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

ORGANIZAÇÃO DOS ESTADOS AMERICANOS
Av. Marechal Floriano, 196 - 3º andar – Palácio Itamaraty - Centro - 20080-002 - Rio de Janeiro - RJ
Tel: (55-21) 2206-9903; Fax: (55-21) 2203-2090
e-mail: cjioea.trp@terra.com.br

Rio de Janeiro, January 27th, 2009

CJI/O/01/2009

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.39 CJI/doc. 316/08), regarding the activities of the Committee in 2008.

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

Jaime Aparicio
Chairman
Inter-American Juridical Committee

ORGANIZATION OF AMERICAN STATES
INTER-AMERICAN JURIDICAL COMMITTEE

CJI

73rd REGULAR SESSION
August 4 to 14, 2008
Rio de Janeiro, Brazil

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ANNUAL REPORT

OF THE INTER-AMERICAN JURIDICAL COMMITTEE

TO THE GENERAL ASSEMBLY

2008

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 Department of International Law of the Secretariat for Legal Affairs 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).

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INTRODUCTION

The Inter-American Juridical Committee is honored to present its “Annual Report to the General Assembly of the Organization of American States”. This report concerns the Committee’s activities in 2008, 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; innovating forms of access to justice in the Americas; Considerations on na inter-American jurisdiction of justice; legal-institutional cooperation with the Republic of Haiti, and evaluation and follow-up of the Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union.

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 2008 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. Jaime Aparicio, 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 by the Annual Report of the Inter-American Juridical Committee

A. Seventy-second Regular Session

The 72nd regular session of the Inter-American Juridical Committee took place on March 3 to 14, 2008, at its seat in the city of Rio de Janeiro.

The following members of the Inter-American Juridical Committee were present for the regular session, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28(b) of the Rules of Procedure of the Inter-American Juridical Committee:

Antonio Fidel Pérez
Hyacinth Evadne Lindsay
Guillermo Fernández de Soto
Ana Elizabeth Villalta Vizcarra
Mauricio Herdocia Sacasa
Jean-Paul Hubert (Chairman)
Ricardo Seitenfus
Jorge Palacios Treviño
Freddy Castillo Castellanos
Jaime Aparicio (Vice Chairman)

Dr. Galo Leoro was unable to attend this regular session for health reasons.

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, Dr. Dante M. Negro, Director of the Department of International Law, and Dr. Manoel Tolomei Moletta, Principal Legal Officer with that same department. Ms. Maria Helena Lopes served as the rapporteur for the proceedings.

In compliance with Article 12 of the Rules of Procedure, Dr. Jean-Paul Hubert, Chairman of the Inter-American Juridical Committee, gave his report on the Committee's activities since its last meeting.

He also welcomed Dr. Guillermo Fernández de Soto of Colombia, who was elected as a member of the Inter-American Juridical Committee at the 37th regular session of the OAS General Assembly (Panama City, June 2007).

During the session, the Inter-American Juridical Committee resolved to adopt resolution CJI/RES. 143 (LXXII-O/08), "Date and venue of the seventy-third regular session of the Inter-American Juridical Committee", whereby it decided to open its 73rd regular session at its headquarters in the city of Rio de Janeiro on August 4, 2008.

CJI/RES. 143 (LXXII-O/08)

DATE AND VENUE OF THE SEVENTY-THIRD 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 73rd regular session at its headquarters in the city of Rio de Janeiro, Brazil, as of August 4th, 2008.

This resolution was adopted at the session held on March 11th, 2008, by the following members: Drs. Antonio Fidel Pérez, Hyacinth Evadne Lindsay, Guillermo Fernández de Soto,

Mauricio Herdocia Sacasa, Jean-Paul Hubert, Ricardo Seitenfus, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

In addition, the Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 135 (LXXI-O/07), "Agenda for the 72nd Regular Session of the Inter-American Juridical Committee":

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)

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 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.

B. Seventy-third Regular Session

The 73rd regular session of the Inter-American Juridical Committee took place on August 4 to 14, 2008, at its seat in the city of Rio de Janeiro, Brazil.

The following members of the Inter-American Juridical Committee were present for the regular session, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28(b) of the Rules of Procedure of the Inter-American Juridical Committee:

Ricardo Seitenfus (Vice Chairman)
Ana Elizabeth Villalta Vizcarra
Guillermo Fernández de Soto
Jorge Palacios Treviño
Mauricio Herdocia Sacasa
Freddy Castillo Castellanos
Jaime Aparicio (Chairman)
Jean-Paul Hubert
Hyacinth Evadne Lindsay
Antonio Fidel Pérez

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, Dr. Dante M. Negro, Director of the Department of International Law, and Dr. Manoel Tolomei Moletta, Principal Legal Officer with that same department. Ms. Maria Helena Lopes served as the rapporteur for the proceedings.

In compliance with Article 12 of the Committee's Rules of Procedure, the Chairman of the Inter-American Juridical Committee gave his report on its activities since the last meeting.

The Chairman of the Inter-American Juridical Committee also reported that during the 38th regular session of the OAS General Assembly (Medellín, June 2008), Dr. Fabian Novak Talavera (Peru) and Dr. David P. Stewart (United States) had been elected as new members of the Inter-American Juridical Committee, and that Dr. Jean-Paul Hubert (Canada) was re-elected. The mandates of these three members are to commence on January 1, 2009, for a period of four years.

