing diplomacy with solidarity in Kantian law. Kant defends the idea of a *cosmopolitical right*, in the following terms:

> *The rational idea of a universal, peaceful, if not yet friendly, Union of all the Nations upon the earth that may come into active relations with each other, is a juridical Principle, as distinguished from philanthropic or ethical principles.*

[8] The author's emphasis. One of the motivations is linked to the similarity of the ethnic and cultural roots of the two peoples. This perception discards the process of intents promoted against the Brazilian decision that would be based on the fight to obtain a seat as a permanent member of the SC. Now. Argentina – with strong presence in Haiti – is also a candidate for the SC.

> *Nature has enclosed them altogether within definite boundaries, in virtue of the spherical form of their abode as a globus terraqueus (...) Hence all nations originally hold a community of the soil, but not a juridical community of possession (communio), nor consequently of the use or proprietorship of the soil, but only of a possible physical intercourse (commercium) by means of it. In other words, they are placed in such thoroughgoing relations of each to all the rest,* (…). *This Right, in so far as it relates to a possible Union of all Nations, in respect of certain laws universally regulating their intercourse with each other, may be called 'Cosmopolitical Right' (jus cosmopoliticum).*[9]

The classic ideas of Immanuel Kant open a way to the philosophical understanding of diplomacy with solidarity, which exists in fact and requires a scientific explanation. These statements on adopting the difference between moral and law in Kant are preliminary and, far from being a reply, are questions, which researchers of international relations and international law must consider.

For the first time in UN history, a group of States that play a secondary role in the international system respond to an appeal of the SC to comprise the mission of stabilization in Haiti (MINUSTAH). The unprecedented composition of the group of mediating States raises the question of the fact that we are on the threshold of a new stage in mediation and dispute settlement, through a collective and uninterested instrument. In other words, this is a group of countries that do not have economic, ideological, military or political interests. Moreover, there are no major international interests.

Previously the United States intervened to prevent the arrival of the *boat people* in its territory, and France because it had cultural, historic and linguistic bonds with Haiti.

Current intervention has a differential. The intervening States have no national interests in the actual dispute. This condition offers them an impartial supplementary capacity with neutral action – elements essential for mediation. They are *above* the dispute, providing a more complete and comprehensive view and with the certainty that they will not take sides for reasons other than those linked to the actual dynamics of the dispute and for finding a solution.

Nevertheless, a serious problem arises from diplomacy with solidarity: the mediators do not have conditions to provide actual guarantees for compliance with what is agreed. The only other way for the indispensable search for effectiveness and concrete results is to transfer to the SC the responsibility of materially sustaining the decisions adopted.

At the end of the first half of 2004, Brazil agreed to participate, commanding the troops and contributing with 1,200 military personnel, in the UN peace operation in Haiti. Created by Resolution 1542 (2004) of the Security Council (SC), MINUSTAH substituted the multinational emergency force (Resolution 1529/2004 of the SC) that had been called together in haste due to the vacancy in the power in Haiti after the fall on February 29, 2004, of the president Jean-Bertrand Aristide.

The Brazilian decision, when put in the context of our contribution to UN peace missions, reveals the scope of this initiative as in the following table.

Brazilian contribution to the UN Peace Missions[10]

Mission	Location	Military	Police	Civilians	Period
UNEF I	Sinai & Gaza Strip	6,300	-	-	1957-1967
ONUC	Congo	179	-	-	1960-1964
UNSF	Western New Guinea	2	-	-	1962
DOMREP	Dominican Rep.	1	-	-	1965-1966
UNIPOM	India/Pakistan	10	-	-	1965-1966
UNFICYP	Cyprus	20	-	1	1964-1967 [11]

[9] KANT, Immanuel; HASTIE, W. (trans.). *The philosophy of law: an exposition of the fundamental principles of jurisprudence as the science of right.* Edinburgh: Clark, 1887 (Translated to Portuguese *Doutrina do direito*. São Paulo: Ícone, 1993. p. 201-202).

[10] SEITENFUS, Ricardo. *De Suez ao Haiti: a participação brasileira nas operações de paz*. In: BRASIL. Ministério das Relações Exteriores. *O Brasil e as Nações Unidas*. Brasília: FUNAG, in press.

[11] Since 1995 two Brazilian military members are part of the General Staff of the Argentine battalion in UNFICYP in Cyprus.

UNAVEM I	Angola	16	-	-	1989-1991
ONUCA	Central America	34	-	-	1990-1992
UNAVEM II	Angola	77	39	4	1991-1995
ONUSAL	El Salvador	63	16	5	1991-1995
ONUMUZ	Mozambique	218	66	16	1993-1994
ONUMUR	Ruanda/Uganda	13	-	-	1993-1994
UNPROFOR	ex-Yugoslavia	90	23	-	1992-1995
UNTAC	Cambodia	-	-	19	1993
UNOMIL	Liberia	3	-	-	1993
MINUGUA	Guatemala	39	37	-	1994-2001
UNOMSA	South Africa	-	-	12	1994
UNAVEM III	Angola	4,174	48	-	1995-1997
UNCRO	Croatia	2	1	-	1995-1996
UNPREDEP	Macedonia	5	-	-	1995
UNTAES	East Slovenia	9	2	-	1996-1998
UNMOP	Peninsula of Prevlaka	5	-	-	1996-2006
MONUA	Angola	35	39	-	1997-1999
UNAMET/ UNTAET	East Timor	62	18	19	1999-2006
MINUSTAH	Haiti	7,200	-	-	2004-2006

The Haitian crisis drags on for twenty years and although its motivations have an essentially internal origin – struggle for power, disrespect for the basic principles of representative democracy and the State of Law, political violence and the mafia, recurring economic crisis – its repercussions are cross caused an increase in the fragility of the social tissue that could result in a civil war and destabilize the group in the Caribbean Basin.

2.4 The epilogue to a long transition

Between February 29, 2004 – when President Jean-Bertrand Aristide left the power under still nebulous circumstances – to date, various unknown quantities and some certainties appear that cause the balance of what was done to be marked by contrasts.

a) A mitigated balance

The main objective of MINUSTAH was achieved: the power was frozen and a clear political stabilization in the country for the last 30 months. There were no uprisings, attempts at coups d'état and, especially, the degrading process of Haitian public life was interrupted. In fact, although criticized for its apathy and little legality, the interim government administrated the country with enthusiasm and diminished the high rates of corruption that traditionally affect public administration.

The crisis leading to the fall of Aristide had already clearly demonstrated the rise of mafia groups, criminals and drug traffickers interested in influencing and if possible taking over. Even those who criticize the presumed talk of MINUSTAH's grip in Port-au-Prince slums acknowledge that if this were to increase "we would now have had half a dozen coups d'états and certainly the drug barons would be occupying – directly or through representatives – the Presidential Palace".[12]

Many of the difficulties faced during the transition period arise from the dubiousness of the mandate given by SC to MINUSTAH, especially with regard to the relations between the latter and the Haitian National Police. On the other hand, Ambassador Juan Gabriel Valdés (personal representative of the UN General Secretary) suffered progressive stress in his role. The experience of other peace missions shows that, if at first there is a positive assessment tending to unanimity, this impression reverts to become, in less than two years, a negative unanimity.

[12] Interview with Apaid and Boulos, leaders of the Group of 184 and critics of the presumed lack of security in Port-au-Prince neighborhoods.

The organization of the electoral campaign also suffered from the ambiguity of the functional relationship between the Interim Electoral Council (CEP), MINUSTAH and the Organization of American States (OAS). The many accusations launched on the voting day and the serious crisis when calculating the results was a clear demonstration of this situation.

Lastly, there was also supplementary ambiguity inasmuch as the poor population of Haiti waiting for the foreign presence to revert in its benefit. Now, almost all expenses with the mediation operation in Haiti were allocated to foreigners. The main Haitian beneficiaries are the hotel complex and property owners.

Some foreign Armed Forces comprising MINUSTAH, such as those of Argentina in the catastrophe of Gonaives and those of Brazil in recovering the Bel-Air neighborhood/slum (odd name for a region in the capital known for its stench), tirelessly and efficiently performed a social work that resulting in a clear decrease of tensions and a superficial and transitory relief for the local population.

Definitively, the main and almost exclusive role of MINUSTAH was security for the rounds of elections in February and March 2006.

b) The general elections

There is no doubt that the main achievement in this transition phase is its epilogue. In other words, the elections on February 7, 2006, which substituted the Interim government imposed by the foreigner for another as a result of the voters' wishes. There was a double reconquest of sovereignty: that of the people that expressed its wishes and the State that may be self-administrated.

Thirty-three candidates ran for president of the Republic.[13] The significant number indicates the existence of candidates with scarce electoral density and national representation, in addition to structural weakness of the political parties.

The exercise of politics by a large number of players in a closed society – practically "blocked" – like the Haitian, results in the impossibility of social ascension through means known in open capitalist societies (work, intellectual formation, family alliances). In Haiti politics is the fastest means – and sometime the only way – to try and climb up the social and economic ladder. Moreover, the Haitian State distributed among the candidates (majority and proportional) a sum of over US$14 million – from the international community – so that each presidential candidate received the sum of US$143,000 and the candidates to the Senate US$13,000 each. Another characteristic of the election campaign consisted of the intensity of the political impasses resulting from its living and irreconcilable dichotomies.

The 2006 elections were not perfect. Not all potential voters had voting cards – it is calculated that approximately 85% had been distributed. There were problems of communications and infrastructure, obliging potential voters living in remote places to cover long distances by their own means. This situation was aggravated by the ban on vehicles circulating on elections day.

Since the vote is not mandatory, it is expected that there would be a high abstention rate – around 50% – as happened in the different elections since 1987. The following table reproduces this phenomenon.

Electoral participation (1987-2000)[14]

Year	1987	1988	1990	1995	2000
Population	5,440,000	5,520,000	6,686,047	7,180,204	7,958,914
Registered	2,200,806	----------	3,271,155	3,668,049	4,049,026
Voters	----------	1,063,537	1,640,729	1,140,523	2,869,134

Although the data in this table are official they are not reliable. In fact, certain independent electoral observers consider them totally false and inflated. They believe that

[13] There were 35 at the start of the campaign. However Frantz Perpignant withdrew on January 24, alleging that he was supporting a competitor and Sylvain Jean Jacques *a rendu l'âme*, victim of lung cancer on January 30, as the newspaper Le Matin reported with flourish and irony. It is found that more than twenty candidates never campaigned and their names were only on the official list. The purpose of these supposed candidates consisted on negotiating their support to the real candidates in exchange for favors and positions. This bargaining occurred during the election campaign preceding the first round and not between the two rounds as normally occurs. There was only one female candidate for 49% of registered female voters.

[14] These data were compiled by the services of MINUSTAH and taken from various official Haitian sources.

the number of voters has never been over 30% of the number of those registered. In some elections, such as 1987, for example, the participation in fact was only 10%.

The need to take into account the past electoral participation is not based on an academic bias. On the contrary, it pursues a clear objective. Indeed, it is foreseeable that criticism of the election process and probable contestations of its results – leading to the accusation of legal incapacity of the winner's power as a result of lack of representativeness of the voting collegiate – would be supported by the essential in the participation rates.

According to official data announced by the Interim Electoral Council (CEP), the participation in the first round of presidential and legislative elections on February 7, 2006, reached the unprecedented level of 63% of all those registered. There has never been voting in Haiti that would reach such a participation percentage, since this doubled when considered the historic average of participation.

Despite these conditions and the violence of armed gangs in certain Port-au-Prince slums, especially in *Cité Soleil* ("Sun City"), what matters is the fact that the majority of the Haitian population can freely express their idea and chose their governors independently.

2.5 A new phase and many doubts

a) The indispensable international collaboration

There is perfect Haitian and international harmony between the observers, public international organizations, non-governmental organizations, political parties and public opinions on the imperative need to continue with foreign collaboration after the new government takes over. Only with international participation will it be possible to confront – with some possibility of success – the numerous Haitian challenges.

The main fields to which the international community must collaborate are as follows:

Internal security

Haiti has only 4,000 policemen for over eight million of a population. The Armed Forces were extinguished by former President Aristide; there are no Military Police, State, Departmental or Municipal Guards. These conditions require the continuing foreign police and military presence. There should certainly be a progressive inversion of the proportion existing today (75% military and 25% police) and, especially, a mass formation of new members of the PNH. Public security must continue as one of the permanent objectives of the international community role.

Socioeconomic actions

One of the current characteristics of the Haitian social drama is the high rate of unemployment and underemployment (around 80% of the economically active population). It is therefore essential that any action to induce development is accompanied by an offer of jobs. Family farming fields, cooperativism and garbage collection and recycling are areas resulting in absorbing an unskilled workforce, as in the case of the garbage collector and waste recycling associations.

Rebuilding the infrastructure

For many years now the communication network, power generation and distribution, basic sanitation and roads have been neglected. Power generation is chaotic. The country does not have natural resources and is structurally dependent in this area to cause serious irreparable damage to the environment. Lastly, recovery of the basic sanitation system and a joint effort to extend it are necessary and urgent. Public hygiene and health are strongly affected, which results in high rates of ailments and a short life expectancy. This is sign that confronting the sanitary problem is a pressing challenge.

Sanitary cooperation

Promoting public health policies for primary care in this area is important in the prevention of disease and is economically feasible for a country with sparse economic resources. The possibility of implanting a free medication distribution system to the poor population – the vast majority – may also be considered.

Re-founding the State

Haiti is the only example today to demonstrate the possibility of social coexistence in the absence of the State. In other words, this is a Stateless society. The State was worn down over the past twenty years when the legal system and set of public institutions disappeared.

One of the actions should contribute to structuring the election processes in Haiti. As one of the objectives is for governors and representatives to be chosen by democratic, participative and transparent voting, the creation of an election culture of campaign practices, instruments (voter registers, electronic ballots) and a permanent electoral legal body is essential. Democracy is complex and costly, and Haiti does not have the means to confront any of these two challenges.

3. CONCLUSION: THE HAITIAN CRISIS IN THE CONTEXT OF LESS DEVELOPED COUNTRIES (LDC)

Haiti and its crisis must be placed in the broader context of the Less Developed Countries (LDC). The striking disparity, from all aspects, between the so-called Third World countries imposes the preparation of a hierarchy of poverty. Three groups are worth mentioning:

a) the new industrialized countries (NICs);

b) the intermediary countries;

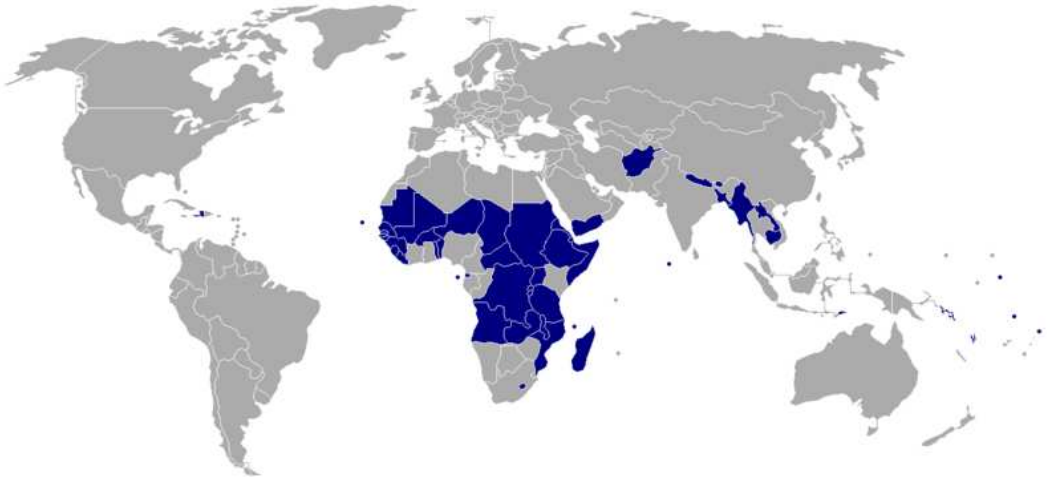
c) the less developed countries (LDC).

The LDC group consisted, when it was created, of 25 countries. Only one – Botswana – of the original has managed to leave behind the unsustainable situation, because of its diamond mining. However, the club doubled the number of its members and now has 48 States with a total of 744 million inhabitants.

Poverty if not absolute misery of a considerable portion of the population is prominent. The scarcity of national savings leads to increasing indebtedness with no prospect of economic growth. This is either negative or has been long stagnant. It is accompanied by a recurring inflationary spiral that increases its foreign dependence, making it difficult to administrate.

Endogenous reasons explain the size of the catastrophe: persistent civil wars, political instability, uncontrolled demographic growth, high rate of corruption, and natural disasters cause these countries not to have conditions to respond autonomously to the basic needs of the population.

The map below shows the absolutely southern location of these societies:



Haiti, the only American country to be on this list must be analyzed from a broader perspective of asymmetric and unequal development that castigates a large number of the human societies. The international system must face this challenge by structuring long term measures under penalty of becoming not only unfair but unfeasible.

Bibliography

AGUIAR, Sergio Luiz (org). *Brasil em Missões de Paz*. São Paulo: Usina do Livro, 2005.

AMNESTY INTERNATIONAL. *Haiti: Les visages de la répression*. Paris: Francophones d'Amnesty International (EFAI), 1985.

AMORIM, Celso. *Speech at the Special Meeting of the Security Council on Haiti*. New York, January 12, 2005.

ARCINIEGAS, German. *Biografía del Caribe*. 3. ed. Buenos Aires: Sudamericana, 1951. 546 p.

ARENDT, Hannah. *Les origins du totalitarisme: l'impérialisme*. Paris: Arthème Fayard, 1982. 348 p.

ARISTIDE, Jean-Bertrand. *(Tout Moun se Moun) Tout Homme est un Homme*. Paris: Seuil, 1992. 223 p.

AZUELOS, Martine (org.). *Pax Americana: de l'hégemonie au leadership économique*. Presses de la Sorbonne Nouvelle, 1999. 187 p.

BEIGBEDER, Yves. *Le controle international des élections*. Brussels: Bruylant, 1994. 187 p.

BERANGERE, Taxil. *L'OMC et les pays em développement*. Paris: Montchrestein, 1998. 179 p.

BERMAN, Eric G.; SAMS, Katie E. *Peacekeeping in Africa: Capabilities and Culpabilities*. [s. l.]: ONU, 2000. 540 p.

BERNARDIN, Raymond. *La nationalité haïtienne: Constituitions et lois de 1804 à 1987*. Port-au Prince: Imprimeur II, 2001. 283 p.

BETHELL, Leslie (org). *História da America Latina: a America Latina colonial*. 2. ed. São Paulo: EUSP; Brasilia: Fundação Alexandre Gusmão, 1998. v. I, 979 p.

_____. (org). *História da America Latina: da Independência até 1870*. São Paulo: EDUSP; Imprensa Oficial do Estado; Brasilia: Fundação Alexandre Gusmão, 2001. v. III, 1013 p.

BETTATI, Mario; KOUCHNER, Bernard. *Le devoir d'ingérence*. Paris: Denoël, 1987. 300 p.

BOSCH, Juan. *De Cristobal Colon a Fidel Castro: el Caribe, frontera imperial*. Madrid: Alfaguara, 1970. 740 p.

BRAZIL. Câmara dos Deputados do Brasil. Confederação Parlamentar das Américas (COPA). *Missão Parlamentar ao Haiti, 12 a 15 de novembro de 2004*. [Brasilia – DF], 2004.

BRAZIL. Ministério das Relações Exteriores. Agência Brasileira de Cooperação. *Haiti: Cooperação para Reconstrução e Desenvolvimento*. Brasilia- DF, December 2005.

BRAZIL. Ministry of Foreign Affairs. Under Secretary-General on Political Matters (SGAP). Department of North, Central Americas and the Caribbean (DAN). Division of Mexico, Central America and the Caribbean (DCC). *Visit of the President to Haiti, August 18, 2004*. Brasilia-DF, 2004.

BRUNEL, Sylvie. *La Coopération Nord-Sud*. Paris: Presses Universitaires de France, 1997. 125 p.

BUSHNELL, David. *Simon Bolívar: Hombre de Caracas: proyecto de America: una biografia*. Buenos Aires: Biblios, 2002. 190 p.

CAGGIANO, Monica Herman Salem. *Direito parlamentar e direito eleitoral*. Barueri, SP: Manole, 2004.

CÂMARA, Irene Pessôa de Lima. *Em nome da democracia: a OEA e a crise haitiana, 1991-1994*. Brasilia: Instituto Rio Branco; Fundação Alexandre de Gusmão; Centro de Estudos Estratégicos, 1998. 240 p.

CARDOSO, Afonso José Sena. *O Brasil nas operações de paz das Nações Unidas.* Brasilia: Instituto Rio Branco; Fundação Alexandre de Gusmão; Centro de Estudos Estratégicos, 1998. 169 p.

CARPENTER, Ted Galen. *Delusions of Grandeur: The United Nations and Global Intervention*. Washington, D.C.: CATO Institute, 1997.