The Inter-American Juridical Committee also approved resolutions CJI/RES. 146 (LXXIII-O/08), "Tribute to Dr. Antonio Fidel Pérez," and CJI/RES. 148 (LXXIII-O/08), "Tribute to Ambassador Galo Leoro Franco", recognizing the work of those two members of the Juridical Committee, whose time with the Committee came to an end on December 31, 2008.

CJI/RES. 146 (LXXIII-O/08)

TRIBUTE TO DR. ANTONIO FIDEL PÉREZ

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Dr. Antonio Fidel Pérez's mandate as a member of the Inter-American Juridical Committee will terminate on the 31st December 2008;

AWARE that as a member of the Inter-American Juridical Committee for four years, Dr. Antonio Fidel Pérez made an ample contribution to the work of this Organ, especially the work dealing with the joint efforts of the Americas in the struggle against corruption and impunity; implementation of the Inter-American Democratic Charter; and harmonization and standardization of Private International Law, above all his reports as rapporteur on the themes of the Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII,

RESOLVES:

1. To express its appreciation of Dr. Antonio Fidel Pérez and to wish him continued success in his future activities.

2. To express the gratitude of the Inter-American Juridical Committee to Dr. Antonio Fidel Pérez for his support of the work of the Juridical Committee.

3. To transmit this resolution to Dr. Antonio Fidel Pérez and to the other organs of the Organization.

This resolution was adopted unanimously at the session held on August 7, 2008 by the following members: Drs. Ana Elizabeth Villalta Vizcarra, Guillermo Fernández de Soto, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, and Hyacinth Evadne Lindsay.

CJI/RES. 148 (LXXIII-O/08)

TRIBUTE TO AMBASSADOR GALO LEORO FRANCO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Ambassador Galo Leoro Franco's mandate as member of the Inter-American Juridical Committee terminates on 31 December 2008;

RECALLING that Ambassador Leoro was also a member of the Inter-American Juridical Committee from January 1981 to August 1996, and occupied the Presidency from 1984 to 1985;

AWARE of the eminent contribution made by Ambassador Galo Leoro Franco to the work of the Inter-American Juridical Committee during his mandates, and that his reports represented an inestimable service to the development and codification of international law in the Inter-American System, with special emphasis on his reports on competence in the international sphere for extraterritorial validity of foreign judgments; immunity from jurisdiction of States; personality and capacity of juridical persons in private international law; coercive measures of an economic nature; opinion on studies on the procedures for peaceful settlement of disputes; the examination of the American Treaty of Peaceful Settlement (the Bogotá Pact); environmental law; privilege and immunities of persons, among others,

UNDERLINING Ambassador Leoro's many qualities, including his extensive juridical and academic culture, his diplomatic expertise and his cordial manner, which distinguished him among the members of the Juridical Committee,

RESOLVES:

1. To express its profound appreciation of Ambassador Galo Leoro Franco for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

2. To wish Ambassador Galo Leoro Franco every success in the future and to hope that he continues his close relationship with the Inter-American Juridical Committee.

3. To transmit this resolution to Ambassador Galo Leoro Franco and to the other organs of the Organization.

This resolution was adopted unanimously at the session held on August 7, 2008 by the following members: Drs. Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra, Guillermo Fernández de Soto, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, and Hyacinth Evadne Lindsay.

At its meeting on Friday, August 8, 2008, at the conclusion of the mandate of the Chairman and Vice Chairman, the Inter-American Juridical Committee elected Dr. Jaime Aparicio to serve as Chairman for a period of two years. Dr. Ricardo Seitenfus was elected Vice Chairman, for a similar two-year period. The members extended their thanks to Dr. Jean-Paul Hubert for his excellent work as Chairman. They also congratulated the new Chairman and Vice Chairman and wished them every success in their endeavors.

At its 73rd regular session, the Inter-American Juridical Committee had before it the following agenda, adopted by means of resolution CJI/RES. 142 (LXXII-O/08), "Agenda for the Seventy-third Regular Session of the Inter-American Juridical Committee":

CJI/RES. 142 (LXXII-O/08)

AGENDA FOR THE SEVENTY-THIRD REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, as of 4 August 2008)

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. Innovating forms of access to justice in the Americas
   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. Considerations on an inter-American jurisdiction of justice
   Rapporteurs: Drs. Guillermo Fernández de Soto and Freddy Castillo Castellanos
7. Juridical-Institutional cooperation with the Republic of Haiti
   Rapporteurs: Drs. Ricardo Seitenfus and Freddy Castillo Castellanos
8. Follow-up on the application of the Inter-American Democratic Charter
   Rapporteurs: Drs. Ricardo Seitenfus, Jaime Aparicio, Mauricio Herdocia Sacasa, Ana Elizabeth Villalta Vizcarra, Jean-Paul Hubert, Freddy Castillo Castellanos and Guillermo Fernández de Soto
9. 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 March 11th, 2008, by the following members: Drs. Antonio Fidel Pérez, Hyacinth Evadne Lindsay, Guillermo Fernández de Soto, Mauricio Herdocia Sacasa, Jean-Paul Hubert, Ricardo Seitenfus, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

During this regular session, the Inter-American Juridical Committee also adopted resolution CJI/RES. 152 (LXXIII-O/08), “Agenda for the 74th Regular Session of the Inter-American Juridical Committee”, and decided, by means of resolution CJI/RES. 151 (LXXIII-O/08), “Date and Venue of the seventy-fourth Regular Session of the Inter-American Juridical Committee”, to open that session at its headquarters in the city of Rio de Janeiro on March 9, 2009, while at the same time empowering the Committee’s Chairman to decide to hold the session at a different venue, should such a proposal be received from an interested government.