CASAS, Bartolome de las. *Brevíssima relación de la destrucción de las Índias*. Barcelona: Información y Revistas, S.A.- CAMBIO16, 1992. 109 p.

CASIMIR, Jean. *Pa Bliye 1804: Souviens-toi de 1804*. Delmas: Lakay, 2004. 378 p.

CASTOR, S. *Les origines de la structure agraire en Haïti*. Centre de Recherche et de Formation Economique et Sociale pour le Développment (CRESFED), Port-au-Prince, 1989. 45 p.

CASTOR, Suzy. *L'occupation Américaine d'Haïti*. 3. ed. [s. l.]: Résopresse, 1987. 317 p.

CENTRE HAITIEN DE RECHERCHES ET DE DOCUMENTATION (CHRD); COMMISSION TIERS-MONDE DE L'EGLISE CATHOLIQUE (COTMEC); HAITI-INFO. *Haïti: votre cri ne sera pas étouffé*. Geneva, 1993.

COLOMBO, Cristóvão. *Diários da Descoberta da América. As quatro viagens e o testamen*to. Porto Alegre: L & PM, 1998. 236 p.

CONSTANT, Jean-Robert. *Les Etats-Unis et la Caraïbe. coopération ou protectorat déguisé?* Port-au-Prince: Imprimeur II, 2004. 119 p.

CORNEVIN, Robert, *Haiti*. Paris: Presses Universitaires de France, 1982. 128 p.

CORTEN, Olivier; KLEIN, Pierre. *Droit d'ingérence ou obligation de réaction?* Brussels: Bruylant, 1992. 283 p.

CROCKER, Chester. Engaging Failing States. *Foreign Affairs*, 82, n. 5, 2003. 32-45 p.

CUGOANO, Ottobah. *Réflexions sur la traite et l'esclavage des nègres*. Port-au-Prince: Presses Nationales d'Haïti, 2004. 151 p.

DABENE, Olivier. *L'Amérique Latine au XX^e siècle*. Paris: Armand Colin, 1997. 191 p.

DALEMBERT, Louis-Philippe. *Le songe d'une photo d'enfance*. Annecy: Ed. Le Serpent à Plumes, 1993. 139 p.

DAMROSCH, Lori F. *Enforcing restraint: collective intervention in internal conflicts*. New York: Council on Foreign Relations, 1993.

DANTÓN, José Antonio Gutierrez. *La Invasión a Haiti: no al envio de tropas: la cara sucia de las razones humanitárias.* [Buenos Aires]: Organización Socialista Libertaria (OSL), 2004. 32 p.

DAUDET, Yves (Coord). *La Crise d'Haïti (1991-1996). CEDIN, Paris I,* Cahiers Internationaux. Paris: Montchrestien,1996. 206 p.

DAVID, Dominique. *Sécurité: l'après-New York.* Paris: Sciences Politiques, 2002. 129 p.

DEBRAY, Régis. *Haïti et la France*. Paris: La Table Ronde, 2004. 121 p.

DEFARGES, Philippe Moreau. *Un monde d'ingérence*. Paris: Sciences Politiques, 1997. 124 p.

DEVIN, Guillaume. *Sociologie des relations internationals*. Paris: La Découverte de Syros, 2002. 122 p.

DIEDERICH, Bernard; BURT, Al. *Papa Doc et les Tontons Macoutes: la vérité sur Haïti*. Port-au-Prince: Henri Deschamps, 1986. 404 p.

DIEDERICH, Bernard. *Trujillo: la mort du dictateur*. Port-au-Prince: Henri Deschamps, 1989. 257 p.

DORSINVILLE, Luc. *Abregé d'histoire d'Haïti*. Port-au-Prince: Imprimière de L'Etat, 1961. 196 p.

DRAGO, Roland (direction). *Souveraineté de l'Etat et interventions internationales*. Paris: Dalloz, 1996. 74 p.

FABRE-GOYARD, Simone. *La Construction de la Paix, ou, le Travail de Sisyphe*. Paris: Vrin, 1994. 268 p.

FARRELL, R. Barry. *America Latina y Canadá frente a la política exterior de los Estados Unidos*. Mexico: Fondo de Cultura Económica, 1975. 364 p.

FAURE, Jean-Claude (Président); JOLLY, Cécile (Rapporteuse). *L'Etat et les ONG: pour un partenariat efficace. Rapport du groupe "Pour un nouveau partenariat entre les organisations de solidarité internationale et les pouvoirs publics*". Paris: La Documentation Française, Feb. 2002. 209 p.

FERRAJOLI, Luigi. *A soberania no mundo moderno*. São Paulo: Martins Fontes, 2002.

FERREIRA FILHO. Manuel Gonçalves. *A reconstrução da democracia: Ensaio sobre a institucionalização da democracia no mundo contemporâneo*. São Paulo: Saraiva, 1979.

FONTOURA, Paulo Roberto Campos Tarrisse da. *O Brasil e as operações de paz das Nações Unidas*. Brasilia: FUNAG, 1999. 409 p.

FOREIGN POLICY; FUND OF PEACE. The failed States Index. *Foreign Policy*. May/June 2006. Available at: http://foreignpolicy.com/story/ .

FUENTES, Claudio S. (ed.). *Bajo la mirada del halcón: Estados Unidos-América Latina post 11/09/2001.* Santiago de Chile: FLACSO-Chile, 2004. 260 p.

FUKUYAMA, Francis. *Construção de Estados: governo e organização do século XXI*. Rio de Janeiro: Rocco, 2005. 168 p.

FURTADO, Celso. *Subdesenvolvimento e estagnação na America Latina*. Rio de Janeiro: Civilização Brasileira, 1966. 127 p.

GEIFUS, F. *80 herramientas del desarrollo participativo: Diagnóstico, Planificación, monitoreo, evaluación*. San Salvador: Prochalate-IICA, 1997. 208 p.

GEUSS, Raymond. *Historia e ilusión en política: libertad, violencia, tolerancia, coerción; las contradicciones del estado democrático*. Barcelona: Kriterios, 2004. 281 p.

GHERARI, Habib de; SZUREK, Sandra. *Sanctions unilatérales, mondialisation du commerce et ordre juridique international*. Paris: Montcherestein, 1998. 338 p.

GLEIJESES, Piero. *La crise dominicaine, 1965*. Milan: A. G. Battaia, 1973. 476 p.

GOMES, Sergio Luiz. Haiti: instabilidade crônica do processo político, retrocesso econômico, crise eco-ambiental e implicações para a diplomacia brasileira. *XXIX Curso de Altos Estudos*. Berne: Ministério das Relaciones Exteriores, Instituto Rio Branco 1994. 169 p.

GRAVATT, Patricia. *L'église et l'esclavage*. Paris: L'Harmattan, 2003.138 p.

GREENE, Graham. *Les Comédiens*. Port-au-Prince: Henri Deschamps, 1993. 248 p.

HESBURGH, Theodore M. (Pe). *O imperativo humanitário: um desafio para o ano 2000.*

HOFFMANN, Stanley. *The ethics and politics of humanitarian intervention*. Notre Dame: University of Notre Dame Press, 1996.

JOUVE, Edmond. *Le droit des peuples*. Paris: Presses Universitaires de France, 1986. 126 p.

KAUFMAN, Daniel; KRAAY, Aart; MASTRUZZI, Massimo. *Governance matters III: governance indicators for 1996-2002*. Washington: World Bank, June 30, 2003. Available at: http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf .

LEYBURN, James G. *El Pueblo Haitiano*. Buenos Aires: Claridad, 1946. 372 p.

LUGO, Luis E. *Sovereignty at the Crossroads? Morality and International Politics in the Post-Cold War Era*. Lanham: Browman and Littlefield, 1996.

LYONS, Gene M.; MASTANDUNO, Michael. *Beyond Westphalia? State sovereignty and international intervention*. London: The Johns Hopkins University Press, 1995. 324 p.

MADARIAGA, Salvador de. *El Ocaso del Império Espanhol en America*. Buenos Aires: Sudamericana, 1955. 554 p.

MANIGAT, Leslie. *L'Amérique Latine au XX^{e} siècle 1889-1929*. Paris: Seuil, 1991. 465 p.

MÁRQUEZ, Luis Arranz. *Cristobal Colon: Diario de a bordo*. Barcelona: Información y Revistas, S.A.- CAMBIO16, 1991. 221 p.

MATHELIER, Richard (Coord.). *Connaître la frontière: laboratoire des relations haïtiano-dominicaines*. Port-au-Prince: INESA, 2002.189 p.

MAYALL, James. *The New Interventionism 1991-1994*. Cambridge: Cambridge University, 1996.

McCALLA, Jocelyn; ARCHER, Merrie. *Non au système restavèk: Vers l'élimination de esclavage de l'enfant en Haïti*. Port-au-Prince: Coalition Nationale pour les Droits des Enfants.

MÉDICINS SANS FRONTIÈRES. *Conflits en Afrique: Analyse des crises et pistes pour une prévention. Rapport de la commision "Régions africaines em crise"*. Brussels: GRIP – Institut Européen de Recherche et d'Information sur la Paix et la Securité, 1997. 293p.

MICHEL, Claudine. *Aspects éducatifs et moraux du vodou Haïtien*. Port-au-Prince: Le Natal, 1995. 112 p.

MORAL, Paul. *Le paysan haïtien: Etudes sur la vie rurale en Haïti*. Port-au-Prince: Fardin, 2002. 375 p.

MÜLLER, Luis Diaz. *America Latina: Relaciones internacionales e derechos humanos.* Mexico: Fondo de Cultura Económica, 1986.375 p.

MUÑOZ, Heraldo. *Las políticas exteriores de America Latina y el Caribe: un balance de esperanzas*. Buenos Aires: Grupo Editor Latinoamericano, 1987. 488 p.

MURPHY, Sean D. *Humanitarian intervention: the United Nations in an evolving world order*. Philadelphia: University of Pennsylvania, 1996.

NATIONS UNIES. Commission Européenne; Banque Mondiale; Banque Inter-Américaine De Développement. *République d'Haïti: Cadre de Cooperation Intermaire 2004-2006*. *Rapport de Synthèse*. [s. l.: s. n.] 87 p.

OCAMPO, José Antonio; MARTIN, Juan. *Une décennie d'ombres et de lumières. L'Amérique Latine et les Caraïbes dans les années 90*. Santiago de Chile: CEPALC; Institut des Hautes Etudes de l'Amérique Latine et les Caraïbes, 2003. 401 p.

PELLET, Alain. Droit d'ingérence ou devoir d'assistence humanitaire? *Problèmes Politiques et Sociaux*. Paris: La Documentation Française, 1er-22 décembre 1995. n. 758-759, 133 p.

PLUCHON, Pierre. *Voudou, sorciers et empoisonneurs: de Saint-Domingue à Haïti*. Paris: Karthala, 1987. 279 p.

PROGRAMME DES NATIONS UNIES LE DEVELOPPEMENT (PNDU). *La bonne gouvernance: un défi majeur pour le développement humain durable en Haïti*. Haití, 2002. 199 p.

PROGRAMME DES NATIONS UNIES LE DEVELOPPEMENT (PNDU). *La vulnérabilité en Haïti: chemin inévitable vers la pauvreté? Rapport national sur le développement humain*. Haïti, Sept. 2004. 144 p.

QUEUILLE, Pierre. *L'Amérique Latine: La doctrine Monroe et le Panaméricanisme: Le conditionnement historique du tiers-monde latino-américain*. Paris: Payot, 1969. 287 p.

RECHERCHES INTERNATIONALES. *Amérique Latine: L'internationale socialista: Le rôle des ONG*. Paris: 1999. n. 58, 4, 194 p.

REPUBLIC OF HAITI. Ministry of the Economy and Finances. Haitian Institute of Statistics and Information Technology. *Les indicateurs conjoncturels:* 1er et 2e Trim. 2003-2004. Port-au-Prince, 2004. 99 p.

Visages d'Amérique Latine. Revista de Estudios Iberoamericanos. Paris: Jun. 2005, n. 2.

RIADO, Pierre. *L'Amérique Latine de 1870 à nos jours*. Paris: Masson, 1979. 253 p.

RIBEIRO, Darcy. *O dilema da América Latina: estruturas de poder e forças insurgentes*. 3. ed. Petropolis: Vozes, 1983. 273 p.

RIST, G. *Le développement: histoire d'une croyance occidentale*. Paris: Science Po., 1996. 427p.

_____ . *Le développement: un mythe de l'Occident*. Paris: Gallimard, 1991.

ROBERTSON, William Spence. *France and Latin-American Independence*. Baltimore: J. H. Furst Company, 1939. 626 p.

ROCHA, Guilherme Salgado. *Pense no Haiti, reze pelo Haiti: A história da freira Santina e sua aventura no mar do Caribe: Um grito de solidariedade*. Preface by Paulo Henrique Amorim. São Paulo: Musa, 1995. 93 p.

RODRIGUES, Thiago. *Política e drogas nas Américas*. São Paulo: Educ/Fapesp, 2004, 334 p.

_____. *Narcotráfico: uma guerra na guerra*. São Paulo: Desatino, 2003, 126 p.

ROGERS, E. M. *Elementos del cambio social en America Latina: difusión de innovaciones*. Bogotá: Tercer Mundo, 1966.

ROUMAIN, Jacques. *Œuvres complètes*. Paris: ALLCA XX, 2003. 1690 p.

ROUQUIÉ, Alain. *Amérique Latine: introduction à l'Extrême-Occident*. Paris: Seuil, 1998, 484 p.

SACHS, I. *Em Busca de Novas Estratégias de Desenvolvimento. Estudos Avançados*. n. 25, São Paulo: Edusp, 1995. v. 9.

SAINT-LOUIS, Fridolin. *Le vodou haïtien: Reflet d'une société bloquée*. Paris: L'Harmattan, 2000. 181 p.

SALAMÉ, Ghassan. *Appels d'empire: Ingérences et resistances à l'âge de la mondialisation*. Paris: Librairie Arthème Fayard, 1996. 348 p.

SEITENFUS. Ricardo. *Haiti: A soberania dos ditadores*. Porto Alegre: Sólivros, 1994. 137 p.

_____. *Elementos para uma diplomacia solidária: a crise haitiana e os desafios da ordem internacional*. Santa Maria: Entrementes; Faculdade de Direito de Santa Maria, v. I, a. 1, p. 16-32.

_____. *O Brasil e suas relações internacionais.* In: SCHÜLER, Fernando (Org.); AXT, Gunter (Org.). *Brasil contemporâneo: Crônicas de um país incógnito.* Porto Alegre: Artes e Ofício, 2006. p. 129-150.

SILVA, Alberto Costa; SOUZA, Francisco Félix de. *Mercador de Escravos*. Rio de Janeiro: Nova Fronteira; UERJ, 2004. 207 p.

SILVA, Luiz Inácio Lula da; ALEXANDRE, Boniface. *Visit of President Luis Inácio Lula da Silva to Haiti: joint release*. Port-au-Prince, August 18, 2004.

SOBREIRO NETO. Armando Antonio. *Direito Eleitoral: teoria e prática*. Curitiba: Juruá, 2000.

STIGLITZ, Joseph E. *La grande désilusion*. Paris: Librairie Arthème Fayard, 2002. 324 p.

TENDLER, Judith. *Good government in the tropics*. Baltimore: Johns Hopkins University Press, 1997.

TIERNEY, Brian. *Religion et le droit dans le développement de la pensée constitutionnelle.* Paris: PUF, 1993. 150 p.

WALZER, Michael. *Las esferas de la justicia: Una defensa del pluralismo y la igualdad.* Mexico: Fondo de Cultura Económica, 2001.

WARGNY, Christophe. *Haiti n'existe pas. 1804-2004: Deux cents ans de solitude.* Paris: Autrement, 2004. 191 p.

WORLD BANK. *Llegando a los pobres de las zonas rurales*. Washington: World Bank, 2002.

WORLD BANK. *Globalização, crescimento e pobreza. A visão do Banco Mundial sobre os efeitos da Globalização.* São Paulo: Futura, 2003. 212 p.

ZARTMAN, I. William. *Collapsed States: The disintegration and restoration of legitimate authority*. Boulder, Colorado: L. Rienner publishers, 1995. 303 p.

12. Proposal to support the founding of an Official Latin American Regional Bulletin

	Resolution
CJI/RES.117 (LXX-O/07)	Official Latin American Regional Bulletin (BOREAL)
	Document
CJI/doc.240/07	Official Latin American Regional Bulletin (presented by Dr. Eduardo Vio Grossi)

At the 70th regular session of the Inter-American Juridical Committee (San Salvador, February-March 2007), Dr. Eduardo Vio Grossi presented document CJI/doc.240/07, "Official Latin American Regional Bulletin". Dr. Vio Grossi explained that in some OAS Member States (e. g. Chile), laws are published in an Official Gazette or Bulletin. He mentioned that representatives of the official bulletins of Argentina and Chile had recently contacted him, in his capacity as a member of the Juridical Committee, to inform him of their idea to found a Regional Official Bulletin of Latin America. Their idea is to create an online journal to collect legislation on tax, labor, financial and foreign trade regulations that may be of interest to other countries. They were seeking support from the Committee and the OAS. The Bulletin would be overseen by a board on which one IAJC member would sit. The estimated cost is $50,000 USD, to be covered by the States and not representing any additional cost to the Committee or the OAS. If the Juridical Committee was in favor of lending its support, Dr. Vio Grossi added, it should recommend that the bulletin not be limited to Latin America but be extended to cover all OAS Member States. This would imply a change in name, posting of translations of some norms, and the inclusion of Inter-American treaties and major resolutions. In conclusion, he thought the initiative interesting and deserving of support at this initial phase. He recommended that a Committee member be appointed to follow developments, and help define the proposal and submit it to the Juridical Committee once it has been finished.

Dr. Mauricio Herdocia Sacasa thanked Dr. Vio Grossi for the information and recalled that Article 103 of the Charter states that the Inter-American Juridical Committee shall establish cooperative relations with national entities on juridical matters of international interest. In his opinion the proposal in question was in need of further work, and the Committee should support the idea in general, encourage the initiative and appoint Dr. Vio Grossi to follow developments. He did not, however, agree with the idea of having a IAJC members on the board, and thought it would be prudent to put that matter aside until the proposal were more mature.

Dr. Jorge Palacios Treviño said that there already is a website – *Orden Jurídico* – that publishes the full texts of Mexican legislation and treaties ratified by the country. He expressed agreement with the ideas put forward by Dr. Herdocia Sacasa.

Dr. Ricardo Seitenfus made two observations. He raised the question of the potential clientele of such a website as university and public employees already had access to national websites. He then brought up the question of the value of IAJC sponsorship. He pointed out that UNICEF and UNESCO negotiate sponsorship agreements, and he wondered what the Inter-American Juridical Committee had to gain from such sponsorship.

Dr. Ana Elizabeth Villalta Vizcarra informed the Committee that in El Salvador all legislation and international treaties to which the country is a party are published on the website of the Supreme Court of Justice. She expressed support in general, but added that more attention should be given to the cost/benefit potential of the project. She also reminded members that there is a Central American Gazette that publishes all treaties, resolutions and accords, as well as selected legislation of the countries of the Central American system.

Dr. Hyacinth Evadne Lindsay announced that Jamaica also has an Internet site of this nature, and that CARICOM published the laws of its member States. In regard to the proposal, she wondered how the bulletin would be organized to assure availability of up-to-date information, as it was intending to cover a large number of laws and even subsidiary norms.

Dr. Galo Leoro Franco said that the participation of an IAJC member would be necessary for support to be granted, above all to prevent the approval of any instrument unacceptable to the OAS. He suggested the name be changed to "The Juridical Legislative Bulletin of the

Americas," as that would preclude further name changes as non-Latin American countries joined in.

Dr. Antonio Fidel Pérez said that it would be easy for the Legal Department of the OAS to create a website with hyperlinks to national sites, adding value by including a table of contents with laws organized by topic area. Member States could take on the task of translating their own laws to the other official OAS languages.

The Inter-American Juridical Committee passed resolution CJI/RES.117 (LXX-O/07), "Official Latin American Regional Bulletin (BOREAL)", by which Dr. Eduardo Vio Grossi was appointed rapporteur and asked to monitor developments and report back to the Committee.

During the Inter-American Juridical Committee's 71st session (Rio de Janeiro, August 2007), Dr. Eduardo Vio Grossi reported that there were no new developments on this front, and that it should be left for the Committee's next regular session, at which time a new rapporteur would have to be appointed.

CJI/doc.240/07

OFFICIAL LATIN AMERICAN REGIONAL BULLETIN

(presented by Dr. Eduardo Vio Grossi)

INTRODUCTION

By means of electronic mail dated February 8 and 9, 2007 and a note bearing the latter date, the representatives of the Official Bulletin of the Republic of Argentina, and the Official Gazette of the Republic of Chile delivered the Project for the creation of an Official Latin American Regional Bulletin to the author of this report (BOREAL - for its acronym in Spanish), asking that I communicate it to the Inter-American Juridical Committee of the Organization of American States.