CJI/RES. 152 (LXXIII-O/08)

AGENDA FOR THE SEVENTY-FOURTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, as of March 9, 2009)

Topics under consideration

1. Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)
   Rapporteuse: Dr. Ana Elizabeth Villalta Vizcarra
2. Access to Public Information
   Rapporteur: Dr. Jaime Aparicio
3. Innovating forms of access to justice in the Americas
   Rapporteur: Dr. Freddy Castillo Castellanos
4. International Criminal Court
   Rapporteur: Dr. Mauricio Herdocia Sacasa
5. The struggle against discrimination and intolerance in the Americas
   Rapporteuse: Dr. Hyacinth Evadne Lindsay
6. Considerations on an inter-American jurisdiction of justice
   Rapporteur: Dr. Guillermo Fernández de Soto
7. Juridical-Institutional cooperation with the Republic of Haiti
   Rapporteur: Dr. Ricardo Seitenfus
8. Follow-up on the application of the Inter-American Democratic Charter
   Rapporteur: Dr. Jean-Paul Hubert
9. Implementation of international humanitarian international law in the OAS Member States of the OAS
   Rapporteur: Dr. Jorge Palacios Treviño
10. Evaluation and follow-up of the Opinion of the Inter-American Juridical Committee on the Directive on Return approved by the Parliament of the European Union
    Rapporteur: Dr. Ricardo Seitenfus

This resolution was adopted unanimously at the session held on August 13, 2008, by the following members: Drs. Ricardo Seitenfus, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, Hyacinth Evadne Lindsay, and Antonio Fidel Pérez.

CJI/RES. 151 (LXXIII-O/08)

DATE AND VENUE OF THE SEVENTY-FOURTH 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 74th regular session at its headquarters in the city of Rio de Janeiro, Brazil, as of March 9, 2008, without detriment to delegating to the Chairman of the Inter-American Juridical Committee the decision to hold said regular session at another venue, should this be proposed by some other government.

This resolution was adopted unanimously at the session held on August 13th, 2008, by the following members: Drs. Ricardo Seitenfus, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, Hyacinth Evadne Lindsay, and Antonio Fidel Pérez.

Finally, during the regular session, the Inter-American Juridical Committee adopted resolution CJI/RES. 149/08, "Vote of Thanks to the Government of the Federative Republic of Brazil," for its contribution, which not only enabled the 73rd regular session to take place successfully, but also allowed the Juridical Committee to fulfill the goals of its Statute and, consequently, those of the Organization and of its member states.

CJI/RES. 149 (LXXIII-O/08)

THANKS TO THE GOVERNMENT OF THE FEDERATIVE REPUBLIC OF BRAZIL

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN RECOGNITION OF the importance that the Government of the Federative Republic of Brazil assigns to the Inter-American Juridical Committee, as demonstrated once more in granting it premises in Itamaraty Palace in the city of Rio de Janeiro;

EMPHASIZING that the Brazilian Government has constantly shown a special interest in matters related to the perfect functioning of the Juridical Committee, having helped to provide the necessary funds for the ceremony to inaugurate the new offices, as well as for the celebration and edition of the book on the Centenary of the Inter-American Juridical Committee;

RECALLING also the granting of space at Itamaraty Palace to hold all the Joint Meetings with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS;

UNDERLINING that the Brazilian Government has once more expressed its total willingness to support the work undertaken by the Inter-American Juridical Committee by helping to provide the financial resources so that the 73rd regular session in August 2008 could count on the services of simultaneous interpretation in the official languages of the Organization, services that are indispensable for conducting the work carried out by the Juridical Committee,

RESOLVES:

To reaffirm its appreciation and gratitude to the Government of the Federative Republic of Brazil for the contribution that not only guaranteed the success of the seventy-third regular session, but also allowed the Juridical Committee to attend to the objectives of its Statutes and consequently of the Organization and its Member States.

This resolution was approved unanimously at the session held on August 8, 2008 by the following members: Drs. Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra, Guillermo Fernández de Soto, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, Hyacinth Evadne Lindsay and Antonio Fidel Pérez.

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2008

During 2008, the Inter-American Juridical Committee held two regular sessions. At those two meetings, the Juridical Committee's agenda covered the following topics: the scope of the right of identity; the International Criminal Court; access to information and protection of personal data; follow-up on the application of the Inter-American Democratic Charter; the struggle discrimination and intolerance in the Americas; the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII); implementation of international humanitarian law in the OAS member States; the legal situation of migrant workers and their families in international law; innovating forms of access to justice in the Americas; considerations on an inter-American jurisdiction of justice; juridical-institutional cooperation with the Republic of Haiti; and evaluation and follow-up of the Opinion of the Inter-American Juridical Committee on the Directive of Return approved by the European Union.

Each of those topics are dealt with below, including, when appropriate, the relevant documents drawn up and adopted by the Inter-American Juridical Committee.

1. Scope of the Right of Identity

During the 72nd regular session (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reminded the Committee that following its previous session, it had sent an opinion to the Permanent Council. He reported that the Permanent Council's Committee on Juridical and Political Affairs had set up a working group on the topic, which was already working on a draft Inter-American Program for Universal Civil Registry and the Right of Identity; he explained that the working group was studying that inter-American program and had held a special meeting, which had heard contributions from several areas of the Organization, other specialized agencies, and representatives of civil society. He noted that all these discussions had taken account of the contents of the Opinion adopted by the Juridical Committee in light of its significant contributions to the topic.

The Department of International Law had consequently drawn up and presented the Inter-American Juridical Committee with document ODI/doc.2/08, "Report on the current status of the Draft Inter-American Program for Universal Civil Registry and the Right of Identity", which contains two annexes: CAJP/GT/DI-2/07 rev.4 corr.1, "Draft Inter-American for Universal Civil Registry and the 'Right of Identity'", and CAJP/GT/DI-20/08, "Report of the Special Meeting of the Working Group to prepare an Inter-American Program for Universal Civil Registry and the 'Right of Identity', held on December 5, 2007", with comments on that document.

The Chairman spoke of the background to this topic, saying that it arose from a request asking the Committee to issue an opinion on the scope of the right of identity in the aftermath of the special meeting on "Children, Identity and Citizenship in the Americas." The rapporteur, Dr. Mauricio Herdocia, reviewed the topic report submitted the previous August, on the basis of which the Juridical Committee approved the corresponding Opinion. He also gave the members a document from the University of Berkeley that cited the Opinion, and he emphasized the importance of this work, which had caught the attention of academia. Dr. Ana Elizabeth Villalta then reported that the most recent judgments of the Inter-American Court of Human Rights also cited the Opinion, underscoring the Committee's function in the progressive development of international law.

On June 25, 2008, the Department of International Law sent the members of the Inter-American Juridical Committee a copy of resolution AG/RES. 2362 (XXXVIII-O/08), "Inter-American Program for Universal Civil Registry and the 'Right to Identity'", in which the General Assembly approved the program.

2. International Criminal Court

Resolution

CJI/RES. 140 (LXXII-O/08) - Promotion of the International Criminal Court

Annexes:

- CJI/doc.290/08 rev.1, "Report on perspectives for a model law on State cooperation with the International Criminal Court"
  (presented by Dr. Mauricio Herdocia Sacasa)
- CJI/doc.293/08 rev.1, "Guide to the general principles and agendas for the cooperation of States with the International Criminal Court"
  (presented by Dr. Mauricio Herdocia Sacasa)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reported that following a request made within the Committee on Juridical and Political Affairs, his department had once again distributed the questionnaire on this topic drawn up by the Juridical Committee. He also said that the Department of International Law had prepared and distributed document ODI/doc.03/08, covering the CAJP's working session on the International Criminal Court held on January 28, 2008, and containing, in addition to information on the results of that meeting, relevant legislation from Argentina, Ecuador, Costa Rica and Venezuela.

Dr. Dante Negro reported that the working session was attended by Dr. Mauricio Herdocia, in his capacity as the Inter-American Juridical Committee's rapporteur for the topic.

Dr. Mauricio Herdocia commented on that meeting and on another meeting, organized by Mexico, held in the afternoon of the same day, dealing with progress with the model law on cooperation between the member States and the International Criminal Court, which led to a discussion on the most recent mandate of the General Assembly. He said that both meetings were highly positive and suggested that the Committee should henceforth arrange for the rapporteurs to attend meetings on their corresponding topics held by the CAJP: this would enhance participation and increase the dissemination of the Inter-American Juridical Committee's work and its function in the progressive development of international law.

Dr. Herdocia also submitted documents CJI/doc.290/08 rev.1, "Report on Perspectives for a Model Law on State Cooperation with the International Criminal Court," and CJI/doc.293/08 rev.1, "Guide to the General Principles and Agendas for theCooperation of State with the International Criminal Court."

Dr. Herdocia spoke of the background to the topic within the Juridical Committee; he referred to the mandates issued by the General Assembly, the reports prepared by the rapporteur, the responses of the OAS member States to the questionnaire sent out by the Juridical Committee, the meetings of the Committee on Juridical and Political Affairs, and the support documents prepared by the Department of International Law, and he put emphasis on the main problems in adhering to or ratifying the Rome Statute, possible forms of cooperation with the International Criminal Court, and bringing national criminal law into line with the Rome Statute, which, in his opinion, were often in conflict with constitutional provisions. He also spoke of the contents of his most recent report, which had been adopted by the Juridical Committee and contained recommendations for both those OAS member States that are parties to the Rome Statute and those that are not yet parties.

Regarding the General Assembly mandate for the Committee to draft model legislation on cooperation between the member States and the International Criminal Court, Dr. Herdocia spoke of the laws already existing in the Hemisphere, such as those enacted by Canada, Uruguay, Peru, Costa Rica, Argentina and Trinidad and Tobago, which represent the most significant experiences with the implementation of the Rome Statute. The recommendation to be made by the Juridical Committee, he said, should indicate those areas where internal national procedures need development, the implementation of which will be subject to the States' individual domestic legal

and institutional regimes. He spoke of the need to identify a central authority for dealing with the topic in each country, in order to avoid the proliferation of hierarchies.

The rapporteur said that the question of cooperation measures should be understood very broadly, going beyond the provisions set out in Part IX of the Statute. The cooperation process even allows for non-party States to appear before the Court. In that way, non-party States – which in general have laws and instruments that empower them to cooperate with the ICC – are not excluded.

With regard to the adaptation of domestic laws, Dr. Herdocia said that attention should be paid to the full range of humanitarian law treaties, the Rome Statute, the 1949 Geneva Conventions and Protocol I thereto, and to those principles that target all States – parties and non-parties – and that allow the harmonization of domestic legislation.

Dr. Guillermo Fernández de Soto commented on the issues subject to the most debate regarding the International Criminal Court, such as cooperation measures, evidence gathering, complementarity, the question of the interest of justice, and the confidentiality with which information is handled. He reminded the members that a review of the Rome Statute was to take place this year, and he emphasized the vital importance of studying the preparatory documents in order to learn about the proposed amendments to the Statute.