Due to the fact that the referred project contemplates, as is reiterated below, the participation of the representatives of the Inter-American Juridical Committee in the BOREAL Council, compliance is given by accepting the referred petition, detailing the proposition that is formulated, depicting and signaling some complements, in order to finalize in a conclusion with suggested courses of action.

I. BOREAL PROJECT

a. Name of the Project: BOREAL – **Of**ficial **L**atin **A**merican **R**egional **B**ulletin.

b. Objective: To prepare a Bulletin with information extracted from the official gazettes and bulletins of the countries that make up the OAS. This Bulletin will useful for promoting foreign commerce and foreign investment in the varied countries based on a more in-depth knowledge and expeditious access to the local bulletins of every country regarding the subjects of tax, labor, financial and foreign commerce regulations.

c. Publication platform: Electronic Bulletin in Internet. That is, a web site of the www.boreal.xx type or as a link from the www.oas.org site. Later, and depending on the success of this project, the hard copy publishing will be evaluated.

d. Contents: National constitutional and normative documents in the matters of community and bilateral relevance, that is for example: labor, tributary, and foreign commerce norms. In general, all the documents that treat substantial matters will be published so they may be consulted by the citizens of the OAS country members.

e. Content management: All the documents published in the official gazettes will be stored in an information data base. The documents (new laws or modifications of the same) will be updated by the members of associated countries (functionaries of the official gazettes) with a single updating tool, which will be done remotely and with a simple application for content management. The documents will be stored in a common format and structure, for which standard XML has been chosen.

f. Implementation periods (proposals): Total implementation will depend on the political will of each country, nonetheless it is estimated that the incorporation of the first ten countries could be accomplished in 2007 (starting on June 1, 2007), that is possible because

of the ease and standardization of the tools used. The rest of the countries can be incorporated during 2008.

g. Project organization: A council composed of the official gazette directors from the Member States, in addition to some members of the OAS Inter-American Juridical Committee will be established. The meetings will be carried out by means of video-conferences with a frequency to be determined. The council will also designate a manager who will organize the activities and start the project.

h. Investment, costs and funding: It is estimated that the initial investment required to implement this service is US$ 50,000, which includes the procurement of one Content Management System, Servers, Software and Applications. On the other hand, the operations costs will be assumed by the Bulletin Officials who must program part of an official's time for updating their "section" of the data base. The funding for this project is a matter that has not been defined yet, but that could be proposed by the council after it is constituted or by the OAS itself.

i. Contact Data: Presently, the project is an initiative coordinated by Mr. Carlos Orellana Céspedes (Official Gazette of Chile, telephones 56-2-7870110 or 56-2-7870373; e-mail: proyecto@diarioficial.cl ; fceballosb@diarioficial.cl).

II. CHARACTERISTICS AND COMPLEMENTS

a. Characteristics of the initiative:

- **i. Already started by the interested parties**. As was expressed in their communication, the National Director of the Official Gazette of Argentina, and the Director of the Official Gazette of Chile, the mentioned initiative *ya ha capturado la atención de otros Diarios Oficiales de América* (It has already captured the attention of other Official Gazettes in America), which indicates, at least for its exploratory phase, that it concerns an initiative that is already underway and that has been started, or has risen by virtue of the same actors in charge of the dissemination of the Law in their corresponding countries. Therefore, it is not about a suggestion that must be initiated, nor one that emanates from authorities external to the interested parties.
- **ii. Participative**. We are also before a suggestion, the implementation of which implies the active and constant participation of the Official Gazettes and/or Bulletins of the States involved, thus definitively it does not concern a project that would be designated to third parties for implementation, but one that depends on the permanent and active participation of the mentioned parties.
- **iii. Feasible**. Precisely the latter makes the initiative possible or feasible, at least for the phase where it is communicated by Internet, because it basically consists of maintaining a site, portal or web page updated, similar to that which is published daily by the news, a task that even if it is somewhat complex, is not difficult.
- **iv. Modern**. It is also about a project that is characterized by its modernness, because it pretends to use the Internet as a means of disseminating the legal norms of the involved States.
- **v. Useful**. And finally, it is an initiative that in all aspects is very useful, and that will undoubtedly help in the dissemination of the Law and complement the American States that are committed to the same.

b. Complements:

- **i. Extendable to all the members of the OAS**. **Change of Name**. But as with all proposals, it is subject to complements or improvements, and among the latter it could be said that the referred project must definitely aspire to cover all of the OAS member States, which would lead to changing its name so that it may include the United States of America, Canada and the Caribbean States. Perhaps it may be named, Official American Regional Bulletin (BORA – for its acronym in Spanish).
- **ii. In the OAS languages**. For the same reason, in this and in future hypotheses, the edition of BOREAL or BORA into the four OAS languages, Spanish, English, Portuguese and French must be considered.

iii. **Inter-American Norms**. Perhaps, the future incorporation of the main juridical texts that are adopted by the OAS into BOREAL or BORA should be contemplated in the same manner.

CONCLUSION

In virtue of the above, the following courses of action are suggested by the Inter-American Juridical Committee:

a. Manifest support and congratulations for the initiative. For the time being, express support and congratulations for an initiative such as the one presented, which if put into practice would result in benefit of the dissemination of the Law and for juridical security in the hemisphere, in addition to helping in the necessary complementation among the involved States.

b. Recommend complements. At the same time, suggest that the referred project be perfected in the future, within the terms previously indicated, among others.

c. Entrust monitoring. In order to promote the referred initiative, to channel the negotiations involved within official institutions, and to participate in the preparation of the final BOREAL or BORA project, to entrust the author of this report so he may, with the cooperation of the Secretariat, carry out the monitoring of the matter and maintain contact with the authors of the former.

d. Reporting to the Permanent Council and the General Assembly. Finally, and precisely with the purpose of collaborating as of now in the dissemination of the proposal formulated by the Official Bulletin of Argentina and the Official Gazette of Chile, and to allow all the States of the Inter-American System to participate in the same, if they so wish, immediately report everything regarding the above to the Permanent Council and General Assembly of the OAS.

CJI/RES.117 (LXX-O/07)

OFFICIAL LATIN AMERICAN REGIONAL BULLETIN (BOREAL)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING SEEN report CJI/doc.240/07, dated February 14, 2007, titled “Official Latin-American Regional Bulletin”, presented by Dr. Eduardo Vio Grossi;

CONSIDERING that in the referred document account is given of the initiative assumed jointly by the Official Bulleting of the Republic of Argentina and the Official Gazette of the Republic of Chile with the purpose of establishing a web site or web page in Internet, that will be denominated Official Latin-American Regional Bulletin (BOREAL), where the basic laws of the Latin American countries would be published concerning tax, labor, financial and foreign commerce that may be of interest for promoting foreign commerce as well as foreign investment in the aforesaid countries;

BEARING IN MIND that the supply and updating of information for the mentioned web site or web page would be of the responsibility of the corresponding state entities in charge of the publication of the laws in the respective countries of the hemisphere that support the initiative, and which, furthermore will finance it;

AWARE that the development of an initiative such as the stated would constitute a significant contribution to the dissemination of the Law in the American Continent, to the principle of legal security in the Continent, and to the improvement of the legislative information systems among the States of the Inter-American System;

HAVING IN MIND the provisions of article 103 of the *Charter of the Organization* indicating that the Inter-American Juridical Committee will establish cooperation relations with national entities dedicated to the dissemination of juridical matters of international interest,

RESOLVES:

1. To thank the Official Bulletin of the Republic of Argentina and the Official Gazette of the Republic of Chile for the remittance, through the member of the Inter-American Juridical Committee, Dr. Eduardo Vio Grossi, of the aforementioned initiative relating to the “Official Latin American Regional Bulletin (BOREAL)”.

2. To encourage the institutions to give impetus to the referred initiatives, so they may quickly put into practice the instrument that will be at the service of all the Member States of the Organization of American States.

3. Appoint Dr. Eduardo Vio Grossi as rapporteur of the topic and entrust him to carry out the follow-up and report on same.

This resolution was adopted unanimously at the session held on March 1st, 2007, in the presence of the following member: Drs. Eduardo Vío Grossi, Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Ricardo Seitenfus, Jaime Aparicio, Jorge Palacios Treviño, Freddy Castillo Castellanos, Galo Leoro Franco, Jean Paul Hubert and Antonio Fidel Pérez.

CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE IN 2007

A. Presentation of the Annual Report of the Inter-American Juridical Committee

During the 71st regular session of the Inter-American Juridical Committee (in Rio de Janeiro, in August 2007), the Committee Chair, Dr. Jean-Paul Hubert, referred to his presentation of the Annual Report of the Inter-American Juridical Committee on its activities in 2006 to the Committee on Juridical and Political Affairs of the Permanent Council on March 22, 2007.

The Chair also announced that on that same day the CAJP had held a special meeting on the principles of international law contained in the Charter of the Organization of American States. That meeting was attended by several members of the Inter-American Juridical Committee, namely Dr. Jaime Aparicio, Dr. Mauricio Herdocia, Dr. Antonio Pérez, and Dr. Ricardo Seitenfus (Dr. Seitenfus being the representative of the Government of Brazil). Dr. Herdocia gave a lengthy presentation on the 14 principles of international law contained in the OAS Charter. Dr. Hubert commented on the lack of uniform rules with respect to the interdependence between democracy and Member States' development obligations. Dr. Aparicio urged the representatives to use the Juridical Committee for studies of topics related to international law. Dr. Seitenfus underscored the importance of Article 3 of the OAS Charter as regards rules of conduct binding upon states. Dr. Pérez supported his colleagues' statements and said that the Juridical Committee was keen to be assigned mandates by Member States in areas related to the Committee's functions.

The Chair of the Juridical Committee also mentioned the Report prepared by the Office of International Law[1], which fully reflects the opinions expressed by the Committee members and the observations made by the representatives of the Member States during that session. In his closing remarks, he said that he supported the idea that members of the Inter-American Juridical Committee should have more contact with the CAJP, going beyond the presentation of its annual report.

For his part, the Vice-Chair of the Inter-American Juridical Committee, Dr. Jaime Aparicio, referred to the presentation he gave of the "Annual Report of the Inter-American Juridical Committee" on its activities in 2006 during the thirty-seventh regular session of the OAS General Assembly (Panama, June, 2007).

Dr. Aparicio mentioned the difficulties of including a presentation of the Annual Report of the Juridical Committee on the agenda for the General Assembly and thanked Ambassador Osmar Chohfi of Brazil, who interceded with the Assistant Secretary General of the OAS to allow the Committee to give a formal presentation of its report to the General Assembly.

Dr. Aparicio said that his presentation had been brief, referring first to the centennial anniversary of the Juridical Committee and then to topics that had originated in General Assembly mandates: the interdependence between democracy and development; the International Criminal Court; the right to information and the Carter Center; discrimination and intolerance; CIDIP-VII, and the task of codifying and harmonizing international law in the Americas. He emphasized the importance of holding the annual course on international law and the need for support for that course. He went on to mention the success of the session held in El Salvador and thanked the Government of that country for the opportunity to discuss the topics on the Committee's agenda. He then addressed the challenges facing the Inter-American Juridical Committee with respect to problems facing the region and the part the Committee can play: subjects such as implementation of the Inter-American Democratic Charter, migration

[1] *Informe: sesión especial sobre los principios de derecho internacional contenidos en la Carta de la Organización de los Estados Americanos*, Washington, D.C., 22 marzo 2007.

issues, democratic governance, and efforts to combat corruption. He underlined the fact that the Juridical Committee adds numerous topics to its agenda on its own initiative and that it was precisely that independence which distinguished the Committee from the other organs of the Organization.

As for the Committee's report, the Chair recalled that for many years there had been efforts to eliminate presentations of the reports of the organs during the General Assembly, although some organs continued to present them. He thanked Dr. Jaime Aparicio and Dr. Jean-Michel Arrighi, the Director of the Department of International Legal Affairs, for interceding in such a way as to facilitate the presentation of the Committee's report.

Dr. Arrighi explained that, based on an interpretation of Article 91.f of the OAS Charter, it had been decided to eliminate the presentation of reports, since they were subject to review by the corresponding Committees of the Permanent Council. He also announced that a decision had been made to choose a keynote topic to be discussed at the General Assembly and that this year that topic had been human rights, which is why the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights had given a presentation. He said the idea was to continue the practice of choosing a central issue for each General Assembly and inviting the organ that had worked on that subject to give a presentation.

Dr. Mauricio Herdocia stated that for him it was very important that the Juridical Committee continue to give its presentation at the General Assembly because of the symbolic value and publicity attached to debates in that forum. He said he had also noted a very positive atmosphere and constructive response to the Committee's work.

Dr. Ana Elizabeth Villalta congratulated Dr. Jaime Aparicio on his intervention to ensure that the Committee was able to deliver its presentation at the General Assembly.

Dr. Eduardo Vio said he disagreed with the way it had been construed, within the OAS, that reports should only be presented to the Permanent Council, because Article 91.f only provided that it was incumbent upon the Permanent Council to make observations and comment on the report; it did not establish that the organ concerned should not present its report to the General Assembly. He also pointed out that Article 13 of the Statutes provides that the Committee shall present its annual report to the General Assembly. Finally, he suggested that a resolution be passed based on those legal grounds.

Dr. Freddy Castillo Castellanos stressed that the Juridical Committee must insist on presenting its report to the General Assembly, since there were various mandates of that Assembly and it appeared to him that, as the Organization's advisory body on juridical matters, the Committee should be present. He said it sufficed to mention Article 13 of the Statutes, since the other references were not express norms and should not therefore be interpreted.

B. Course on International Law

The Inter-American Juridical Committee and the Office of International Law of the OAS Department of International Legal Affairs held the XXXIV Course on International Law from July 30 to August 24, 2007. It was attended by 26 teachers from different countries in the Americas and Europe, 28 OAS scholars chosen from over 70 candidates, and 10 students who paid to participate. The central topic was "Legal Aspects of Regional Development."

The XXXIV Course on International Law was inaugurated on July 30, 2007, at the Hotel Everest Rio Convention Center. The ceremony was attended by the Secretary General of the OAS, José Miguel Insulza, the members of the Juridical Committee, the Director of the Department of International Legal Affairs, the Director of the Office of International Law, and a number of invited officials. Dr. Eduardo Vio paid tribute to the distinguished jurist Santiago Benadava. The text of his speech appears in document CJI/doc.268 (LXXI-O/07), which is transcribed below.

The course program was as follows:

XXXIV COURSE ON INTERNATIONAL LAW
"Legal Aspects of Regional Development"
Rio de Janeiro, July 30–August 24, 2007

First Week

Monday 30

10:00 – 12:00 **Opening session**

Tuesday 31

9:00 – 10:50 **Luis Toro Utillano**
Legal Officer. Office of International Law of the OAS
Draft American Declaration on the rights of the indigenous peoples: the negotiation process

11:10 – 1:00 **Luis Toro Utillano**
Draft American Declaration on the rights of the indigenous peoples: substantive aspects

2:30 – 4:30 **Inés Bustillo**
Director, ECLAC Office in Washington D.C.
Status of and outlook for economic and social development in Latin America and the Caribbean

Wednesday 1

9:00 – 10:50 **Jonathan T. Fried**
Executive Director for Canada, Ireland, and the Caribbean, International Monetary Fund
Good governance and development: some architectural issues

11:10 – 1:00 **Inés Bustillo**
International insertion of Latin America and the Caribbean and the trade agenda

2:30 – 4:30 **Meaghan McGrath Beaumont**
Principal Attorney, Legal Department, International Financial Corporation, International Monetary Fund
A legal framework for Project Finance and PPPs in Latin America

Thursday 2

9:00 – 10:50 **Jonathan T. Fried**
Preventing financial crises: the international agenda

11:10 – 1:00 **Meaghan McGrath Beaumont**
A legal framework for Project Finance and PPPs in Latin America II

2:30 – 4:30 **Juan Carlos Murillo**
Regional Legal Advisor, UNHCR
Right of asylum and the protection to refugees in the American Continent: regional contributions and developments

Friday 3

9:00 – 10:50 **José Miguel Insulza**
Secretary General of the Organization of American States

11:10 – 1:00 **Juan Carlos Murillo**
The Inter-American system of protection of Human Rights: its importance for the protection to refugees

2:30 – 4:30 BREAK

Second Week

Monday 6

9:00 – 10:50 **Ana Elizabeth Villalta Vizcarra**
Member of the Inter-American Juridical Committee
Integration, Trade, and Development in the framework of the Central-American Integration System

11:10 – 1:00 **Mauricio Herdocia Sacasa**
Member of the Inter-American Juridical Committee
The value of the principles of the OAS Charter for the inter-American system

2:30 – 4:30	**Ana Ampuero**
	Professor of International Law, Catholic University of Peru
	National treatment, most-favored nation treatment, minimum level treatment, and expropriation in international agreements on investment I
Tuesday 7	
9:00 – 10:50	**Ana Ampuero**
	National treatment, most-favored nation treatment, minimum level treatment, and expropriation in international agreements on investment II
11:10 – 1:00	**Michael Dennis**
	Head of the United States Delegation at the negotiation at the Seventh Inter-American Specialized Conference on Private International Law - CIDIP-VII
	CIDIP VII: building an agenda for consumer protection in the Americas I
2:30 – 4:30	**Eduardo Tellechea**
	Full Professor and Director of the Institute of Private International Law, Law School of the University of the Republic, Uruguay
	International legal cooperation and the recognition of foreign sentences at the regional level I
4:30 - 5:30	**Mauricio Herdocia Sacasa**
	Peaceful settlement of disputes
Wednesday 8	
9:00 – 10:50	**Eduardo Tellechea**
	International legal cooperation and the recognition of foreign sentences in the regional scope II
11:10 – 1:00	**Michael Dennis**
	CIDIP VII: building an agenda for consumer protection in the Americas II
2:30 – 4:30	**Ana Ampuero**
	National treatment, most-favoured nation treatment, minimum level treatment and expropriation in the international agreements on investments III
4:30 – 5:30	**Darío Soto**
	Assistant Director, Trust for the Americas of the OAS
	Right to access to public information, regional considerations and national perspectives"
Thursday 9	
9:00 – 10:50	**Eduardo Tellechea**
	International legal cooperation and the recognition of foreign sentences in the regional scope III
11:10 – 1:00	**Michael Dennis**
	CIDIP VII: building an agenda for consumer protection in the Americas III
2:30 – 4:30	**Welber Barral**
	Professor, Law School of the Federal University of Santa Catarina, Brazil
	The multilateral trade system
Friday 10	
9:00 – 10:50	**Ricardo Seitenfus**
	Member of the Inter-American Juridical Committee
	The contribution of the Americas to integration processes: theoretical contributions and historical experience
11:10 – 1:00	**Welber Barral**
	Regulation of subsidies and limits to State intervention
2:30 – 4:30	**Welber Barral**
	International Differendums

Third Week

Monday 13

9:00 – 10:50	**Dante Negro** Director, Office of International Law of the OAS *Emerging issues in the Inter-American system: the draft Inter-American Convention against Racism, Discrimination, and Intolerance and their implications for the development of the Americas*
11:10 – 1:00	**Nadia Rendak** Lawyer, Legal Department of the International Monetary Fund *The International Monetary Fund: legal aspects of membership*
2:30 – 4:30	**Daniela Trejos Vargas** Professor of Private International Law, Catholic University, Rio de Janeiro, Brazil *Litis pendens in Private International Law: praxis of the Brazilian courts*

Tuesday 14

9:00 – 10:50	**Nadia Rendak** *New developments at the International Monetary Fund*
11:10 – 1:00	**Gabriel Valladares** Legal Adviser of the International Comité of the red Cross for the Southern Cone (Topic to be determined)
2:30 – 4:30	**Cláudia Lima Marques** Professor of International Law, Federal University, Rio Grande do Sul, Brazil *Protection of the weakest parties in Private International Law and CIDIP-VII efforts regarding consumer protection I*

Wednesday 15

9:00 – 10:50	**Roberto Ruiz Díaz Labrano** Professor of International Law, National University, Asunción, Paraguay *The legal system of integration and international law I*
11:10 – 1:00	**Anton Camen** Legal Adviser of the International Committee of the Red Cross for Latin America and the Caribbean – Consulting Service (Topic to be determined)
2:30 – 4:30	**Cláudia Lima Marques** *Protection of the weakest parties in Private International Law and CIDIP-VII efforts regarding consumer protection II*

Thursday 16

9:00 – 10:50	**Roberto Ruiz Díaz Labrano** *"The legal system of integration and international law II*
11:10 – 1:00	**Dante Negro** *The new inter-American legal framework with respect to persons with disabilities and its implications for the development of the region*
2:30 – 4:30	**Antenor Madruga** Professor, Catholic University of Brasilia, Brazil *International legal cooperation I*

Friday 17

9:00 – 10:50	**Roberto Ruiz Díaz Labrano** *The legal system of integration and international law III*
11:10 – 1:00	**Antenor Madruga** *International legal cooperation II*
2:30 – 4:30	BREAK

Fourth Week

Monday 20	
9:00 – 10:50	**Jean-Michel Arrighi** Director, Department of International Legal Affairs of the OAS *The evolution of the Inter-American system I*
11:10 – 1:00	**Antônio Augusto Cançado Trindade** Professor, Head of the Law Department, University of Brasilia and Instituto Rio Branco, Brazil, former President of the Inter-American Court of Human Rights *Broadening the material content of jus cogens I*
2:30 – 4:30	BREAK
Tuesday 21	
9:00 – 10:50	**Jean-Michel Arrighi** *The evolution of the Inter-American system II*
11:10 – 1:00	**Antônio Augusto Cançado Trindade** *Broadening the material content of jus cogens II*
2:30 – 4:30	**Antônio Celso Alves Pereira** Professor, Head of the Law Faculty, University of the State of Rio de Janeiro, Brazil *United Nations Reform, Development, and Human Rights I*
Wednesday 22	
9:00 – 10:50	**Guy De Vel** Former Legal Director of the European Council *Building Europe together on the Rule of Law*
11:10 – 1:00	**Ives Daudet** Professor, Paris 1 University, Pantheon-Sorbonne and Secretary of The Hague Academy of International Law *L'exercice de compétences territoriales par les Nations Unies I*
2:30 – 4:30	**Antônio Celso Alves Pereira** *United Nations Reform, Development, and Human Rights II*
Thursday 23	
9:00 – 10:50	**Guy De Vel** *Comment la coopération entre le Conseil de l'Europe et l'Union européenne contribue au développement juridique du continent européen." [How cooperation between the Council of Europe and the European Union contributes to the legal development of the European continent.]*
11:10 – 1:00	**Ives Daudet** *L'exercice de compétences territoriales par les Nations Unies II*
2:30 – 4:30	**Daniela Trejos Vargas** *Migrant Workers*
Friday 24	
10:00	Closing session and awarding of certificates

The members of the Inter-American Juridical Committee decided that the XXXV Course on International Law would address the new challenges facing international law.