The Juridical Committee decided to adopt resolution CJI/RES.140 (LXXII-O/08), "Promotion of the International Criminal Court", which approved the two reports submitted by the rapporteur, said it was important for the States to take on board the reports' remarks, principles and guidelines with a view to strengthening cooperation with the ICC, and forwarded the documents to the Permanent Council for it, in turn, to convey them to the General Assembly. It also repeated the request made of the States in earlier resolutions, stressed the importance of the special sessions of the Committee on Juridical and Political Affairs, and encouraged that Committee to continue to provide frameworks for discussions on the measures States must adopt in order to cooperate with the International Criminal Court.

On March 24, 2008, the Department of International Law forwarded the documents in question to the Organization's Permanent Council.

As with the topic of access to public information, at this regular session the Inter-American Juridical Committee was visited by Dr. Andrés Bertoni. He reported that two aspects of the topic were being dealt with by the Due Process of Law Foundation (DPLF): first, substantive issues, and second, the question of cooperation between member States and the International Criminal Court. States must make substantive changes to their laws to enable such cooperation to take place once they have ratified the Rome Statute, he said. It would be most useful, he added, for the Committee to conduct a study into the minimum principles for guiding legislative procedures and the implementation process in those countries where they have not yet taken place.

At its 38th regular session (Medellín, June 2008), by means of resolution AG/RES. 2364 (XXXVIII-O/08), the OAS General Assembly asked the Inter-American Juridical Committee, on the basis of its proposal to prepare a model law on cooperation between States and the International Criminal Court, to promote, insofar as it is able and with support from civil society, the adoption of that law in those States that do not yet have a law in the area, and, with collaboration from the General Secretariat and the Secretariat for Legal Affairs, to provide support for and promote in the member States the training of administrative and judicial officials and academics for that purpose, and to report on progress thereon to the General Assembly at its 40th regular session.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the rapporteur for this topic, Dr. Mauricio Herdocia, proposed that the discussions on the matter be included textually in the proceedings. Those discussions appear in proceedings No. 6 of Monday, August 11, 2008.

Resolution CJI/RES. 140 (LXXII-O/08), with its two annexes, appears below:

CJI/RES. 140 (LXXII-O/08)

PROMOTION OF THE INTERNATIONAL CRIMINAL COURT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that the General Assembly held in Panama in June 2007, through resolution AG/RES. 2279 (XXXVII-O/07), 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 model law on cooperation between States and the International Criminal Court, taking into account the Hemisphere's legal systems, and to submit it to the General Assembly of the Organization at its thirty-eight regular session;

CONSIDERING THAT, pursuant to that mandate, the rapporteur of the theme, Dr. Mauricio Herdocia, presented during the 72nd regular session of the Inter-American Juridical committee held in Rio de Janeiro in March 2007, documents CJI/doc.290/08 rev.1, "Report on perspectives for a model law on State cooperation with the International Criminal Court" and CJI/doc.293/08 rev.1, "Guide to the general principles and agendas for the cooperation of States with the International Criminal Court", which were considered by the Inter-American Juridical Committee during the aforesaid regular session,

RESOLVES:

1. To thank Dr. Mauricio Herdocia, rapporteur of the topic, for his presentation of documents CJI/doc.290/08 rev.1, "Report on perspectives for a model law on State cooperation with the International Criminal Court", and CJI/doc.293/08 rev.1, "Guide to the general principles and agendas for the cooperation of States with the International Criminal Court".

2. To receive said reports and underline the importance for States to take into account their considerations, principles and agendas, with a view to strengthening cooperation with the International Criminal Court.

3. To convey those reports to the Permanent Council of the Organization, which in turn will convey them to the OAS General Assembly during its thirty-eight ordinary session to take place in Medellin, Colombia, in June 2008.

4. To reiterate the request to the OAS Member States that have not yet replied to the questionnaire prepared by the Inter-American Juridical Committee, to do so, and to those States party to the Statute of the International Criminal Court that have already completed the process of law adoption and implementation, to deliver such information to the Inter-American Juridical Committee.

5. Furthermore, to reiterate the request to the States that have already completed the process of adoption of laws that embody, modify or add the criminal types characterized in the Rome Statute, to provide the updated information to the Inter-American Juridical Committee.

6. To underline the importance of the special sessions on this topic that are organized annually in the framework of the Committee of Legal and Political Affairs of the OAS Permanent Council; to stimulate said Committee to continue sponsoring frameworks for discussion on the adequate measures that States must take to cooperate with the International Criminal Court, and to highlight the involvement of the rapporteur of the topic in the special session held on January 28, 2008.

This resolution was unanimously adopted during the session held on March 7th, 2008 by Drs. Hyacinth Evadne Lindsay, Guillermo Fernández de Soto, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Jean-Paul Hubert, Ricardo Seitenfus, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

Annexes:

- CJI/doc.290/08 rev.1, "Report on perspectives for a model law on State cooperation with the International Criminal Court"
  (presented by Dr. Mauricio Herdocia Sacasa)
- CJI/doc.293/08 rev.1, "Guide to the general principles and agendas for the cooperation of States with the International Criminal Court"
  (presented by Dr. Mauricio Herdocia Sacasa)

CJI/doc.290/08 rev.1

REPORT ON PERSPECTIVES FOR A MODEL LAW ON STATE COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Mauricio Herdocia Sacasa)

I. INTRODUCTION

The OAS General Assembly, through resolution AG/RES. 2279 (XXXVII-O/07) Promotion of the International Criminal Court, of June 5, 2007, decided to:

> Request the Inter-American Juridical Committee, on the basis of the information received from and updated by the member states, the recommendations contained in the report CP/doc.4194/07, and existing cooperation law, to prepare a model law on cooperation between states with the International Criminal Court, taking into account the Hemisphere´s different legal systems, and to submit it to the General Assembly at its thirty-eighth regular session.

No doubt this is a complex initiative as it requires to address a large amount of legal and practical problems and finding possible solutions to current situations, in a scenario characterized by the peculiarity of laws and domestic criminal procedures, in the context of an international instrument with universal vocation.

As this work cannot be separated from previous works of the Juridical Committee involving the promotion of the International Criminal Court, there is need to bear in mind the background and general information on the issue.

II. THE ORIGIN OF THE WORK OF THE INTER-AMERICAN JURIDICAL COMMITTEE

The work of the Inter-American Juridical Committee on this subject, in more recent times, goes back to the mandate received by the General Assembly of the Organization of American States on June 7, 2005, when it was requested to prepare a questionnaire to be submitted to the OAS Member States. The questionnaire sought to secure information on how the respective national legislations were ready to cooperate with the International Criminal Court.

Some two months later, in August 2005, the Inter-American Juridical Committee approved including in the agenda the topic on the Promotion of the International Criminal Court.

It should be highlighted that at that time the “Questionnaire on the International Criminal Court” comprised Member States to the Statute of Rome as well as non-member countries.

In a short space of time, the “Questionnaire on the International Criminal Court” was responded by 17 countries, of which 11 were Parties to the Rome Statute and 6 were not. Based on this information, the Rapporteur submitted the requested report.

On June 6, 2006, the OAS General Assembly decided to request the Inter-American Juridical Committee, taking into consideration the results of the report presented, to prepare a document of recommendations to the OAS Member States, on how to strengthen cooperation with the International Criminal Court. Report CJI/doc.256/07 rev.1 was forwarded to the Permanent Council, which in turn delivered it to the General Assembly.

This Report addresses the perspective of a model law on the cooperation of the States with the International Criminal Court, pursuant to the mandate contained in the aforementioned resolution AG/RES. 2279 (XXXVII-O/07).

III. UPDATING OF THE RAPPORTEUR´S REPORT REGARDING THE INTER-AMERICAN SYSTEM

Since the first Report, information was received from the Permanent Mission of the Eastern Republic of Uruguay at the Organization of American States. It is an update of the material submitted through Note No. 010/06 of January 12, 2006. The new note forwards a copy of Law No.18026, “Genocide, Crimes of Lese Humanity, War Crimes and Cooperation with the International Criminal Court”, which was promulgated on September 25, 2006, as well as a copy of Law No. 18013 promulgated on September 11, 2006, through which the Agreement on Privileges and Immunities of the International Criminal Court was approved.

The last two working sessions of the Committee on Juridical and Political Affairs should also be mentioned as a very important updating element, with the support of the OAS Office of International Law, which took place at the Organization headquarters on February 2, 2007 and on January 28, 2008, and which will be reviewed later. These sessions were timely occasions for updating legislative developments by the States regarding the implementation of the Rome Statute.

The 23 countries of the Inter-American System which have 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) **Saint Vincent and The Granadines** (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 which have not yet ratified the Rome Statute are: **Bahamas, Chile, Cuba, Haiti, Jamaica, Saint Lucia, United States of America, Grenada, Guatemala, Nicaragua, El Salvador and Suriname.**

The Agreement on Privileges and Immunities of the International Criminal Court (APIC) was ratified by 11 countries of the Inter-American System, namely: **Argentina** (February 1st, 2007), **Belize** (September 14, 2005), **Bolivia** (January 20, 2006), **Canada** (June 22, 2004), **Ecuador** (April 19, 2006), **Guiana** (November 16, 2005), **Panama** (August 16, 2004), **Paraguay** (July 19, 2005), **Trinidad and Tobago** (February 6, 2003), **Uruguay** (November 1st, 2006) and **Mexico** (September 27, 2007).

IV. CONTENTS OF REPORT CJI/doc.211/06 BY THE IAJC RAPPORTEUR

Since Resolution AG/RES. 2176 (XXXVI-O/06) requested that the preparation of a document of recommendations on how to strengthen cooperation with the Court should be based on the results of the Report presented by the Inter-American Juridical Committee, we deem it pertinent to provide a general summary on the contents of the document.

Said report addressed, in the first instance, the overall situation of the Rome Statute as regards the countries in the Inter-American System, highlighting the presumably more conflictive items vis-à-vis ratification or adhesion to it in relation to domestic legislation of the countries: Ne Bis In Idem, Irrelevance of Official Capacity; Duties and Powers of the Prosecutor with respect to Investigations; Arrest Proceedings in the Custodial State; Life Imprisonment and Pardon and Amnesties.

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

Mention was also made of the final report of the Inter-American Juridical Committee CJI/doc.199/05 rev.1, of August 15, 2005, addresing the topic “Legal Aspects of Compliance within the States with Decisions of International Courts or Tribunals or Other International Organs with Jurisdictional Functions”, which included replies from States on the issue of the International Criminal Court.

It was seen that most States have incorporated in their legislation the crime of genocide, while a smaller number of States have incorporated war crimes. Crimes against Humanity represent the lowest number of classifications within the domestic legislation of the States which replied to the questionnaire, and this seems to indicate a more complex problem in the process of legislative harmonization as regards the latter.