CJI/doc.268/07 rev.1

HOMAGE TO SANTIAGO BENADAVA
INAUGURATION OF THE 34TH COURSE ON INTERNATIONAL LAW
OF THE INTER-AMERICAN JURIDICAL COMMITTEE
OF THE ORGANIZATION OF AMERICAN STATES
Rio de Janeiro, Brazil, July 30, 2007

(presented by Dr. Eduardo Vio Grossi)

It is now a tradition that every year, at the beginning of the Course on International Law of the Inter-American Juridical Committee of the Organization of American States, tribute is paid to some outstanding American jurist who has recently died.

Yet, what evidently is unprecedented is that the person to whom the tribute is paid wrote his own biographical sketch to be precisely used later when he died. This is the case of Santiago Benadava to whom today we pay just and deserving tribute. Of course, I would not dare to just repeat what he himself wrote in his unique and enviable style, but rather to venture to use some of the statements made therein.

And it is this fact of having written his own obituary that portrays his awareness. As a concerned and considerate, meticulous man who loved his neighbors as he did himself, he did not wish to leave the others any problem, which is why he also took special care to facilitate the task for people like us who now refer to him.

Santiago Benadava was, first and foremost, a great man and was able, therefore, to be a fine jurist.

The law, as such, must effectively regulate life and, to do so, we must understand what it is. If it fails to achieve the latter, it then fails to do the former. Law is life or it is simply not Law.

And whoever intends to be a jurist must, then, understand the world in which it develops, just as the good lawyer must know the client. Everything to do a good job, by amending, enhancing or modernizing the Law in the first case, or duly representing other interests in the second case, but in both situations, complying with the principles that are professed.

Santiago Benadava understood others and especially their time. This is why his personality was not only of an outstanding jurist. He was also a distinguished diplomat and educator, and even a literary figure, and all activities that he practiced and understood were closely linked to that of a jurist, which was definitely his passion.

But he did this as he always did, based on valorizing the human being and all of humankind.

This is why it is not strange that Santiago Benadava would also recall, not without a certain pride, his Sephardic origin, his education in a Marist college, although not a Catholic, and then in public high school, or his law studies in the University of Chile and University of North Carolina, USA, where he was awarded his Master's.

Nor can we forget that he appreciated in simple terms his work on two occasions as Ambassador to Israel and participation in the Papal Mediation during the Chilean-Argentine dispute over the Beagle Channel; but on this last occasion he said that "it was the most important mission he had ever accomplished".

Also, there are two statements which he considers of the utmost importance and that accounts for his extremely rich personality. One when he refers to his USA university studies. He said "I recall very clearly that at the end of the written exams we had to state under our signatures that we had not given or been given any help. Everyone scrupulously complied with this statement". A great legacy for all law students, left by someone who would say that his "favorite activity was teaching", taught in the University of Chile, Diego Portales University, Instituto Superior de Carabineros and Academia de Ciencias Policiales de Investigaciones, all Chilean institutions.

The other statement is the purpose of the visit he made in the early 1960s, when allocated as a Chilean Foreign Service employee to Sir Percy Spender, President of the International Court of Justice, The Hague. He recalls that Sir Percy told him: "When you have to settle a legal matter, first use common sense, then the precedents and finally

doctrine. And remember that what is based on common sense is legally correct". Another great and lifelong teaching that he assimilated at the time when he was studying courses at the International Law Academy of The Hague.

Also, we cannot forget to mention Santiago Benadava's unique characteristics whenever he sought to link, under the cover of Public International Law, his specialty, theory with practice, regulations with life.

He was also distinguished for his juridical writings, the most important of which is the handbook on Public International Law, running to six editions. This is a straightforward text, precise, concise and complete. Not a missed or superfluous word. I always tell my students: the book by Santiago Benadava must be read and learned in full, not to be used just for consulting, but for understanding. But it is not the only legal work that should be mentioned on an occasion like this. I also feel impelled to mention his classic work on Relations between International Law and Internal Law in Chilean Jurisprudence, which undoubtedly was used in the recent Chilean constitutional amendments on treaties.

But, at the same time as his academic facet, Santiago Benadava had extremely exceptional opportunities to apply International Law in extreme situations. We have already mentioned the Papal Mediation, which culminated in 1984 with a "Treaty of Peace and Friendship between Chile and Argentina" that banished, we hope forever, the risk of war between both nations. There is no doubt that the formulas outlined in that text on dispute settlement are to some extent responsible for the valuable contributions made by Santiago Benadava, who also used the occasion to apply them fully as one of the five arbitral judges who ruled in 1995 the case of the "Laguna del Desierto", precisely on the headquarters of Inter-American Juridical Committee.

His irresistible inclination to understand the life that the law must regulate also led him to make incursions into historic topics. And this is why Santiago Benadava wrote about the History of the Frontiers of Chile, the History of the Papal Mediation between Chile and Argentina and An incident in diplomatic history: the Dogger Bank case. But the most surprising for everyone was his writing in 1986 on The German Legation Crime. As he himself said, "an astonishing crime committed in Chile in 1909 by a German diplomat. It was not easy to find the voluminous legal files of that time".

Everything said above cannot, however, do justice to the complex and rich personality of Santiago Benadava.

Maybe this is a vain attempt but I will venture to do so. I believe that two stories could help in knowing, understanding and remembering him better.

The first refers to the flower that he would wear every day without exception in the buttonhole of his jacket or coat. With a curiosity nurtured by the fact that his unique image was enhanced by his use of an elegant walking stick, I asked him why he wore it. He told me that every morning he would stroll in the garden, and one of the things he did was to pick a flower for his buttonhole; later that day he would surely meet a woman who give her the flower and this would make it a happier day, which I had the privileged of seeing on many an opportunity. His love for life in all its expressions!

The second story, when known by Santiago Benadava, he told me that it was not exactly as it happened in fact, but he enjoyed it. He said that when he returned from one of his trips abroad, he brought, as many diplomats do, a good car – in his case, a Mercedes Benz. Well, when he was giving his course on Public International Law in the University of Chile, the traditional discussion arose about the existence or not, as a juridical discipline, of this branch of Law, before which Santiago Benadava make all his students go into the street and before the said vehicles he would say to them: I don't know if you believe that International Law exists or not, but it gave me this Mercedes Benz. Love for the law in any event!

The lessons that ceased when Santiago Benadava died on February 1, 2004, when he was 73 years old, are not solely and exclusively found in the valuable, entertaining and precise texts that he wrote. The gestures that he also adopted during his fruitful life were also significantly relevant.

And talking about gestures, please permit me to call attention to one very much relating to Santiago Benadava.

In the early 1990s, as recently appointed Director Ambassador on Juridical Matters of the Chilean Ministry for Foreign Affairs, I had the pleasure of holding an official lunch offered by the Chilean Chancellor at that time, Enrique Silva Cimma, friend and former teacher of

Santiago Benadava, in his homage, on his then departure for the second time from the Republic's foreign service. I felt that it was a gesture of recognition to someone who had been distinguished in an environment where I was just beginning.

Undoubtedly, I am gratefully surprised to again pay homage to Santiago Benadava, precisely in the last regular session of the Inter-American Juridical Committee in which I have been participating for 16 years. I could think, consequently, that this is a sign for closing one chapter or life cycle.

Nevertheless, I should remind you that this homage was planned for two courses before this one, but I was unable to appear on those occasions due to health reasons. If today I now fully accomplish such an honorable task with certain delay, it is especially because Santiago Benadava's legacy points directly to the message that he sought to convey, and which was perhaps repeated over and over again as fully valid especially for students like yourselves, namely, that Life is found in Law and expressed therein.

Thank you very much.

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 2007, as representatives of the Committee:

1. Dr. Jean-Paul Hubert, Chair of the Inter-American Juridical Committee, along with other members of the Juridical Committee, presented the Annual Report of the Committee on its 2006 activities to the Committee on Juridical and Political Affairs of the Permanent Council, on March 22, 2007. A transcription of his presentation can be found in document CJI/doc.263/07, "Presentation of the 2006 Annual Report by the Chair of the Inter-American Juridical Committee to the Committee on Juridical and Political Affairs of the Organization of American States (Washington, D.C., March 22, 2007)."
2. Dr. Jaime Aparicio, Vice Chair of the Inter-American Juridical Committee, presented the Committee's Annual Report on its activities in 2006 to the General Assembly at its thirty-seventh regular session, held in Panama in June 2007. A transcription of his presentation can be found in document CJI/doc.263/07, "Presentation of the Annual Report of the Inter-American Juridical Committee to the General Assembly of the Organization of American States (Panama, July 5, 2007).
3. Dr. Mauricio Herdocia gave a presentation to the Committee on Juridical and Political Affairs of the OAS on March 22, 2007. A transcription of his presentation can be found in document CJI/doc.270, "The Principles of International Law Contained in the OAS Charter – Presentation by Dr. Mauricio Herdocia, Member of the Inter-American Juridical Committee at the Special Meeting of the Committee on Juridical and Political Affairs (CAJP) of the Permanent Council.
4. Dr. Mauricio Herdocia represented the Juridical Committee before the United Nations International Law Commission, which met in Geneva in July 2007.
5. Dr. Mauricio Herdocia represented the Juridical Committee at the First Encounter of Regional and International Courts of World Justice, held in Managua, Nicaragua, on October 4 and 5, 2007.

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 2007.

CJI/doc.263/07

PRESENTATION OF THE 2006 ANNUAL REPORT BY THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS OF THE ORGANIZATION OF AMERICAN STATES (Washington, D.C., March 22, 2007)

(presented by Dr. Jean-Paul Hubert)

Contents

I. INTRODUCTION. 2006, Centennial year of the Inter-American Juridical Committee. TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2006. 1. International Criminal Court. II. Topics discussed by the Inter-American Juridical Committee at the regular sessions held in 2006. 2. Legal aspects of the interdependence between democracy and economic and social development. 3. Preparations for the commemoration of the centennial of the Inter-American Juridical Committee. 4. Seventh Inter-American Specialized Conference on Private International Law. 5. Considerations on the task of codifying and harmonizing international law in the Americas. 6. Right to information: access to and protection of information and personal data. 7. Principles of judicial ethics. 8. Legal aspects of inter-American security. 9. Joint efforts of the Americas in the struggle against corruption and impunity. 10. Follow-up to the implementation of the Inter-American Democratic Charter. 11. Preparation of a draft international convention against racism and all forms of discrimination and intolerance. 12. Thoughts on the challenges of the Inter-American Juridical Committee. 13. Other activities during 2006. 14. Special aspects.

* * *

It is an honor for me to have been invited, as Chair of the Inter-American Juridical Committee, to give a summary of the Committee's activities during the year 2006. During the years 1990 to 1994, when I had the great privilege of representing Canada in this same chamber as its first Permanent Representative to the OAS, I never imagined that, 13 years later, I would have the pleasure of returning, this time to address you on behalf of the Inter-American Juridical Committee. I am very gratified by your presence.

I. INTRODUCTION

2006, Centennial year of the Inter-American Juridical Committee

In adopting a Declaration on the Centennial of the Inter-American Juridical Committee [AG/DEC. 49 (XXXVI-O/06)], the OAS General Assembly, during its thirty-sixth regular session (Santo Domingo, Dominican Republic, June 2006) proclaimed 2006 the year for commemorating that Centennial. 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.

This historic commemoration gave rise to various activities of special importance for the Juridical Committee. These included the Special Session held here in Washington by the Permanent Council, with the presence of members of the Committee meeting at OAS headquarters on the occasion of their first regular session of the year. At that time the Chair of the Committee, Dr. Mauricio Herdocia Sacasa, summarized and highlighted the Committee's major contributions to international law, both universal and hemispheric, during its 100 years of studies and opinions, as he did again during the heavily attended Centennial commemoration ceremony held on August 16, 2006 at the Itamaraty Palace in Rio de Janeiro, the headquarters of the Juridical Committee, during its second annual session.

Similarly, during its annual presentation to the United Nations Commission of International Law in Geneva, the representative of the Inter-American Juridical Committee took advantage of the occasion to share with UN jurists some of the highlights of the Committee's history, and the original contributions of the inter-American system to the development of international law in many sectors.

Finally, I should mention the Inter-American Juridical Committee's choice of “International Law in the Americas: 100 years of the Inter-American Juridical Committee" as the theme for its 33rd Course on International Law (Rio de Janeiro August 2006), and the publication of a commemorative work entitled "The Inter-American Juridical Committee: a Century of Contributions to International Law", by the OAS Office of International Law, with the active participation of the Committee.

The Juridical Committee approved a resolution, “Thanks to the Federative Republic of Brazil” (69th regular session, CJI/RES.111 (LXIX-O/06)), in which it thanked the Brazilian government for the significant support it had given the Juridical Committee in its centenary celebrations and drew particular attention to the Brazilian cooperation that made possible the publication of the commemorative centenary book and the successful holding of the Special Session.

II. TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2006

As indicated previously, the Inter-American Juridical Committee held two regular sessions during 2006, the first here in Washington, and the second in Rio de Janeiro, Brazil.

In the course of those two meetings, the Committee had on its agenda the following topics:

1. International Criminal Court

During its 68th regular session (Washington, D.C., March 2006), with the support of the Office of International Law and experts from the American Society of International Law, the Vanderbilt University School of Law and the University of California, and the Special Advisor to the Prosecutor of the International Criminal Court, the Inter-American Juridical Committee conducted a workshop on the structure and functioning of the International Criminal Court, the implementation of the Rome Statute, and the topic “Democracy in the Americas and the International Criminal Court”.

During the same session, the Juridical Committee approved a report on the International Criminal Court prepared by the rapporteur for this topic, Dr. Mauricio Herdocia Sacasa. That report contained, among other things, an analysis of certain relevant provisions of the Rome Statute, such as *res judicata*, the irrelevance of official capacity, the functions and powers of the Prosecutor of the International Criminal Court, detention procedure, life imprisonment, and pardons and amnesties. It also summarized the proposals received from 17 Member States to the questionnaire circulated previously by the Committee. In addition the Committee (a) asked Member States that have not yet replied to the questionnaire to fill it in, (b) requested States Parties to the Statute of the International Criminal Court that have completed the process of adopting laws and implementing Parts IX (on international cooperation and judicial assistance) and X (on enforcement of sentences) of that Statute to notify the Inter-American Juridical Committee of that fact; (c) asked States that have completed the process of adopting laws that incorporate, modify, or add the criminal offenses addressed in the Rome Statute to provide updated information thereon to the Committee; and (d) requested States Parties to the Rome Statute to report any other amendment that facilitates cooperation with the International Criminal Court.

At its thirty-sixth regular session (Santo Domingo, June 2006), the OAS General Assembly asked the Committee to prepare a set of recommendations to OAS Member States on ways to strengthen cooperation with the International Criminal Court, for forwarding to the General Assembly at its thirty-seventh regular session, i.e. next June.

During the Committee's 69th regular session (Rio de Janeiro, August 2006), the rapporteur summarized the inputs received at the working session held by the OAS Committee on Juridical and Political Affairs with the representative of the International Criminal Court in February 2006, and explained that with the results of that session he would proceed to study and draw up the documents necessary to fulfill the applicable mandates. Finally, another request was sent out, through the General Secretariat, for Member States that have not yet done so to respond to the questionnaire.

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

It will be recalled that the Committee included this theme on its agenda after the General Assembly, during its thirty-fourth regular session (Quito, Ecuador, June 2004) requested that, as part of its considerations on "Application of the Inter-American Democratic Charter", the Committee should examine "the legal aspects of the interdependence between democracy and economic and social development," bearing in mind the recommendations and declarations contained in various hemispheric and universal instruments.

The Juridical Committee held wide-ranging discussions of the issue during the following four sessions, including its 68th regular session (Washington, D.C., March 2006) when it received and examined the final report (CJI/doc.190/05 rev. 3) of the rapporteur, Dr. Jean-Paul Hubert.

In his report, and before suggesting some possible conclusions from his analysis of the issue, the rapporteur presented some general considerations and some important statements regarding the interrelation and interdependence of democracy and economic and social development. For example, he referred to the debate (more political than juridical in nature) over which must come first, democracy or development. He insisted that, while economic development and social development are not absolute preconditions for democracy, they certainly strengthen it, and that while the lack of development may pose a threat to democracy, this cannot be used as an excuse for eliminating or curtailing it.

The rapporteur also referred to the question of whether there is a "right to democracy," and/or a "right to development" inherent in international law in general, and in the international law of the Americas, and if there were such rights, who exactly would be the beneficiaries, and what obligations they would create. He addressed the relationship between democracy and economic and social development, on one hand, and human rights on the other, concluding that, regardless of whether democracy is a human right, the two concepts must not be confused.

In the wake of these and other considerations of a general nature, and on the basis of his review and analysis of the relevant documents attached to his report, the rapporteur offered a series of conclusions that he put to other members of the Committee with a view to providing sufficient information for the adoption of a possible resolution. Among those conclusions were the following: (i) the Juridical Committee must eschew political considerations with respect to the mandate; (ii) democracy is a legally protected value in the inter-American system, and the OAS is empowered as an organ to promote and uphold democracy; (iii) the OAS "mission" to defend democracy is clearly accompanied by that of preventing and anticipating the 'causes' that affect democracy; (iv) lack of development is widely acknowledged as one of such causes; (v) while the absence or lack of development can and does imperil democracy, that cannot be a justification to suppress or diminish democracy; (vi) any State in which the democratic process is interrupted immediately incurs the obligation to restore it; (vii) the Inter-American Democratic Charter is a binding international instrument which takes into consideration the progressive development of international law; (viii) the debate about which comes first, development or democracy, addresses a complex issue regarding which there is considerable disagreement; moreover, it is, in principle, a political, not a legal, issue; (ix) the Inter-American Democratic Charter establishes the existence of a right of peoples to democracy and an obligation of governments to defend it; (x) while there is a growing consensus about the existence of a right to development; there is no consensus that this right to development establishes an obligation of States such that sanctions could be applied for noncompliance; (xi) the Inter-American Democratic Charter is not designed for application to lack-of-development cases; (xii) when looked upon from the specific angle of the possible "legal" aspects of the universally proclaimed interdependence between "democracy" and "economic and social development", there would appear to be very fundamental differences, as least as pertains to the inter-American system; (xiii) in this respect, while the Member States, through their Democratic Charter and pursuant to the OAS Charter, have endorsed and imposed upon themselves individually an 'obligation of democracy'; an obligation the breach of which carries immediate political and legal consequences, the same does not apply to development; (xiv) there is nowhere to be found any sanctionable or enforceable "obligation of development": the one obligation which all OAS Members undeniably have with regard to development is that of collaborating with one another to promote and achieve development, since, as per the OAS Charter, "Inter-American cooperation for integral development is the common and joint responsibility of the Member States";

These considerations led the rapporteur to ponder whether what the Committee had in fact been asked was whether there are legal answers that would correct or improve upon the above situation. He considered that hemispheric documents as they now exist, and more specifically the OAS Charter and the Inter-American Democratic Charter, already establish in their proper and specific perspectives and legal scopes the rights and obligations of its Members, as well as the duties of the OAS itself and of its bodies, with regard to democracy on one hand, and social and economic development on the other, and their interdependence.

Yet, should there be a political will on the part of OAS Members to proceed with the negotiation and eventual approbation of a new instrument aimed at better addressing the interdependence between democracy and development, he suggested one of the objectives

of such a document could be a better understanding, interpretation, and effective application of such existing rights and obligations, incorporating them as they evolve.

He concluded that such an instrument would naturally need to find its foundation in the OAS Charter and take into account the Inter-American Democratic Charter. The rights and obligations it could spell out would therefore need to take into consideration the basic differences in the generally accepted legal parameters attached to the interrelated notions of "democracy" on one hand, and "economic and social development" on the other.

The rapporteur's report was well received by the Juridical Committee and, after a wide-ranging discussion of its contents and its conclusions, the Committee approved resolution CJI/RES.106 (LXVIII-O/06) on the legal aspects of the interdependence between democracy and economic and social development, which is attached to the report of the rapporteur.

In that resolution, the Committee considered, among other things, that in relation to the "democracy" part of the "democracy and economic and social development" equation, it follows from the Inter-American Democratic Charter that: (a) "the peoples of the America have a right to democracy and their governments have an obligation to promote and defend it", pursuant to the OAS Charter, and that (b) observance of the attributes inherent to democracy supported on the rule of law is indissolubly linked to the enforcement of representative democracy. In relation to the part corresponding to "economic and social development", and pursuant to the OAS Charter and the Inter-American Democratic Charter, the resolution deduced that: (a) both "economic" development and "social" development are now considered as components inherent to "integral development" established in the inter-American system and that the human being is the central subject of the development process, and that (b) the primary responsibility to achieve development lies with each of the Member States, which have the duty to cooperate with each other in accordance with the rule of common and shared responsibility of the Member States.

The resolution thereupon concludes that: (a) "International legal regulations with regard to the effective exercise of representative democracy in the States of the inter-American system form a specific and special order, and therefore, albeit complementary, different from others with another purpose, (...)" (CJI/RES.5/LII/98 dated March 19, 1998), and that (b) although economic and social development consolidates and strengthens democracy, the absence of adequate levels of development cannot be a call to affect democracy. It then reaffirmed that, without detriment to the foregoing, eradication of abject poverty is an essential part of promoting and consolidating representative democracy.

It also concluded that, on analyzing the possible legal aspects of interdependence between democracy and economic and social development, there are differences in focus, to the extent that: (i) the countries of the Hemisphere, in accordance with the inter-American legal system, have assumed that democracy is an obligation whose violation gives rise to lawsuits by the Organization, while (ii) the current inter-American system in terms of economic and social development does not provide sanctions or legal consequences referring to failure to comply with cooperation agreements for development. Consequently, the obligation toward democracy and the obligation to cooperate with development have different legal effects, regardless of the interdependence declared in the OAS Charter and Inter-American Democratic Charter.

The resolution concluded by affirming that development has a component of economic, social, and cultural rights enshrined in international and inter-American declarations and legal instruments in the sphere of human rights, an essential part of democracy, and that its increasing prevalence strengthens the legal link and interdependence between democracy, integral development, and combating poverty, as stated in the Inter-American Democratic Charter

Subsequently, during its thirty-sixth regular session (Santo Domingo, June, 2006) the General Assembly requested the Juridical Committee to include a final report on the topic in its next annual report, i.e. in the one presented today. Nevertheless, the Committee Chair thought it best not to wait, and at his request the Office of International Law forwarded resolution CJI/RES.106 (LXVIII-O/06) to the Permanent Council on July 14, 2006, together with document CJI/doc.190/05 rev. 3.

During the Committee's 69th regular session (Rio de Janeiro, August, 2006), the rapporteur's report having already been sent to the political bodies of the Organization, the matter was left as one of the topics under consideration on the Committee's agenda.

3. Preparations for commemoration of the Inter-American Juridical Committee Centennial

At its 68th regular session (Washington, D.C., March 2006), the Juridical Committee reviewed the preparations and program for the commemoration of the Committee's centennial and discussed the book to be published to mark this milestone. It also considered the topics it was going to discuss at the closure of the centennial and the events planned for the August 14, 15, and 16, 2006, which were to involve five sessions on the inter-American challenges and the ceremony commemorating the centennial.

At the 69th regular session (Rio de Janeiro, August 2006), Dr. Manoel Moletta, Secretary to the Committee, gave a presentation about the book to commemorate the centenary, and thanked the Members of the General Secretariat staff responsible for preparing the edition and the authors who wrote the various articles contained in the volume.

In light of the Brazilian government's support for the centenary celebrations and the publication of the book, the Inter-American Juridical Committee adopted resolution CJI/RES.111 (LXIX-O/06) "Thanks to the Federative Republic of Brazil".

The Chairman then moved to discussion of the General Assembly's invitation, issued during its thirty-sixth regular session (Santo Domingo, June 2006) to the Juridical Committee, through the Permanent Council, to present its views on the general principles of law that form the legal basis of the inter-American system. The Chairman recalled the original text of the draft Declaration on the Centenary of the Committee, which contained a series of general legal principles recognized by the inter-American system, and said that it provided a good starting point for working toward fulfilling the mandate of the General Assembly. It was decided to hold talks with the Chairman of the Committee on Juridical and Political Affairs in order to identify the best way to tackle the subject. A decision was made to comply with the mandate as part of the presentation of the Juridical Committee's Annual Report to the OAS Committee on Juridical and Political Affairs in March 2007.

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

At its 68th regular session (Washington, D.C., March 2006), the Juridical Committee considered report CJI/doc.209/06, presented by Dr. Ana Elizabeth Villalta Vizcarra, the rapporteur for this topic, who, after summarizing the background to the subject, recalled the General Assembly mandates contained in resolutions AG/RES. 2069 (XXXV-O/05) and AG/RES. 2065 (XXXV-O/05), in which the Juridical Committee was asked to comment on the final agenda items of CIDIP-VII and to assist with the preparatory studies on those subjects.

On the first of the two topics approved for CIDIP-VII, consumer protection, three documents are in preparation: a Brazilian draft of an Applicable Law Convention, a United States proposal for a Model Law on Monetary Restitution, and a Canadian text of a Convention on Jurisdiction. Each of these proposals is of a different scope, but, at first glance, the three are mutually compatible. On the second topic of CIDIP-VII, the idea is to establish a new registry system for implementation of the Model Inter-American Law on Secured Transactions.

At the Chair's request, Dr. John Wilson, Legal Officer at the Office of International Law, gave a brief summary of the methodology adopted in the preparatory work for CIDIP-VII, which would include a virtual forum in which governmental and independent experts could exchange ideas. Dr. Wilson also mentioned the possibility that the Committee might participate in that virtual forum.

From the discussion it emerged that the forum's website would contain a page for the Juridical Committee at which its reports on the subject would be posted, and a resolution was adopted [CJI/RES.104 (LXVIII-O/06)] requesting the rapporteurs for the subject (Dr. Antonio F. Pérez being the co-rapporteur) to participate in a coordinated manner in that forum, as representatives of the Committee.

During its thirty-sixth regular session (Santo Domingo, June 2006), the OAS General Assembly adopted resolution AG/RES. 2218 (XXXVI-O/06) in which it asked the Committee to cooperate in the preparations for CIDIP-VII and encouraged the rapporteurs for this topic to participate in the consultation mechanisms to be established for work on the topics proposed for that Conference.

During the 69th regular session of the Juridical Committee (Rio de Janeiro, August 2006) Dr. Villalta reported on the progress of the virtual forum on CIDIP-VII. Dr. Pérez considered it advisable that the Committee should not formulate concrete recommendations until it had the three documents in hand and could take a comprehensive view of the topic. He suggested instead that the Committee proceed with a more conceptual analysis.

The Juridical Committee adopted resolution CJI/RES.115 (LXIX-O/06), in which it reiterated its support for the CIDIP process as the best possible forum for codifying and harmonizing private international law in the Hemisphere. It also reiterated its support for the rapporteurs' participation in the preparations for CIDIP-VII. Finally, it resolved to draw up new texts, comments, and questions for the CIDIP-VII Internet discussion forum, in order to encourage dialogue toward the production of instruments for implementation in all the Organization's Member States.

5. Considerations on the task of codifying and harmonizing international law in the Americas

The report presented by Dr. Ana Elizabeth Villalta Vizcarra, co-rapporteur for the topic, during the 68th regular session of the Juridical Committee (Washington, D.C., March 2006), recalled that that in this area the Committee aims to study the process of codifying private international law, make an inventory of what already exists in this field and of the Juridical Committee's contributions to the process, and put forward conclusions as to the best way to codify and harmonize international rules. The Committee asked the rapporteur [CJI/RES.103 (LXVIII-O/06)] to submit an updated report on the topic at its next meeting.

During its thirty-sixth regular session (Santo Domingo, June 2006), the OAS General Assembly adopted resolution AG/RES. 2218 (XXXVI-O/06), which requests that the Inter-American Juridical Committee continue considering the topic.

During the 69th regular session of the Juridical Committee (Rio de Janeiro, August 2006), its members suggested that, although the topic was complex, it should be possible for the Committee to adopt a decision on the way in which a general system of private law could be established in the Hemisphere. It was also suggested, however, that at the current juncture it was more important to consider the specific topics of CIDIP-VII, since they represented the most direct and effective way in which the Juridical Committee could help codify private international law in the Americas.

In connection with this, Dr. Ana Elizabeth Villalta Vizcarra spoke of the importance of preserving the CIDIP process as the prime forum for codifying and harmonizing private international law in the Hemisphere. She also cited the differences between universal forums (such as The Hague Conference on Private International Law) and regional forums like CIDIP, and underscored the need to preserve the latter, since they facilitated greater participation by the region's States and responded more accurately to the needs and realities of the hemisphere.

Finally, the Committee adopted resolution CJI/RES.116 (LXIX-O/06), in which, *inter alia,* it recognized the valuable contribution made by the CIDIP process in modernizing, harmonizing, and standardizing the applicable law in the Americas; emphasized the renewed interest and new dimensions acquired by this important topic in light of the progress made with subregional integration efforts and the agreements struck in the areas of free trade, investments, and services; underscored the importance of increasing the number of ratifications of and accessions to the CIDIP conventions and the incorporation of model laws into domestic law; and noted that the CIDIPs have helped demonstrate the complementary benefits of common law and civil law, thereby generating a new dynamic of integration and enrichment that strengthens the basic unity of the inter-American system.

6. Right to information: access to and protection of information and personal data

In its discussion on this topic during its 68th regular session (Washington, D.C., March 2006), the Juridical Committee recalled that it still had to fulfill a previous mandate from the General Assembly with respect to an update on the protection of personal data, based on comparative law, and it appointed Dr. Jaime Aparicio as rapporteur for the topic.

The General Assembly, during its thirty-sixth regular session (Santo Domingo, June 2006) again requested such an update, and also asked for an update of a study prepared by Dr. Jonathan Fried in 2000 on "Right to information: access to and protection of information and personal data in electronic format" (AG/RES. 2218 (XXXVI-O/06) and AG/RES. 2252 (XXXVI-O/06)) on the basis of a new questionnaire that the Committee would prepare with the help of the Secretariat.

During the 69th regular session of the Juridical Committee (Rio de Janeiro, August 2006), the rapporteur presented, with the assistance of Dr. Antonio F. Pérez, a Questionnaire for the OAS Member States Concerning Legislation on Access to Information and Protection of Personal Data in View of the Possible Drafting of a Legal Instrument (CJI/doc.232/06 rev. 1).

The questionnaire's basic structure, he explained, focused on the national laws of the Member States, the basic rules governing information access and data protection, and the ways in which those provisions were implemented and enforced. The questionnaire also asked Member States for their opinion on the possible adoption of an inter-American instrument on access to information and the protection of personal data.

Committee members said it was important to emphasize that the ultimate goal of this undertaking was the possible drafting of an inter-American instrument on those two topics of access to information and protection of personal data. The Juridical Committee then approved the questionnaire and asked the General Secretariat to convey it to the Organization's Member States so that the Juridical Committee could proceed to study this question.

The Chairman reminded the Committee of the above-mentioned report prepared by Dr. Fried and asked the Office of International Law to update that study as it related to comparative legislation, for prompt conveyance to the rapporteurs.

7. Principles of judicial ethics

At its 68th regular session (Washington, D.C., March 2006), the Juridical Committee appointed Dr. José Manuel Delgado Ocando as rapporteur on the topic. During the recess, he presented document CJI/doc.221/06, "Preliminary notes on principles of judicial ethics".

During the Committee's 69th regular session (Rio de Janeiro, August 2006), given the rapporteur's resignation from the Committee for health reasons, Dr. Ana Elizabeth Villalta Vizcarra was selected as the new rapporteur for the topic.

The Chairman then gave a verbal summary of the report prepared by Dr. Delgado Ocando. After describing in detail the work of compiling various international instruments on judicial ethics, the report referred to several issues that affect the independence of the judiciary, particularly the fact that court magistrates in some countries of the Americas are subject to influences from the political system. After some general considerations about the principles and rules that govern this matter, the report went on to explain the way in which internationally accepted judicial ethical principles are addressed, and described the results of the Sixth Ibero-American Summit of Supreme Court Chief Justices of 2001.

In its conclusions, the report offered some thoughts about the impact that enacting a code of judicial ethics might or might not have on the independence of the judiciary, noting that, in some cases, doubts could arise about the relative effectiveness of such codes in the absence of social, political, and economic conditions underpinning the ethical responsibility of members of the judicial branch.

With respect to the independence of the judiciary, during the Committee's discussion members noted that a balance had to be struck between judicial independence and the handling of cases by the courts, in the sense that independence must not be used to impede access to justice.

Finally, the Chairman said that one very important task would be to gather together all the Juridical Committee's work on this topic (including the report and proposal drafted by Dr. Jonathan T. Fried, a former member of the Committee) and compile it into a Code of Judicial Ethics for the Hemisphere. It was also noted that if it were decided to draft such a code, it would have to apply not only to judges, but to all participants with direct ties to the judiciary and to the administration of justice.

8. Legal aspects of inter-American security

The Juridical Committee did not consider this topic at its 68th regular session (Washington, D.C., March 2006).

At its 69th regular session (Rio de Janeiro, August 2006), the Chairman of the Committee remarked that there was no specific mandate regarding this topic. However, he suggested waiting until the new members of the Juridical Committee arrived in March 2007 to explore the direction to be taken in its treatment.

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

The Inter-American Juridical Committee did not consider this topic at its 68th regular session (Washington, D.C., March 2006).

At its 69th regular session (Rio de Janeiro, August 2006), the Chairman recalled that the Committee had already complied with the General Assembly's mandate. Since the resolution requires no new action in this regard, he also said that the Committee should consider removing it from its agenda.

10. Follow-up to the Implementation of the Inter-American Democratic Charter

The Inter-American Juridical Committee did not consider this topic at its 68th regular session (Washington, D.C., March 2006), nor did it do so at its 69th regular session (Rio de Janeiro, August 2006).

11. Preparation of a Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance

During the 68th regular session of the Committee (Washington, D.C., March 2006), given indications of a political will on the part of OAS Members to prepare a draft convention on this matter, the Committee elected Dr. Jaime Aparicio as rapporteur for this topic.

On this point, Dr. Dante Negro, Director of the Office of International Law, said that the Office, in its capacity as the Working Group's technical secretariat, was keeping track of each stage of this effort and would keep the Juridical Committee informed.

At its thirty-sixth regular session (Santo Domingo, June 2006), the General Assembly adopted resolution AG/RES. 2168 (XXXVI-O/06), "Combating Racism and all forms of Discrimination and Intolerance and Consideration of the Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance", instructing the Working Group to begin negotiations on a draft convention and reiterating the invitation to the organs, agencies, and entities of the Organization to prepare inputs for consideration by the Working Group.

At the 69th regular session (Rio de Janeiro, August 2006), at the Chair's request, Dr. Dante Negro reported on developments with the draft convention. The members of the Inter-American Juridical Committee agreed to offer analysis and comments on the draft convention when it was at a more advanced stage.

In a letter dated October 10, 2006 to the Chairman of the Inter-American Juridical Committee from the Chairman of the Working Group responsible for preparing a Draft Inter-American Convention against Racism and all forms of Discrimination and Intolerance, Counselor Maria Cristina Pereira da Silva transmitted to the Committee the draft of that convention, and asked it to provide its views as a contribution to the negotiations in the working group. The Chairman responded that the draft would be put to the immediate consideration of Committee members, so that an agreed opinion could be provided during the 70th regular session of the Committee scheduled for late February 2007 in San Salvador, El Salvador.

12. Thoughts on the challenges of the Inter-American Juridical Committee

During the 69th Reglar Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2006), Dr. Eduardo Vio took the occasion of the Committee's centennial celebrations to present a paper with Some Considerations on the Challenges of the Inter-American Juridical Committee at its Centenary. He proposed a number of alternatives for modernizing the structure and functions of the Committee for its future work, including the possibility that it might come to serve as a body for resolving disputes among the OAS Member States. He also proposed studying the establishment of an Inter-American Court of Justice to resolve economic and political disputes that cannot be taken before other jurisdictional venues.

The Juridical Committee asked Dr. Vio to present to the following regular session of the Committee an additional document setting out specific guidelines for the Juridical Committee's continued study of the topic, and it decided to include it on its agenda.

13. Other activities of the Inter-American Juridical Committee during 2006

A. Workshop on Democracy and the Americas

At its 68th regular session (Washington, March, 2006) the Juridical Committee held a joint workshop with the American Society of International Law on "Democracy in the Americas". It was moderated by the Chair of the Juridical Committee, Dr. Mauricio Herdocia

Sacasa, and featured four panelists: Antonio F. Pérez, member of the CJI, who spoke on mechanisms for defending democracy within the inter-American system; Jean-Paul Hubert, Vice-Chairman of the CJI, who spoke on the links between democracy and economic and social development; Ruti Teitel, Professor of Comparative Law at New York Law School, who spoke on democratization, the rule of law, and hemispheric security; and Lisa Davis, of Freedom House, who spoke on the various regional systems for protecting democracy.

B. Presentation of the Annual Report of the Inter-American Juridical Committee

During the 69th regular session (Rio de Janeiro, August 2006), the Committee Chair referred to his presentation of the document CJI/doc.234/06, Report of the Chairman of the Inter-American Juridical Committee, Dr. Mauricio Herdocia Sacasa, to the Thirty-Sixth Regular Session of the General Assembly of the OAS (Santo Domingo, June 6, 2006) on the Committee's activities in 2005. Dr. Herdocia noted 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.

C. Course on International Law

The Inter-American Juridical Committee and the Office of International Law of the OAS Department of International Legal Affairs held the 33rd Course on International Law from July 31 to August 25, 2006. It was attended by 24 professors from different countries in the Americas and Europe, 28 OAS scholars chosen from over 70 candidates, and 14 students who paid to participate. The central topic was "International Law in the Americas: one hundred years of the Inter-American Juridical Committee".

14. Special aspects

It was normal that in its centenary year the Inter-American Juridical Committee should celebrate its past record and the undeniable, and often innovative, contributions that the inter-American system has made to the development and prevalence of international law, both public and private. But it was also appropriate to give some thought to the challenges posed to the Committee by the hemispheric community's still pressing need to consolidate the rule of law and to adapt it continuously in the search for democratic, economic, and social development for its peoples.

This consideration is an ongoing process. Given the mandate and the responsibilities assigned the Committee by the Charter of the Organization of American States, it is essential for Member States to take an active part in that ongoing consideration. This is why the Inter-American Juridical Committee attaches such great importance to maintaining and strengthening cooperative relations between itself and the Committee on Juridical and Political Affairs. The same may be said of participation by its rapporteurs in the specialized meetings of the working groups.

The Committee strives to remain alert to the juridical needs of the Hemisphere, and for example, in its most recent session, held a few days ago in El Salvador, it agreed that at its next session it would address such topics as the situation of migrant workers and their families in international law, and judicial cooperation in matters relating to Haiti. It also believes that additional study may be needed on the new forms of threats to democracy not contemplated in the OAS Democratic Charter.

The Chairman must once again stress how important it is that the questionnaires sent out by the Inter-American Juridical Committee should receive as many answers as possible, so that the Committee can work from a broad, complete, and duly substantiated base.

Finally, the Chairman is grateful for the valuable cooperation received from the Committee on Juridical and Political Affairs of the Permanent Council of the Organization, and reiterates his readiness to tackle the tasks requested of him in that spirit of cooperation.

CJI/doc.265/07

PRESENTATION OF THE ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES (Panama, 5 July 2007)

(presented by Dr. Jaime Aparicio Otero, Vice-Chairman)

I. COMMEMORATION OF THE CENTENARY OF THE INTER-AMERICAN JURIDICAL COMMITTEE

In Washington, D.C., in March 2006, the Permanent Council held a Special Session in commemoration of the Centenary of the Inter-American Juridical Committee on 29 March 2006. On its part, the General Assembly of the OAS, during its 36th regular session (Santo Domingo, Dominican Republic, June 2006), adopted the "Declaration on the Centenary of the Inter-American Juridical Committee" [AG/DEC.49 (XXXVI-O/06)].