It was indicated that in the case of war crimes and crimes against humanity, some of the definitions provided by the States are frequently disseminated in their legislation and do not necessarily cover the broad gamut of the Rome Statute.

It was highlighted that a good number of States Parties to the Statute that replied to the Questionnaire expressed that they have norms for implementing cooperation with the Court, either because they were specially prepared or because they consider that the prevailing legislation allows them, in any case, to cooperate with the Court. It was then stressed that the

fact that for some States Parties to the Statute the absence of specific legislation did not seem to necessarily prevent their capacity to provide for the requirements of cooperation of the Court under the prevailing legislation, while the corresponding amendments are carried out.

In the case of the States Parties to the Statute that did not have a legislation specially devised to implement the cooperation with the Court, these States Parties expressed that the corresponding legislation was currently being drafted and was being processed accordingly.

In order to resolve potential problems of the statute vis-à-vis the Constitution and the domestic legal frame, certain mechanisms are worth bearing in mind in case the States are not yet Parties to the Statute:

a) Global constitutional reform

b) Report, statement or opinion of the organs involved in constitutional control

c) Studies and consultations that allowed for a straight course of ratification or adhesion

Taking into consideration the complementary nature of the International Criminal Court jurisdiction, in relation to the domestic criminal jurisdiction, the relevance of the strengthening of the domestic jurisdiction itself was highlighted. This would imply the adequate classification of the crimes included in the Statute within the Criminal Codes of each country and the qualification of the domestic legal framework for suing them locally.

V. CONTENTS OF IAJC REPORT CJI/doc.256/07 rev.1 BY THE RAPPORTEUR

The last report approved by the Inter-American Juridical Committee and forwarded to the Permanent Council (CJI/doc.256/07 rev.1), refers to the following considerations and preliminary recommendations, which in view of its relation to the topic are presented in full:

7.1. The first approach seeks to highlight the 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 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[1] 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.[2]

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, or whether it is more convenient to incorporate specific provisions for already existing laws, either criminal codes or criminal procedural codes, as other countries have 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.

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[1] See Annex.

[2] The Rome Statute in its article 11 considers that “1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”.

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:

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.

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.

7.5 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.

7.6 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.

VI. SPECIAL WORKING SESSION OF THE CAJP

The OAS General Assembly, through resolution AG/RES. 2176 (XXXVI-O/06), "Promotion of the International Criminal Court", requested the Permanent Council to organize a working session, with the support of the General Secretariat, on the proper measures that States have to take in order to cooperate with the International Criminal Court.

The working session of the Committee on Juridical and Political Affairs on the International Criminal Court –the third to be convened– took place on February 2, 2007; the results are compiled in document OEA/Sec.Gral. ODI/doc.02/07.

The Report contains the main ideas presented during the working session. They are:

- OAS Member States must familiarize their parliaments with the existence of the International Criminal Court and the Rome Statute;
- The participation of civil society and of intergovernmental organizations is essential for the promotion, dissemination, and implementation of the Rome Statute;
- Appropriate implementation and the overcoming of internal technical hurdles require resolute political commitment;
- The legal definitions established in the Rome Statute constitute a minimum benchmark for States. However, each country is free to implement policies and sets of laws that surpass those standards;
- Participants underscored the importance of recognizing the full effectiveness of the International Criminal Court and of respect for the principle of universality;
- Cooperation with the International Criminal Court and the Office of the Prosecutor at the various stages of proceedings are key to making the system fully effective. In this context, political will is essential;
- Comprehensive reparation for victims constitutes a major challenge involving full participation by States;
- Great importance was attached to the Organization of American States reaching cooperation agreements with the International Criminal Court and to designation of the Office of International Law as the unit responsible for liaison with the Court;

Later on, Resolution AG/RES. 2279 (XXXVII-O/07) requested the Permanent Council to hold a working meeting on appropriate measures that States should take to cooperate with the International Criminal Court, which should include a high-level dialogue in which member States discuss the recommendations contained in Report CP/doc.4194/07. This session took place on January 28, 2008.

The report of the working session on the International Criminal Court (OEA/Sec./Gral. ODI/doc.03/08 of February 14, 2008, summarizes the dialogue between delegations as follows:

At the end of the presentations the participants started discussions and comments on the event.

Among the comments and replies submitted by panelists, the following ideas should be highlighted:

- *Rationae persona* jurisdiction contained in Article 1 of the Rome Statute is applicable to natural persons but not to legal persons.
- The principle of universal jurisdiction may be organized in accordance with the domestic legal systems.
- Penalties included in article 80 of the Rome Statute should serve as a reference or minimum standard, as well as the elements included in the 1949 Geneva Conventions and their 1977 Protocols.
- The project of amendments to the Rome Statute for the year 2009 was mentioned, however informing that there is nothing concrete as regards the list of crimes. Nonetheless, there seems to be an interesting opportunity to include a definition of the crime of agression. Despite this, and regardless of the changes in the list, the will

of the States to include in the domestic legislation a list as complete as possible is essential.