During its 69th regular session held in Rio de Janeiro, on 16 August 2006, the principal act in commemoration of the centenary of the Inter-American Juridical Committee took place in the presence of the members of the Inter-American Juridical Committee and various personalities in the head office of the IJC in Itamaraty Palace.

Due to the support lent by the Brazilian government to the celebration of the centenary and publication of the book "The Inter-American Juridical Committee: A Century of Contributions to International Law", the Inter-American Juridical Committee adopted resolution "Thanks to the Federative Republic of Brazil" [CJI/RES.111 (LXIX-O/06)], in which it expresses its thanks to the Government of Brazil for its significant support.

II. TOPICS ON WHICH THE IAJC HAS PERFORMED IMPORTANT WORK IN COMPLIANCE WITH THE MANDATES OF THE GENERAL ASSEMBLY

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

During its 68th regular session (Washington D.C., 20 to 31 March 2006), the Inter-American Juridical Committee adopted a resolution concerning the legal aspects of the interdependence between democracy and economic and social development, to which was annexed the report presented by the rapporteur, Dr. Jean Paul Hubert. Subsequently, the General Assembly of the OAS, during its 36th regular session (Santo Domingo, Dominican Republic, June 2006), asked the IAJC to include a final report on the matter in its next annual report.

B. International Criminal Court

During its 68th regular session, the Inter-American Juridical Committee, with the support of the Office of International Law and together with the American Society of International Law, held the workshop "Democracy in the Americas and the International Criminal Court".

Also during its 68th regular session, the Inter-American Juridical Committee adopted the resolution "Promoting the International Criminal Court" [CJI/RES.105 (LXVIII-O/06)], which approves the document presented by the Rapporteur, Dr. Mauricio Herdocia Sacasa.

The resolution also contains a request for the Member States that have not yet answered the questionnaire prepared by the Juridical Committee to complete said questionnaire. Furthermore, the States that have concluded approval of laws that incorporate, modify or add to the criminal types dealt with in the "Statute of Rome" are requested to provide the Inter-American Juridical Committee with this updated information.

The Inter-American Juridical Committee decided to keep on its agenda the question related to "Promoting the International Criminal Court".

C. Right of Information

The General Assembly of the OAS, during its 36th regular session, asked the Inter-American Juridical Committee to include in its next annual report an updated report on protection of personal data based on comparative law. It also requested an update of the study "Right to information: access to and protection of information and personal data in

electronic format" of 2000, for which, with the support of the Secretariat, it will draft and distribute a new questionnaire on the topic among the Member States.

During the 69th regular session of the Inter-American Juridical Committee, the Rapporteurs of the topic presented the Questionnaire, the same one that was sent to the Member States. To date, three answers to the questionnaire have been received from Member States: Guatemala, Jamaica and Mexico.

On 22 November 2006, the Office of International Law sent to the rapporteur of the topic, Dr. Jaime Aparicio, the document prepared by Dr. Jonathan Fried, duly updated (CJI/doc.25/00 rev.2, "Right to information: access to and protection of information and personal data in electronic format").

With this material, the Juridical Committee, on 19 March 2007, forwarded to the Permanent Council the resolution "Right to Information" [CJI/RES.123 (LXX-O/07)], together with the updated report of the year 2000, in compliance with the mandate of the General Assembly.

D. Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance

During the 68th regular session, the Inter-American Juridical Committee elected Dr. Jaime Aparicio rapporteur of the topic.

During its 69th regular session, the members of the Inter-American Juridical Committee agreed that it would be more convenient to hear comments on the draft convention being negotiated by the respective Working Group when this is in a more advanced stage. Nevertheless, in compliance with a letter sent by the President of the Working Group, dated 19 March 2007, the Juridical Committee sent resolution CJI/RES.124 (LXX-O/07), "The struggle against discrimination and intolerance in the Americas", adopted at its 70th regular session, as a contribution to the negotiations of the Working Group, together with a report on the matter.

III. OTHER TOPICS

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

During the 68th regular session of the Inter-American Juridical Committee, Dr. Ana Elizabeth Villalta Vizcarra, rapporteur of the topic, presented the report "Seventh Specialized Inter-American Conference on Private International Law (CIDIP-VII)" (CJI/doc.209/06).

The IAJC adopted a resolution approving the document presented by the co-rapporteur and asked the rapporteurs of the topic, representing the Juridical Committee, to participate in the consulting mechanisms established to develop the topics proposed for the CIDIP-VII.

The General Assembly of the OAS, during its 36th regular session, through resolution AG/RES. 2218 (XXXVI-O/06), asked the Juridical Committee to collaborate in preparing the next CIDIP-VII.

During the 69th regular session of the IAJC, approval was given to the resolution "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)" [CJI/RES.115 (LXIX-O/06)], in which it reiterates its support of the process of the CIDIPs as the forum *par excellence* for standardizing and harmonizing private international law in the hemisphere.

B. Consideration on the codification and standardization of international law in the Americas

During the 68th regular session of the IAJC, Dr. Ana Elizabeth Villalta Vizcarra, co-rapporteur of the topic, presented the document "Consideration on the codification and standardization of private international law in the Americas" (CJI/doc.208/06).

During this regular session, the Inter-American Juridical Committee adopted the resolution "Consideration on the codification and standardization of international law in the Americas" [CJI/RES.103 (LXVIII-O/06)], in which it requests the rapporteurs to present an updated report to the Juridical Committee on the matter.

The General Assembly of the OAS, during its 36th regular session, through resolution AG/RES. 2218 (XXXVI-O/06), asked the Juridical Committee to continue considering the matter.

During the 69th regular session of the Inter-American Juridical Committee, approval was given to the resolution “Considerations on the task of codifying and harmonizing international law in the Americas” [CJI/RES.116 (LXIX-O/06)].

C. Course on International Law

The Inter-American Juridical Committee and the Office of International Law of the Department of International Legal Affairs of the OAS organized between 31 July and 25 August 2006 the 33rd Course of International Law, with the participation of 24 professors from different countries of America and Europe, 28 OAS scholarship-holders elected from more than over 70 candidates, and 14 pupils who paid their own expenses. The core topic of the Course was “International Law in the Americas: 100 years of the Inter-American Juridical Committee”.

D. 70th regular session of the Inter-American Juridical Committee in El Salvador

Although in this report no mention is made of the 70th regular session of the IJC (26 February to 9 March 2007), since this corresponds to the current year, I would like, as representative of the IAJC, to transmit to the Government and the people of the Republic of El Salvador our gratitude for the generous hospitality offered in San Salvador. Accordingly, I would like to thank Dr. Ana Elizabeth Villalta Vizcarra for the magnificent organization of the 70th regular session of the Inter-American Juridical Committee in El Salvador.

E. Thoughts on the challenges of the Inter-American Juridical Committee

During the 69th regular session of the Inter-American Juridical Committee, Dr. Eduardo Vio Grossi presented the document “Some comments on the challenges of the Inter-American Juridical Committee on occasion of its centenary” (CJI/doc.231/06). Dr. Vio Grossi stressed the fundamental role of the IAJC in the juridical affairs of the hemisphere, underscoring the success obtained across the last one hundred years of existence, but he also pointed to the future challenges of the Inter-American Juridical Committee.

Among these challenges, he mentioned that during the first century of its existence the consultative function of the Juridical Committee had been improved. Notwithstanding, he emphasized the importance of using the Inter-American Juridical Committee initiative capacity to make proposals of a juridical nature concerning major topics of regional interest.

One particular point he mentioned was that the resolutions and opinions of the Juridical Committee were not obligatory for the rest of the branches of the OAS and its Member States. In this sense he proposed some possible alternatives for modernizing the structure of the Juridical Committee and its functions, including the proposal that the Committee be one of the instances for dispute-settlement among the OAS Members States and play a more important role in topics of peace and regional security.

In this sense, and to conclude my comments, I would like to add that the relevance of the Juridical Committee will in the next few years be linked to its capacity to contribute to the relevant juridical topics in the region, either supporting the designing of judicial reforms in countries in the region, such as Haiti; defending the preparation of new inter-American treaties (such as the “Inter-American convention against racism and all forms of discrimination and intolerance”); the proposed Model Laws (consumer protection); improving the Inter-American Democratic Charter, basically with regard to the independence of the powers of the State; and respect for the autonomy of judicial power and due process. This in addition to support for institutionalizing the judicial career in the countries, and finally the topic of access to public information, which is one of the most effective tools to combat corruption.

CJI/doc.270/07

PRINCIPLES OF INTERNATIONAL LAW IN THE OAS CHARTER

**SPEECH BY MR. MAURICIO HERDOCIA SACASA,
MEMBER OF THE INTER-AMERICAN JURIDICAL COMMITTEE, AT THE
SPECIAL MEETING OF THE COMMITTEE ON JURIDICAL AND
POLITICAL AFFAIRS (CAJP) OF THE PERMANENT COUNCIL
Washington, March 22, 2007**

Ambassador Osmar Chohfi, Chairman of the Committee on Juridical and Political Matters of the Permanent Council,

Permanent Representatives and delegates

Ambassador Jean-Paul Hubert, Chair of the Inter-American Juridical Committee

Mr. Jaime Aparicio, Vice-Chairman, Inter-American Juridical Committee

Committee Members, Ricardo Seitenfus and Antonio Fidel Pérez

Dr. Jean-Michel Arrighi, Director, Department of International Legal Affairs

Dr. Dante Negro, Director, International Law Office

I. MANDATE

It is a great pleasure for me to attend this meeting of the Committee of Legal and Political Affairs to participate together with our colleagues of the Committee in this special session on the principles of International Law contained in the OAS Charter, pursuant to the mandate established in resolution AG/RES. 2250 (XXXVI-O/06), with the aim of contributing to these thoughts[1].

The idea of the principles is not a new one for the Inter-American Juridical Committee. On June 2, 1942, the Chair of the Juridical Committee Dr. Mello Franco sent a document to the Director General of the Pan-American Union referring to the "Reaffirmation of the fundamental principles of International law", which would possibly influence the text of Article 3 of the 1948 Bogota Charter[2].

In these lines, I would like to highlight the subsequent contribution of the Panama Declaration on the Inter-American Contribution to the Development and Codification of International Law, in document AG/DEC.12 (XXVI-O/96), and more recently the document approved by the Juridical Committee entitled: "Draft Declaration on the Centennial of the Inter-American Juridical Committee: General Principles of Law Recognized by the Inter-American System (CJI/doc.195/05 rev.4).[3]

II. STARTING POINTS

We must begin with the assessment that the Organization is based on principles. The principles are the basis for maintaining inter-American peace and security and for the development of the aims of the OAS Charter. That is to say, they are essential not only for preserving the paramount aims of peace and security, but also for the fulfillment of all the objectives of the Charter.

Principles have, consequently, a basic nature. They are founding principles acting as pillars, without which the inter-American society could not be construed.

[1] The discussions herein address opinions made by the Committee and references to its work; but of course, only the author is responsible for its content reflecting his own view, perspectives and scopes of the topics solely attributed to him.

[2] The principles, in fact, are being developed since the 1826 *Treaty of Union, League and Confederation*; the 1848 *Treaty of Confederation* (principally); the 1856*Treaty of Alliance and Confederation* and the 1865 *treaty on Conservation of Peace*. Art. 3 of the *OAS Charter* "reaffirms" therefore the principles that had already been stated in various forms, including the 1933 *Convention on Rights and Duties between States*; the 1938 *Declaration of American Principles*; the *Declaration of Mexico*, both dating from 1945 among others, and later the *Charter,* the resolution relating to the 1972 *Strengthening of the principles of non-intervention and self-determination of the peoples and measures to guarantee their compliance*; the 1973 *Principles Referring to Relations between the American States* and the 1979 *Declaration of Peace,* for example.

[3] Under resolution AG/RES.1773 (XXXI-O/01), IAJC was asked to consider the possibility of preparing a draft declaration on its role in the development of International Law for the timely consideration of the General Assembly. Much earlier, by mandate of the Fifth Consultation Meeting of Ministers of Foreign Affairs (Santiago, 1959), the Council of the Organization entrusted the Inter-American Juridical Committee to prepare a draft instrument to state as many of those cases as possible that are violations against the principle of non-intervention and the possible creation of proper procedures to assure strict compliance with the principle. During 1974, following F.V. García- Amador, in his compilation about the Inter-American system, the Committee approved a new draft on cases of violations against the principles of non-intervention.

- Inter-relations

Principles, as regards their construction and application, are closely related among them and each of them should be construed in the context of the other principles. Principles do not live alone as in monastic isolation; they are interdependent, they complement each other and they interact.

This dynamic confluence of principles forms part and confirms the basic unit of International Law and, in our case, of the Inter-American System.

They form the underlying substratum and the guiding principle of the Charter, providing guidance for its resolutions, statements and treaties and the behavior among States.

Obviously we can reaffirm that some principles serve efficiently as a systemic fabric with others so as to achieve the goals of the Charter.

- Charter of the United Nations

It is important to remember that, since the OAS is a regional organization within the United Nations[4], the principles of the Inter-American System are directly related with the principles of the Universal Charter and resolution 2625 (XXV) of the United Nations General Assembly regarding the principles of International Law dealing with friendship and cooperation among States.

We should also mention that not all the principles of the Inter-American System are in the actual UN Charter; for example, the principle of political organization on the basis of representative democracy and the principle of solidarity (different from the cooperation principle) are its own principles and increasingly gaining universal support.

- Presence throughout the whole Charter

I would like to emphasize in this introduction that we must bear in mind that the principles are present throughout the Charter, and not only in Article 3, and they also project themselves in the provisions that regulate each of the XXII chapters of the Charter and the Preamble. Furthermore, its content in terms of principles may be clearer, on occasions, in other provisions of the Charter, as for example with the non-intervention principle of article 19.

- Principle Specificity and Specialty

I could not but indicate that the relationship among principles, through extremely close and interdependent, does not make them miss their individuality nor its contents and specific applicability and outreach. Each principle has its own area of action and its own efficacy, and this does not affect the contribution of them all towards the common goal of a far, democratic and stable Inter-American order.

- Relations with International Common Law

The conventional value of these principles (in view of its consecration in a treaty such as the OAS Charter), does not mean they have lost their value as common international laws. Some rules do not replace others[5]. As the International Court of Justice has indicated, some principles are already coded and complemented by common laws.[6] Sometimes codification helps to clarify and specify their meaning.

- Principles and today's reality

Principles do not exist in an ideal, abstract and Platonic world. They exist and are applied (or fail to be applied by omission) in a real world in transition, with disturbance preceding major change. The value of these principles cannot be understood without gauging the eras to decode the manner in which they act, sometimes as anchors for humanity, permanent values and reason, before the sometimes apocalyptic signs of a new

□□

4 Art. 1 of the *OAS Charter*.

5 "The fact that the principles mentioned, and recognized as such, were coded or incorporated in multilateral conventions does not mean that they cease to exist and be applied as principles of customary law, including with regard to countries that are party to said conventions. Principles such as those referring to abstention from the use and threat of use of force, non-intervention, respect for independence and territorial of the States…conserve a mandatory nature inasmuch as they are elements of common international law…" IACJ Reports 1984 paragraph 73.

6 A case, for example, of the principle of *jus cogens* relating to abstention of the use and threat of force addressed in the treaties of the UN and OAS and the criterion of proportionality being raised in cases of legitimate defense, by the common International law.

and vertiginous predator initiated with the devastation of terrorism, and which is a demonstration of dehumanization and indifference.

- Today's World and International Law

Continuing my presentation in the Centennial year of the Committee, I wish to highlight as a first characteristic of the current world a faster and deep expansion of the spheres of action of International Law, in areas which were reserved to the local jurisdiction of the States in past times. At present, International law has broadened the issues subject to its competence, this being the difference with the world of the United Nations or that of the first OAS Charter. The menu of international issues is larger similarly to the broadening of borders and horizons worldwide.

A second characteristic of today's world is the break in the state monopoly[7] to admit the new International Law and other emerging players, and to take their honored places at the broader table of the new international society. The old subjects sit at the table with powerful Leviathan, and the human being strives for centrality.

The concept of security has changed drastically today, threats and challenges appear together and portray a multi-thematic aspect which goes beyond national frameworks and demands stronger collective efforts, as well as pluri-national basis for action and resources.

These characteristics are accompanied by a prodigious re-approximation between the regulatory world of the domestic law of States and International Law. Further permeability and interdependence is appreciated between legal systems, and this literally facilitates the transition of subjects of International Law from one environment to another. In this regard, individuals and international organizations adopt new forms and interaction modalities which provide renewed dynamism to international relations.

It has to legislate not only the visible world of material objects, but - and more strongly – the invisible world where, from a new cybernetic and technological space, expressions such as electronic commerce come alive and where millions of transactions producing legal effects are generated instantaneously,

Finally, the emergence, close to a classic rights based upon the will of the States, of a new common law expressed imperatively, and which reflects in the so-called *jus cogens* obligations; the universal rules, reflected in the *erga omnes* provisions focusing the interests of the global International Community and especially, I refer to the rules of regional systems, which reflect the obligations established for the protection of an essential and collective interest towards life also from the group of organized States. This is the case of the Inter-American rules referring to representative democracy and human rights which form an American inter-party regional public order (a kind of *erga omnes* rule among parties).

A corollary of this assessment is the fact that this right not only is collective in the obligations it generates, but that it projects a joint and severally responsibility to act and to cooperate reciprocally in order to face the serious infringements against those essential obligations to the group of States.

III. THE PRINCIPLES OF ARTICLE 3 OF THE OAS CHARTER

In the previous context, I am now going to make a brief reference to the different principles contained in Article. 3 of the Charter, and I would beg not to forget its relation with other provisions of the Charter that for time reasons I will not be able to approach and the fact that the order in which they are mentioned is simply the one of the aforementioned provision[8].

1. Article 3 – The American States reaffirm the following principles

a) International law is the standard of conduct of States in their reciprocal relations.

Under this principle, "the rule of law is an essential element to achieve peace and international security, as well as progress and the development in each of the States of the Hemisphere"[9].

[7] Without refusing the leading and central role that it continues to play, it has new spokespersons that share the international scenario.

[8] It must also be known that other principles have been developing in International Law in multiple matters that are not necessarily recognized in the OAS Charter.

[9] Draft Declaration on the Inter-American Judicial Committee Centennial: General Principles of Law recognized by the inter-American system.

My first comment to this principle is to indicate that International Law has evolved rapidly and deeply. Its nature is precisely that of evolution.

Part of the mandate of the Inter-American Juridical Committee is precisely to promote progressive development of International Law[10]. The 1996 Panama Declaration evidence the priority nature of this work while emphasizing its impact for the interrelationship between civil systems and *common law*.

The fundamental work of servicing the Advisory Body of the Organization and its initiative capability are the best way the Committee has to contribute to the compliance of this principle which, in turn, demands the adjustment of law to the new contemporary realities.

As the Committee itself has indicated, *the "strengthening of international law is currently expressed not only in its codification, but especially in its progressive development to provide solutions to the new problems and challenges".*[11]

International Law is a legal system where rules and principles are not simply an addition, but a systemic model, implying that rules interact with each other, and therefore its nature is that of a coherent relationship with law, where interpretation and dispute have their own legal techniques to reach solutions.

The great challenge of International Law is to "manage" its fragmentation in special regimes and to preserve its unit and coherence, starting from its harmonization, taking as the unifying regime the *Vienna Convention on the Law of Treaties* and the hierarchy between their rules of *jus cogens*, the *erga omnes* regulations, *erga omnes* party and the supremacy of the UN Charter, in Article 103.

A further principle established in article 3 reads that:

b) International order consists essentially of respect for the personality, sovereignty and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law.[12]

Let us begin by addressing the question on sovereignty. As indicated before,[13], originally the components of the classic definition of Sovereignty had a strong and rigid structure on the basis of the ideas on territoriality and the broadest possible exercise of private, absolute and excluding competencies, exercised in a space marked by independence among States, which were considered as sole and privileged depositaries of Sovereignty and indisputable players in the international arena.

We must ask ourselves how this reality has changed. To what extent has contemporary humanization of International Law shaken Sovereignty as an institution, displacing legitimate spaces for action and subjectivity to other subjects and players of the International Law? How true is it that Sovereignty has been relativized in view of the emergence of new concepts, permissive rules and visions that are re-modeling the structure of the international legal system?

To what extent do we today live in a world only of States? How has the world been affected by the emergence of the individual as a subject of rights and obligations that relinquishes his or her anonymous relevance to the population of the State and affirms its own preeminent identity that had never owned before?

Hence the need to reflect from the viewpoint of a fundamental principle such as Sovereignty of the States, from which center radiates the set of principles and proposals that order and structure the relations between the States, a principle on which rests all International Law, as the International Court of Justice said in 1986[14].

Historically, some of the components of the State that have prevailed are those that set boundaries – territory and government – and presume that distribution exclusively and solely, of the jurisdictions and attributions. The population element – which is a universal and component common to one and indivisible humanity -, appeared as relegated and subordinate.

□□

[10] Art. 99 of the OAS Charter.
[11] CJI/doc.195/05 rev.4.
[12] Some articles relating to the Charter. Article 10–13, Article 16 and Article 18.
[13] HERDOCIA SACASA, Mauricio. *Soberanía clasica: un principio desafiado … ¿Hasta Dónde?* Commercial 3H, S.A. p. 4-6.
[14] IACJ Reports 1986, p.133, paragraph 263.

Today, the population element and its individual components rise up with their own autonomous Light and claim their place of influence on exercising sovereignty. In fact, Sovereignty no long configures only from its exercise on the territory and by the governments to develop the human dimension of the populations and the actual people who are part of them.

This is the insurrection of the subjects of Leviathan who now occupy state territories and mark their boundaries.

In today's world there seems to exist a major confusion about the changes and their consequences; some continue to look at Sovereignty and the principles surrounding it (in the Intervention Sovereign Equality and Free Determination, for example) from the viewpoint of those years prior to the decolonization process or the rise of the major treaties on Human Rights, the universal criminal jurisdiction, formation of major codifying blocks in various areas, adoption of a multitude of agreements between the States and with international organizations and the integration processes. For those in favor of this static viewpoint, borders have apparently not changed, despite all the overwhelming evidence of the contemporary reality.

Nevertheless, Sovereignty continues to be the articulating core and the State the subject par excellence.

Concerning the treaties, as the International Court of Justice stated in the case of Nicaragua[15], on the occasion of the commemoration of free elections:

> … the Court does not perceive, over the entire range of matters which an international agreement can address, no obstacle, no provision that prevents a State from making a commitment. The State that is free of decision in its internal system is sovereign to accept in this domain a restraint on its Sovereignty.

Now since its first decision, the Permanent Court of International Justice recalled that, far from being incompatible with Sovereignty:

> … the power of contracting international agreements is an attribute of the State's Sovereignty.[16]

Consequently, as the Charter states: "Respect for and strict compliance with the treaties are standards for the development of peaceful relations between the States. International treaties must be public".[17]

c) Good faith must govern relations of the States between each other

This principle reflects the spirit of the actual Charter. It is consubstantial to its existence, while there is a primary duty to comply with the obligations agreed in the Organization' statutes.

The same compliance of good faith is required for the principles, obligations and standards deriving from International Law. Good faith in compliance with the treaties is a classic rule.

It must be pointed out that, in event of a dispute between obligations of the OAS Charter and that of the United Nations, the latter prevail[18].

A fourth principle is as follows:

d) Solidarity of the American States and the noble purposes that with it are pursued require their political organization on the basis of the effective exercise of representative democracy.[19]

In this sphere, it must be noted that the Inter-American Democratic Charter closely interprets the status of the inter-American regulations on the matter.

On the subject of Democracy, as a starting point, since 1995 the Juridical Committee has indicated that:

> Every State in the Inter-American system has the obligation to effectively exercise representative democracy in its system and political organization.[20]

[15] IACJ Reports 1986, p. 131. Paragraph 259.
[16] Decision of August 17, 1923, Case of the steamship Wimbledon, Series A, Number 1, p. 25.
[17] Article 18 of OAS Charter.
[18] Art. 103 of the United Nations Charter.
[19] Article 9 of the Charter shows the collective reaction to the violation of the principle of representative democracy. The preliminary legal reasons three and four are very important as is art. 2 item b) of the Charter.

This means that the Representative Democracy in America, in its essential and untouchable guidelines, has left the area of actual matters of domestic jurisdiction to move into the sphere of questions governed by international regulations.

In its Draft Declaration on the Centennial[21], the Committee said that "Democracy is a right of the peoples of the American 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 American States".

It is worth recalling what the Committee expressed in the sense that:

> ... the international legal regulations with regard to the effective exercise of representative democracy of the States of the Inter-American System form a specific and special order …[22].

The highlight is the contribution of this OAS body to perfecting the Inter-American Democratic Charter through comments and observations about the draft document in 2001.

Democracy is really the major contribution of the Inter-American System to the 21 century. It is a right in the process of universal crystallization. The idea that within it there are elements that cannot be altered (separation of powers, free elections and Basic rights and freedoms, for example) as well as the subsequent responsibility that generates the illegal fact of altering the democratic order and the legitimate practice of power, tend to transform its original political nature in a legal bond – as the Committee foresaw – that sooner or later would have to reach the actual United Nations Charter, currently lacking one single mention of democracy.

We wait for the day when the Universal Charter includes in its provisions as proposed, that of "promoting the values and principles of democracy, within International Law". This progress has already begun in many resolutions, declarations and action plans of groups for democracy within the framework of the United Nations. The universal value of democracy was also proclaimed at the 2005 World Summit, although definition of its essential elements is still pending.

With regard to the principle of solidarity[23], an important result of the changes was the rise – in *status nascendi* – in my opinion, of a new principle of Juridical Solidarity, although not deep enough in International Law, but very advanced in the sphere of democracy and human rights, for example. This is a principle that aspires to be imperative and different from the simple lax cooperation, interpreted (although its text goes farther) as subject to the arbitration of the parties.

In classic law, the States claimed offences inflicted on their own personality, subjects and property. An almost egoistic right and for itself. The offense and the response were both individual.

The remaining situations affecting the others, except an alliance or pact in mutual defense, were left to the indifference to the destination of third parties. The collective responsibility did not appear – contrary to today – as a distinctive feature of the Society of Nations in various fields.

Article 48 (Calling upon the liability by a different State from the injured State) of the Draft Articles on Liability of the States for Internationally illegal acts by the UN Commission of International Law[24], gives any State that is not an injured State the right to call upon the liability of another State when "The violated obligation exists in relation to a group of States of which the invoking State is part, and was established to protect a collective interest of the group:" The comment of the Commission indicates that "… the obligations protecting a collective interest of the group can derive from multilateral treaties or common International Law. On occasions these obligations are described as 'obligations for all parties".

In turn, article 41 of the draft Articles on State's Liability for Internationally illegal acts, status how a duty, to cooperate to put an end to a violation of an imperative regulation, that is, totally independently of whoever is the directly injured State.

□□□

[20] CJI/RES.I-3/95.
[21] CJI/doc.195/05 rev.4.
[22] CJI/RES.I-3/95.
[23] At the Inter-American Conference for Consolidation of Peace, resolution XXVII was approved in 1936, Declaration of Principles of Inter-American Solidarity and Cooperation, which refers to "the existence of a democracy as a common cause in America".
[24] Supplement Nº 10 (A/56/10) Report of the Commission of International Law. 53rd regular session.

Today, we can sustain the idea of the advanced constitution of a principle of Juridical Solidarity[25]; that is to say, a right interested in the good fortune of people, peoples, the overall international community and the general interest. A right interested in the destination of other nations and the future, not as a gracious concession, but as a result, whether of an imperative legal duty, or in the form of a right of an exercisable role *erga omnes* or "*erga omnes* parties" for the Andean Community, as proposed for the region.

This principle is being built on the basis of various links joining the chain of the Juridical Solidarity and responsibility for acting that it generates[26].

In the American sphere, there is then an emerging principle of solidarity that obliges the collection role of the States that have not been directly injured (in the traditional sense), in case of affecting key collective interests of the System as a whole, that is, the American Public Order. In virtue of this emerging principle, the indifference to the attach on key collective values no longer belongs to the moral sphere and is placed as conduct incompatible with a binding principle that sends the solidarity role of the States that have not been directly injured, within the framework and strict procedures of International Law and respect for the principle of non-intervention.

Other capital principles consist of the following:

e) Every State has the right to elect, without external interferences, its political, economic and social system and to organize itself at its own convenience and have the duty not to interfere in the matters of another state subject to the above provision, the American States will fully cooperate with each other and regardless of the nature of its political, economic and social systems.[27]

Some matters that no longer belong solely to the internal and exclusive jurisdiction of the States of the Inter-American System, to now be part of their legally binding obligations, are the key elements of Representative Democracy[28].

This is why the principle of Juridical Solidarity before the alterations of the constitutional system seriously affecting the democratic order of a State, activating the mechanisms of collective appreciation to promote, by different States than directly injured, standardizing the democratic institutionality and full rule of the democratic institutions.

As a result of these commitments, it should be mentioned that the right to elect the economic, political and social system has lost part of its original scope and, in the author's opinion, cannot be alleged to justify the construction of a model of political organization that refuses the essential values and principles that sustain the democratic constitutional order and sovereignty in the inter-American System.

The Inter-American Juridical Committee indicated that:

> … the principle of non-intervention and the right of each State in the Inter-American System to choose its political, economic, and social system without external intervention, and to organize its structure in the way best suited to it, may not cover a violation of the obligation to effectively exercise representative democracy in said system and organization.[29]

The model of democracy adopted has elements that cannot be the subject of fundamental variation. In other words, it is not possible for any American state, for example, to decide a political system that does not consider, or rather, damages the essential elements of representative democracy, as follows, for example:

> … respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage, as an

□□

[25] HERDOCIA SACASA, Mauricio. *El principio emergente de la solidariedad jurídica entre los Estados: un nuevo orden público internacional* [*The Emerging Principle of Legal Solidarity between the States: A new international public order].* Inaugural speech at the Universidad de Ciencias Comerciales (UCC). May 11, 2006.

[26] Humanitarian Link; Link of Collective Legitimate Defense; Link of the *jus cogens* regulations; Link of the rules *erga omnes*; Like of Human Rights; Link of Representative Democracy; Link of integration processes; Link of humanitarian protection for endangered vulnerable populations (wrongly called "humanitarian intervention").

[27] Some articles relating to the Charter are Article 17, Article 19–20 and Chapter VII – Integral Development (Article 30 – 52) and Chapter XIII – Inter-American Council for Integral Development (Article 93 – 98).

[28] VIO GROSSI, Eduardo. La democracia representativa: obligación jurídica interamericana. [*Representative Democracy: inter-American legal obligation].* In: Democracy in the Inter-American System. Washington, DC: OAS Secretariat for Legal Matters, 1998, p. 31.

[29] CJI/RES.I-3/95. Resolution of March 23, 1995.

> expression of the sovereignty of the people, the pluralistic system of political parties and organizations; and the separation of powers and independence of the branches of government.[30]

Of course, there is complete freedom to adopt the modalities, specific characteristics, programs and priorities or organization and role of a government, always and whenever they do not affect this "essential and hard core" which has to be maintained.

The fully prevailing principle of non-intervention, main and indisputable support of Latin America and the inter-American system to International Law, since the Confederation Treaty signed in Lima in 1848 and definitively approved in the 1933 Convention on Rights and Duties of States, moving through the 1936 Additional Protocol on Non-Intervention, to the 1948 Organization Charter, must now coexist with the principle of representative democracy; as it did before with the universal duty of respecting human rights, both topics that were then ruled by American law[31].

At a universal level, there is no obligation to adopt the model of representative democracy, unless in the form in which it is conventionally agreed in the inter-American System. The International Court of Justice stated that: "…when a State adopts a particular doctrine this is not a violation against international common law …"[32], whenever human rights are not violated with impunity.

Hence the challenge of the States bound to this model to transfer the concepts of democracy to the universal sphere, bearing in mind that the *UN Charter* does not establish the peoples' right to democracy nor contain specific references to it. It seems then that the time has come to make an effort to reform the Universal Charter in this direction to establish democracy as one of its prime goals.

Special attention should be given to the following principle:

> ***f) Elimination of abject poverty is an essential part of promoting and consolidating representative democracy and is a common and shared responsibility of the American States.***[33]

When I finish my presentation, I would like to ask the chair of the IAJC, Dr. Jean- Paul Hubert to address the development of this principle, based on the Report and Resolution of the Inter-American Juridical Committee on the topic relating to the legal aspects of interdependence between democracy and economic and social development. I restrict myself to mentioning that the civil and political components of representative democracy are not enough and it is necessary to look at combined humane and social freedoms and meeting the requirements, the interdependent and indivisible formula between civil and political rights and cultural, economic and social rights. Just as indivisible as the OAS Charter itself, when referring to democracy on one hand and integral development on the other. It is not possible to sacrifice one in the interests of others. It is not enough then to have an Inter-American Democratic Charter and prove that it is work done by the OAS in terms of a Social Charter.

As stated during the commemoration of the Centenary:

Right from the start, it has never gone beyond the Organization to social problems.

Resolution LVIII of the Inter-American Conference on Problems of War and Peace, held in Mexico, assigned the Juridical Committee: "… to formulate, in conjunction with the International Labor Organization and, bearing in mind the conventions and recommendations of this Organization and the legislation of American countries, an 'Inter-American Charter of Social Guarantees' to be submitted for consideration and approval to the Ninth American International Conference to be held in Bogotá".

The Charter was drafted on October 21, 1947.

The mission assigned to the Committee "…was to establish the basic principles to support the workers in any class of our Republics."

Very possibly these groundbreaking efforts influenced the development of the cultural, economic and social rights, inseparable from the civil and political rights.

---

30 Art. 3 of the Inter-American Democratic Charter.

31 It is present under art. 2 of the Organization's Charter that there are no longer power for those that expressly grant the Charter, none of which provisions authorizes intervention in matters of the internal jurisdiction of the Member States.

32 IACJ Reports 1986. par. 263.

33 Relating to this topic, for example, article 34 of the Charter.

As expressed in the account of motives of the Inter-American Juridical Committee on the aforementioned *Charter*: "Thus the enhancement of the Inter-American System of Peace, the Declaration of the International Rights and Duties of Mankind and the Charter of Social Guarantees are the three-pronged support derived to sustain the international American organization*".*

g) The American States condemn the war of aggression: a victory not of rights.[34]

Since the first American International Conference held in Washington in 1889-1890, it was declared that a war of conquest did not grant rights[35]. Article 22 of the Charter expresses this principle in its more general dimension, although it did not expressly include the threat of the use of force.

During the Eighth American International Conference it was repeated in 1938, "as a fundamental principle of the Public Law of America, occupation or acquisition of territories or any other modification or territorial arrangement of borders by conquering by force, and not obtained by peaceful means, is not valid or legally effective"[36].

This principle is closely linked to the following:

h) Aggression against an American State is an aggression against all the other American States.[37]

From this phrase derives a large part of the collective security system in the military sphere, one of the prime concerns of the first treaties in the 19th century.

Resolution 3314 (XXIX) of the UN General Assembly understands aggression to be:

> Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or otherwise inconsistent with the Charter of the United Nations.

Article 9 modified by article I of the Protocol if Reforms of the TIAR resumed, *mutatis mutandis*, this definition[38].

The Advisory Body of the special treaty regulating the matter, the 1947 Inter-American Treaty of Reciprocal Assistance, has been called 18 times between American counties and twice with extra-regional countries.

Here the principle of collective solidarity is expressed in the military sphere that will soon extend – under other modalities, of course – to the field of representative democracy and human rights, motivating collection action.

In fact, the new model of multidimensional security, in my opinion, CAME to break some of the monothematic bases of TIAR. The idea of multidimensional security[39] and the human element as a foundation of security, throws a different light on the old way of addressing the problems of security. The Special Conference on Security in Mexico in October 2003 opened the way that should be translated to the legal language of the instruments of the System. The Declaration of Security in the Americas stressed the process of examination and evaluation of TIAR, "taking into account the realities of security in the hemisphere and the different nature of the traditional and non-traditional threats to security, as well as the cooperation mechanisms to face them."[40]

A principle that marked the contributions of the System is as follows:

□□

34 Some relevant articles of the Charter are arts. 21 and 22.

35 ARRIGHI, Jean Michel. OAS Organization of American States. Manole. p. 13.

36 American International Conferences. First Supplement 1938-1942. Publication of the General Secretariat of the Tenth Inter-American Conference. p. 43.

37 Certain articles from the Charter are: Article 2, Article 28 – 29 y Article 65.

38 See document CJI/doc.159/04 corr.1 dated August 9, 2004 titled "Legal Aspects of Inter-American Security: Principles or General Regulations about the action of the Organization of American States in terms of international peace and security, presented by Dr. Eduardo Vio Grossi.

39 See with respect to the groundbreaking Framework Treaty on Democratic Security in Central America (1995) and the Bridgetown Declaration: the Multidimensional Approach to Hemispheric Security [AG/DEC.27 (XXXII-O/02)].

40 Point 48 of the Declaration on Security in the Americas.

i) The disputes o fan international nature arising between two or more American States must be settled using pacific procedures.[41]

The heart of the matter of peaceful settlement lies mostly on the need for a mechanism of mandatory nature that permits compliance with the purpose of "not letting any dispute between the American States to stay without settlement"[42].

The treaty established the proper means to settlement disputes in the American Treaty on Pacific Settlement (Bogotá Pact).

Since 1957, when it fell asleep, the Pact woke from a long lethargy to you in the International Court of Justice. The Pact was mentioned five times since then in terms of jurisdiction and competence (1986 (2), 1999 (1), 2001 (1) y 2005 (1) to attempt to open the doors of the International Court of Justice.

It is worth mentioning the advance that the American Treaty on Pacific Settlement (Bogotá Pact), when it establishes *ipso facto* the access to the International Court of Justice[43], a much more advanced clause than the optional established in the Statute of the Court, which is subject to the additional unilateral declaration that the States formulate when exercising their sovereignty.

Both jurisdictional titles are autonomous, self-sufficient and have an independent life[44]. The Court estimated that

> ... the commitment in article XXXI of the Pact is independent of the statement of acceptance of the compulsive jurisdiction such as was done Ander article 36, paragraph 2, of the Statute....

On the other hand, the Pact also establishes different ways of gaining access to the Court. On the theme, the Court said:

> … In short, articles XXXI and XXXII provide different ways by which access can be gained to the Court. The first refers to cases in which the Court can be directly requested, and the second, in those where the parties first appeal to reconciliation … the procedure in question does not have to have failed definitively before starting new proceedings. It is enough if... the initial proceedings were suspended in circumstances so that it seemed that there were no prospects that it is continued or resumed.

The Bogotá Pact is then converted into an ideal model for international jurisdiction, whenever it does not require express statement additional to what figures in the actual inter-American instrument.

Even if it is certain that the Pact does not have the desirable number of ratifications, it does not seem to be sufficient reason to take away its merit. As the distinguished scholar Eduardo Jiménez de Aréchaga said, "it is not worth measuring the effectiveness of these pacification agreements by the frequency of their use, since their mere existence plays a preventive role, discouraging abusive approaches or deprived of all merit".[45]

In fact, it should be acknowledged, as Jean-Michel Arrighi[46] commented, that the disputes today occur internally rather than in the sphere of inter-State relations. This was particularly true in Central America, where problems usually arise in the internal system. It was said on other opportunities that there is possibly a greater number of settlements in many cases in the Inter-American Democratic Charter than in the Bogotá Pact. Also it is possibly true that there are greater doses of settlement in the Bogotá Pact than in the Inter-American Treaty of Reciprocal Assistance in many cases between American States under the latter framework.

Recently, a study project has arisen within the framework of the 69th and 70th regular sessions of the Inter-American Juridical Committee, which in turn returns to an initiative of the General Secretary[47] on the possibility of an Inter-American Court of Justice[48] whose

41 Some pertinent articles of the *Charter* are Articles 24-27 of Chapter V (Peaceful Dispute Settlement).

42 Art. 27 of the OAS Charter.

43 See Art. XXXI of the Pact of Bogotá.

44 Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction of the Court and Admissibility of the Application, Judgment, ICJ Reports 1988.

45 JIMÉNEZ DE ARÉCHAGA, Eduardo. *Attempts to Reform the Pact of Bogotá*. Inter-American Juridical Yearbook 1986. Washington- DC: OAS General Secretariat, 2006, p. 8.

46 See footnote Nº 32. p. 2-3.

47 Legal Matters of the Annual Report 2005-2006 of the OAS Secretary General. OEA/Ser. D/III. 56.

background goes to the Fifth American International Conference and Eighth American International Conference.

The effort of the American countries toward peaceful settlement is longstanding and has been a lasting influence on the world system.[49]

j) Social justice and security are bases for lasting peace.[50]

This principle brings us to the basic topic of full peace that can only find support in the social dimension of the democratic processes. Deep down this principle brings to the fore the relevant of the social aspects and justice in the Organization.

The idea of peace founded merely on considerations of now war and the traditional role of the organizations in relation to keeping peace and security, is given attention here in the sense that peace is the result also, if it is to be long-lasting, of justice and social security.

This principle brings us to the last human purposes of the Organization and highlights the importance of the work on a Social Charter. The integral development is also worth mentioning as a key pillar to stable peace in the fabric of the Charter.

Jean-Paul will surely develop this point in greater light from the IAJC report and resolution on the legal aspects of interdependence between development and democracy.

Cooperation takes, of course, a place of honor among the principles:

k) Economic cooperation is essential for the common welfare and prosperity of the peoples on the Continent

An article in the *Charter* that always seems to me to be exception refers to a collective response from the States to a serious economic situation in circumstances that a State cannot overcome with its own efforts. I relieve that this article of the Charter is an accurate reflection of the solidarity of the States, far beyond mere cooperation. Article 37 says the following:

> The Member States agree to joint together in seeking a solution to urgent or critical problems that may arise whenever the economic development or stability of any member State is seriously affected by conditions that cannot be remedied through the efforts of that State.

The following principle is decisive for American history:

l) The American States proclaim the Basic rights of the human being without making distinction of race, nationality, religion or gender.[51]

This is what the Inter-American Juridical Committee said in its 70th regular session, non-discrimination in terms of respect for human rights, includes all kinds of discrimination, both those expressly mentioned, and the others mentioned as contemporary expressions with more particular characteristics.

Human Rights is a field where the Committee contributed decisively to the future instruments that contain the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights.

Mention should also be made of the independent and indivisible nature of human rights in all its civil, cultural, economic, political and social range.

One thing that changed the whole panorama of the collective action of the Organization interest of Human Right is the cases where the Report of the Inter-American Commission of Human Rights was the basis for the Advisory Body to indicate that the solution should be inspired, as one of its bases, on the “Immediate and definitive replacement of the Somocist regime” in Nicaragua.[52]

As said on other opportunities, this resolution opened a breach in International Law that continues until today[53].

□□□

48 VIO GROSSI, EDUARDO. CJI/doc.231/06 and CJI/doc.241/07.

49 For a historic account of these efforts, see LEORO FRANCO, Galo. *La situación pacífica de las controversias: Controversias:¿Tema jurídico o político en América? [*Peaceful Settlement of Disputes: A legal or political Topic in America?] In: *El Comité Jurídico Interamericano. Un Siglo de Aportes al Derecho Internacional [The Inter-American Juridical Committee. A Century of Contributions to International Law]*. Rio de Janeiro: Secretaría General de la OEA, 2006.

50 See, for example, Chapter VII Integral Development Arts. 30 – 52.

51 There are of course references to the topic in the preamble (first and fourth paragraph). Articles 45 and 106 are related articles of the Charter.

52 Resolution II, June 23, 1979 of the Consultive Body (XXVII (Consultive Meeting).

53 HERDOCIA SACASA, Mauricio. *Soberanía Clásica, Un principio Desafiado… ¿Hasta Dónde? [Classic Sovereignty, A*

An interesting aspect that has been developing at an inter-American level is the concept of a "collective guarantee", which is, in my opinion, Ander the principle of American solidarity and the duty to respond to the effect of an interest to the Organization.

Under the principle of guarantee, the Human Rights Commission of the International Covenant on Civil and Political Rights that "Every Member States has a legal interest in all other Member States complying with their obligations. This is deduced from the principle that the rules relating to the basic rights of the human being are obligations erga omnes and that … there is a stipulated obligation … to promote universal respect and abide by the human rights and fundamental liberties … every violation of the rights… by any Member States must call its attention. Pointing out possible violations of the obligations… by Member States and urging them to meet their obligations... must be considered a reflection of the lawful interest of the community rather than an unfriendly act".[54]

A very relevant principle consists of the following:

m) The spiritual unity of the Continent is based on respect for the cultural personality of the American countries and requires their close cooperation in the high purposes of human culture.[55]

In my opinion, this principle reconciles cultural diversity with spiritual unity, making them lie in respect, furthering their own values and identities, and cooperation. Integrating both values (diversity and unity) imprints a fruitful dialogue between education, science and culture that tends precisely to favor understanding and achieve "the high purposes of human culture".

The last principle mentioned in art. 3 of the Charter upholds that:

n) Education of the peoples must be guided toward justice, freedom and peace.[56]

This principle gives us the idea of an inter-American education based on values of justice, freedom and peace, both at a formal level in education institutions and informal level in the mass media and *ad hoc* seminars. The Organization's challenge lies in promoting the values that mark the principles of the Charter to become consciousness and now be part of an inter-American culture.

IV. FINAL COMMENTS

Some final comments are as follows:

1. One point that should be clarified is that the relativization of certain principles of International Law, such as sovereignty itself or the principle of Non-Intervention, does not mean in any way an abrogation of such principles. Quite the opposite, this relativization is precisely a product of the natural consequence of the evolution of an international society. Because of this process, a large number of matters that once were discretional matter reserved exclusively for internal jurisdiction has now become regulated under International Law on the grounds of sovereign capacity of the States to impose essentially conventional restrains on their own jurisdictions, or rather, to establish a common regulatory framework.

With the absence of the premise of an absolute and invulnerable State, supported against any intromission throughout the original range of internal affairs – such as human rights – it is logical that the shield of non-intervention ceases to function for those areas – once internal – that the States themselves have become, by sovereign wishes, an international matter. In all other respects, the value of the principle of non-intervention is imperative and remains inalterable. There is then no contradiction. Forbidden intervention fully functions in all matters where the principle of sovereignty permits the States to act freely[57]. If this sovereignty is agreed to the contrary, or there is a rule of common International Law that so provides, the area in question then is now ruled by *jus gentium*. Otherwise, if an area is affected where it is up to the State to decide freely, the whole principle of non-intervention will be affected.

□□□

challenged principle… How Far?]

54 General Comment No. 31 of the Human Rights Committee of the Pact. Nature of the General Legal Obligation imposed on States Parties in the Covenant: 26/05/2004CCPR/C/21/Rev.1/add.13 (General Comments) quoted by IAHRC in its Report No 11/07 Inter-state Case 01/06 Inadmissibility. Nicaragua v. Costa Rica. OEA/Ser/L/V/II.127 March 8, 2007.

55 Certain related articles in the *Charter* are Articles 17 and 52.

56 The related Article of the Charter is Article 49.

57 IACJ Reports, 1986, par.205.

In the above context, it is worth considering again the famous ruling on the Corfu Channel[58], - recorded and increased after the decision on the Nicaragua case – where the Court had indicated that the "…claimed right of intervention can only be considered as an expression of a policy of force, a policy that, in the past, caused the most serious abuses and which, whatever the defects in international organization, cannot have a place in International Law".

Undoubtedly, new principles have arisen in new realities; but it does not then imply abolition of the earlier principles. Such principles are admitted to a system of cooperation and interdependence that, assuring each its own space, contribute to the common goal of a fair, rational and humane order in the American Community of Nations.

The second paragraph of article 1 of the *OAS* Charter provides the irreproachable "Principle of Legality", according to which the Organization of American States has just as many powers as those expressly granted by the Charter itself, none of whose provisions authorizes intervention in matters of an internal jurisdiction of the member States.

Sovereignty is ruled by the Law. The fact that it is exercised on a relative and limited basis does not mean a decline in sovereignty but a necessary enriching change with new dimensions, players and modalities. Before being eclipsed, sovereignty appears in a new light that expresses a completely renewed view of power and its use by the State.

We must not forget that sovereignty means the power to consent, the power to open spaces for the current of humanization, the power to combine a set of rules that self-restrict the spaces of the State's role, so that people and peoples can also develop their own living spaces.

In this sense, the advances in the sphere of democracy and human rights are truly enriching for sovereignty, in its broadest sense, and proof of its power to transform the state of things and raise them to a **higher broader degree full of humanity.**

Ander its transforming capacity, sovereignty made room for the process of humanizing International Law and for the first time ever shows its profile of **responsibility**, as well as **its capacity to be at the useful service with a common cause for the populations.**

V. SOME SUGGESTED PROPOSALS

I would like to leave you three ideas that I consider important:

The first is the emphatic and categorical reaffirmation that these 14 principles – linked to the others – are the backbone of the Charter. They hold the core values of the Inter-American System and are discussed in the XXII chapters of this statute.

The future of the System will depend on their correct understanding, diffusion, full validity, compliance and reinforcement.

It must always be recalled that this does not address static principles but are actually principles that encourage the process of creating International Law and accompany the Organization in developing its legal and human heritage, ordering, giving meaning and coherence to the work of codification and progressive development of International Law, inspiring, guiding and driving work.

The second idea is that there should be an effort to promote an inter-American culture founded on these principles as bases for peace, security and relations of friendship, solidarity and cooperation between the States and to accomplish the aims of the Charter. A special session of the Permanent Council should be held every so often to reflect on the principles and the way to promote their contribution, validity and update. Another key task is to hold special seminars and take concrete actions in the educational programs in the member States, to disseminate the principles with the support of the public and mass media.

Lastly, it would also be desirable to reflect on a mechanism that permits us to evaluate and measure the progress and validity of these principles in view of their interdependence and complementary nature, in view of a better interpretation of the actual Charter and given the needs for complementation and regulatory development from the current world in the successive changes and remodeling that reality undergoes and that the law must channel under a fair and adequate system with a common cause.

Our time is obliged to give eloquent testimony in the irrevocable transformation of classic International Law. The new emerging law must conjugate and balance, with wisdom,

[58] Corfu Channel. Reports, 1949, p. 35.

the areas of action of the many subjects and players coexisting on the global international scene, each with its own and lawful sphere of activity, but in close interdependence, complementing, solidarity and joint responsibility. The principles of the Charter point to these goals.

Meetings organized by the Inter-American Juridical Committee

The Inter-American Juridical Committee invited the following people to take part in its meetings, or visited them, in 2007:

- José Miguel Insulza, Secretary General of the OAS
- Eduardo Cálix, Vice Minister of Foreign Affairs of the Republic of El Salvador
- Margarita Escobar, Vice Minister of Foreign Affairs for Salvadorans living abroad
- Rubén Orellana, President of the Legislative Assembly of El Salvador
- President and Magistrates of the Supreme Court of Justice of El Salvador
- Members of the Foreign Affairs Committee Central American Integration and Salvadoran Living Abroad of the Legislative Assembly of El Salvador
- Aníbal Quiñonez Abarca, Secretary General of the Central American Integration System (SICA)
- Mauricio Gutiérrez Castro, former member of the Inter-American Juridical Committee
- Jonathan Fried, former member and former Chair of the Inter-American Juridical Committee and currently Executive Director for Canada, Ireland, and the Caribbean at the World Bank
- Evelyn Jacir de Lovo, President of the Consumer Defense Office of El Salvador and President of the Ibero-American Forum of Consumer Protection Agencies
- Meaghan McGrath, Senior Counsel, International Monetary Fund
- Ines Bustillo, Director of the ECLAC Office in Washington, D.C.
- Dario Soto, Deputy Director, Trust for the Americas
- Laura Neuman, Carter Center
- Ana Amouero, Professor of International Law at the Catholic University in Lima, Peru and adviser to the Peruvian Ministry of Tourism and Foreign Trade
- Eduardo Tellechea, Full Professor and Director of the Institute of Private International Law of the Law Faculty of the University of the Republic of Uruguay
- Michel Dennis, Head of the United States delegation in the CIDIP-VII negotiations.

In his visit to the Inter-American Juridical Committee, the Secretary General of the OAS, José Miguel Insulza, was accompanied by Ms. Patricia Esquenazi, Director of the OAS Office of public Information.

The Juridical Committee had a working meeting with the Secretary General for an exchange of ideas on the activities currently being carried out by the Committee and the support that the General Secretariat could provide for its work and vice-versa.

The Chair of the Juridical Committee, Dr. Jean-Paul Hubert, welcomed Dr. Insulza amd thanked him for visiting the committee and the Course on International law, where he delivered a keynote lecture.

Dr. Hubert then reviewed the Juridical Committee's goals and the topics on the agenda, and invited the members to give a brief progress report on each topic in their respective rapporteurships.

Dr. Mauricio Herdocia said that he wanted to share a few very broad ideas on how the Juridical Committee envisaged itself and its role in the Organization. Bearing in mind the constant changes taking place in the inter-American system, he said the Committee was aware

of the need to set a process of renovation in motion and to cast the role of the Committee in terms of the faculties provided for in the Charter of the OAS. He recalled that, as an organ of the inter-American system, maintained close relations with the General Assembly, the Permanent Counci, and the General Secretariat. What was needed, then, was to tighten those system ties. Since the Juridical Committee was an advisory body, the Organization of American States had resorted to it when it had encountered difficulties and the Committee, for its part, had clearly demonstrated its ability to elucidate such matters on numerous occasions, as, for instance, in the cases of the subject of the headquarters (Tunnerman case), Álvarez Machain, Helms Burton, and in efforts to combat corruption. The Inter-American Juridical Committee had responded in all those areas and its opinion had been highly appreciated, Dr. Herdocia said.

He said, too, that the Committee considered it could perform its functions and expand and intensify them because there were certain unique characteristics of the Committee that other organs of the OAS did not enjoy. The Inter-American Juridical Committee represented all the Member States, which was a truly important comparative advantage. By virtue of a decision taken by the Organization itself, the Juridical Committee had complete technical autonomy. The States could go to the Committee to elicit advisory opinions, which then constituted a legal opinion, albeit not a binding one. He emphasized that in a political entity like the OAS, the Inter-American Juridical Committee's special characteristics placed it in a privileged position, since it could address numerous matters that could not be resolved by other organs or by the States themselves. Accordingly, it was preparing to step up its working ties with the General Secretariat.

In remarks supplementing those of Dr. Herdocia, Dr. Eduardo Vio stressed that, in connection with the celebration of its centennial, the Inter-American Juridical Committee had reflected on the part it should play as a principal organ of the OAS, a special *status* granted it in the Organization's Charter. He mentioned that the International Law Commission of the United Nations, for all its prestige, was a secondary organ established by the General Assembly, whereas the Inter-American Juridical Committee was a principal organ, which gave it special *status*. Second, the Committee's advisory role had been assigned to in the Charter itself: a function that could be exploited to the full, given that its Statutes provided that the Inter-American Juridical Committee had to solve the queries brought to it by the organs of the Organization, without specifiying which. With that in mind, Dr. Vio said that the Committee placed itself at the disposition of the General Secretariat – the support organ providing the infrastructure and resources needed for the Committee to operate – for any expansion of its services.

Dr. Jean-Paul Hubert reinforced the idea of the potential afforded by the Committee's advisory function, which was not available to Member States but also to the organs of the Organization. By way of information, he mentioned the Permanent Council's mandate regarding the scope of the right to identity, which originally was going to be put to the Inter-American Court of Human Rights, but later was consulted with the Juridical Committee.

The meeting then proceeded to hear presentations on issues currently being studied by members of the Committee. These were commented on by the Secretary General, who expressed interest in broader dissemination of the Committee's decisions and studies.

Dr. Jaime Aparicio gave a vote of thanks to the General Secretariat for having organized the OAS Secretary General's visit, which he said had been very useful and would no doubt benefit the Inter-American Juridical Committee.

Dr. Jean-Paul Hubert seconded Dr. Aparicio's motion and said that the working meeting with the Secretary General had prompted appreciation of numerous issues that would provide the Juridical Committee with food for thought for some time to come.

INDEXES

ONOMASTIC INDEX

ALBANÉS DE ESCOBAR, Ana Vilma 7, 11
AMORIM, Celso 189
AMPUERO, Ana 210
APARICIO, Jaime 8, 10, 13, 14, 44, 45, 47, 49, 79, 81, 84, 85, 105, 107, 153, 207, 208, 215, 225, 242
ARRIGHI, Jean-Michel 8, 12, 83, 85, 208, 212, 228, 237
ARISTIDE, Jean-Bertrand 184, 185, 190, 193
BARRAL, Welber 210
BEAUMONT, Meaghan McGrath 209
BENADAVA, Santiago 208, 213, 215
BUSTILLO, Ines 209, 241
CÁLIX LÓPEZ, Eduardo 8, 10, 240
CAMEN, Anton 211
CARTER, Jimmy 82, 89, 90, 91
CASTILLO CASTELLANOS, Freddy 8, 11, 13, 14, 23, 85, 106, 126, 152, 153, 154, 164, 166, 182, 208
DAUDET, Ives 212
DAVIS, Lisa 224
DELGADO OCANDO, José Manuel 155, 156, 222
DENNIS, Michael 211, 241
DE VEL, Guy 212
DUVALIER, François 184
DUVALIER, Jean-Claude 184
ESCOBAR, Margarita 11, 240
ESQUENAZI, Patricia 241
FERNÁNDEZ DE SOTO, Guillermo 12
FRIED, Jonathan T. 44, 45, 47, 49, 62, 209, 222, 226, 241
GARCÍA CALDERÓN, Agustin 8
GÓMEZ ROBLEDO, Alonso 10, 48
GUTIÉRREZ, Lucio 101
GUTIÉRREZ CASTRO, Mauricio 241
HERDOCIA SACASA, Mauricio 9, 10, 11, 12, 13, 14, 21, 22, 24, 32, 34, 45, 81, 84, 85, 107, 112, 126, 155, 164, 166, 200, 207, 210, 215, 223, 227, 242
HUBERT, Jean-Paul 8, 10, 11, 21, 83, 85, 105, 106, 107, 108, 110, 112, 124, 126, 127, 151, 153, 163, 166, 182, 207, 215, 216, 228, 241
INSULZA, José Miguel 15, 174, 208, 209, 240
JACIR DE LOVO, Evelyn 11, 121, 241
KANT, Emmanuel 189, 190
LAÍNEZ RIVAS, Francisco Esteban 11
LEORO FRANCO, Galo 8, 11, 84, 106, 108, 125, 127, 151, 164, 167, 201
LINDSAY, Evadne Hyacinth 8, 11, 13, 14, 23, 45, 108, 152, 153, 167, 200
LOPES, Maria Helena 8, 12
LUJÁN FLORES, María 23, 27

MADRUGA, Antenor	211
MARCHAND STENS, Luis	10
MARQUES, Cláudia Lima	111, 211
MELLO FRANCO, Afrânio	228
MOLETTA, Manoel Tolomei	8, 12, 220
MURILLO, Juan Carlos	209
NEGRO, Dante M.	8, 12, 21, 45, 46, 123, 124, 125, 211
NEUMAN, Laura	44, 46, 241
ORELLANA CÉSPEDES, Carlos	202
ORELLANA, Rubén	11, 241
PALACIOS TREVIÑO, Jorge	8, 11, 13, 14, 22, 106, 125, 126, 128, 149, 164, 166
PEREIRA, Antônio Celso Alves	212
PÉREZ, Antonio Fidel	8, 10, 11, 13, 14, 21, 23, 24, 82, 83, 85, 86, 87, 88, 105, 106, 111, 116, 121, 124, 127, 153, 164, 167, 201, 207, 220, 228
PÉTION, Alexandre	184
QUIÑONEZ ABARCA, Aníbal	241
RENDAK, Nadia	211
SACA GONZÁLEZ, Elías Antonio	11
SEITENFUS, Ricardo	8, 11, 13, 14, 45, 85, 106, 107, 124, 125, 152, 154, 164, 180, 182, 183, 200, 207, 210
SILVA, Maria Cristina Pereira da	223
SOTO, Darío	45, 46, 81, 210, 241
RIBEIRO, Renato	8
RODAS, João Grandino	10
RUÍZ DÍAS LABRANO, Roberto	211
TEITEL, Ruti	224
TELLECHEA, Eduardo	210, 241
TORO UTILIANO, Luis	12, 209
TRINDADE, Antônio Augusto Cançado	212
VALDÉS, Juan Gabriel	191
VALLADARES, Gabriel	211
VARGAS, Daniela Trejos	211, 212
VARGAS VIANCOs, Juan Enrique	155
VIGO, Rodolfo	155, 158
VIO GROSSI, Eduardo	8, 10, 11, 12, 13, 22, 45, 83, 86, 87, 105, 106, 124, 127, 153, 163, 164, 166, 167, 168, 174, 179, 180, 200, 201, 203, 208, 213, 242

* * *

SUBJECT INDEX

Administration of justice 3, 13, 19, 151, 154
Corruption 10, 208, 223
Course, International Law 15, 207, 208, 209, 212, 213, 224, 227, 241
Democracy
Democratic Charter 3, 10, 14, 19, 82, 84, 86, 87, 88, 91, 92, 152, 207, 223
Ethic – justice 3, 10, 19, 151, 153, 154, 157, 222
Homage 8, 12, 213
Human Rights
discrimination 3, 10, 13, 19, 105, 107, 108, 109, 110, 126, 223
humanitarian law 4, 14, 19, 123
racism 10, 105, 108, 109, 223
Inter-American Juridical Committee
agenda 3, 10, 13, 14
centennial of the 165, 207, 216, 220, 242
date and venue 9, 13, 15
structure 3, 7
Inter-American Specialized Conference on
Private International Law-CIDIP 3, 10, 13, 14, 19, 111, 112, 116, 210, 226,
International cooperation
Haiti 3, 13, 19, 182, 183
International law
Codification 7, 226
International courts
Inter-American Court of Justice 13, 163, 168, 174, 179, 180
Inter-American Court of Human Rights 23, 45, 142, 165, 208
International Criminal Court 14, 32, 225
International Court of Justice 85, 164, 176
Legal documents – Latin America 3, 13, 19, 200, 201, 203
Migration 126, 127, 128, 141, 149, 212
Right to information 10, 13, 44, 46, 47, 79, 221
Thanks 24, 121, 168, 217, 242

* * *