During the exchange of ideas, some delegations mentioned the legislative developments in their respective countries. The delegation from Argentina informed that the country's legislation was incorporating principles such as complementarity, territoriality and active nationality. The characterization of the crime involving the forced disappearance of people is also being addressed. Costa Rica in turn informed about the project of amendments to the Criminal Code, which embodies types of crimes such as genocide, lese-humanity, torture and forced disappearance and the inapplicability of any statute of limitations regarding those crimes, as well as the draft law on the Agreement on Privileges and Immunities of the International Criminal Court (Legislative Records No.15676). The Venezuelan delegation stressed the need to preserve the integrity of the Rome Statute and mentioned the high value of some national legislation adopting cooperation schemes with the Court, while respecting the domestic legal framework. The representatives from Mexico explained that the country already has an instrument on privileges and immunities and that the Senate is currently studying a decree on cooperation with the International Criminal Court.[3].The Brazilian delegation reported on a draft law on effective cooperation with the International Criminal Court, which is currently in Congress. The Chilean delegation stated that the ratification of the Rome Statute is under consideration by the Senate, following a request of constitutional amendment. The Canadian delegation explained the efforts to implement the Rome Statute and other drafts and projects developed both in the country and abroad in favor of the approval of legislation on cooperation with the Court, making a technical manual on cooperation available on that occasion. The Ecuadorian delegation mentioned the events organized by the National Committee in charge of putting into effect the Rome Statute, taking into consideration that the Statute had already been approved as well as the Convention on Privileges and Immunities. The Peruvian delegation commented on the inclusion of a chapter on cooperation with the Criminal Court in the Criminal Code and reported on a draft law on crimes against human rights and international humanitarial law. Finally, the Colombian delegation announced that the Senate had approved a draft law on privileges and immunities, but that nevertheless there is still some debate going on regarding self-defense groups.

Some comments were also expressed on more general items. The Jamaican delegation considered that the model law under study by the IJC is really useful, because it will be instrumental both to States Parties of the OAS and non-Party states to the Rome Statute. The American delegation considered that cooperation with the International Criminal Court should take into consideration the interests of all the OAS Member States. The Mexican delegation showed interest in submitting a draft resolution on the promotion of the International Criminal Court during the forthcoming session of the General Assembly.

We should highlight here that most delegations expressed their consent regarding the drafting of an agreement between the OAS Secretary General and the President of the International Criminal Court in order to promote activities on the development of international law.

At the closure of the event, CAJP´s president requested the Secretariat to submit a report on the cooperation agreement prior to the sessions of the General Assembly, as requested by resolution AG/RES. 2279 (XXXVII-O/07).

In the afternoon of January 28th, an informal session convened by the Mexican delegation was organized, addressing the topic of a model legislation on cooperation between States and the International Criminal Court.

VI. PERSPECTIVES TOWARDS A MODEL LAW ON COOPERATION

Please see below the following starting points:

1. Obviously the project should include – although not restricted only to them – the experiences of national legislations, particularly the following: Crimes Against Humanity and War Crimes Act of the year 2000, Canada; Law No. 18026 on cooperation with the International Criminal Court on the Fight Against Genocide, War Crimes and Crimes of Lese-

[3] Regulation Law of item five of Article 21 of the Political Constitution of the United Mexican States and addition to the Organic Law of the Judicial Power of the Federation.

Humanity of the Eastern Republic of Uruguay, year 2006; Decree No. 957, Code of Criminal Procedures, Peru, 2004, containing norms on international judicial cooperation with the International Criminal Court and Law No. 28671 amending the coming into effect of the Code of Criminal Procedures and comprising supplementary norms for the process involving the implementation of the New Code on January 30, 2006; Law No. 8272 on Criminal Repression as a Punishment for War Crimes and Crimes of Lese-Humanity, year 2002, Costa Rica; Law No. 26200, which is the Law on Implementation of the Rome Statute of the International Criminal Court, year 2006, of the Argentine Republic and the International Criminal Court Act of Trinidad and Tobago of 2006.[4.]

The aforementioned recommendations should also be taken into consideration when pertinent, and which are contained in Report CP/doc. 4194/07.

2. However, the discussion on the topic of cooperation with the Court in each of the legislation will reveal certain characteristics which distinguish domestic legal frameworks, and for that reason, on some occasions, only the Committee will be in charge of indicating that certain aspects require development of internal procedures, but that the domestic law will detail them, based on their own democratic institutions.

Diversity and differences in organs and institutions in each State might be eventually liaised with the compliance of the provisions on cooperation with the Court and the peculiarities in their performance. A general perspective when drafting a model instrument is advisable, in order to avoid proliferation of possibilities which nevertheless would not necessarily encompass the whole gamut of alternatives available in the States.

3. Also in this dimension, we must bear in mind the need to harmonize a solution providing response to different legal systems involving common law and civil law prevailing in the hemisphere, on the grounds that there is already a unifying element which is precisely the Rome Statute. Taking into consideration the diversity of legal systems in the Hemisphere, the provisions of the International Criminal Court therefore represent a bridge between Systems, as a sort of common, uniform regime.

4. It is not too much to indicate that the Inter-American system and the practices of States present mechanisms for cooperation, mutual assistance, sentence enforcement, and so on, reflecting some dynamism in the cooperation that could well ease the avenues of an implementing law on the grounds -*mutatis mutandi*- of those experiences, and recalling that cooperation with the Court often requires special treatment, which is not necessarily achieved when we use the traditional aspects and reference frameworks in themselves, and which are contained in other treaties, without the necessary adequation work.

5. The meaning of a cooperation law with the Court should be crystal-clear. It does not replace the Statute nor displaces what is already agreed on in an international treaty such as the Rome Statute. There is no pretension whatsoever to amend it restrictively. The idea is to complement it, making it effective, providing it with internal procedures in those areas where national provisions are essential. It is precisely here that local implementation measures are needed, and as the norms of the Statute are not sufficient, all the splendor of the real use of the law is revealed. These procedures cannot contradict, hamper and become inoperational or annul the provisions of the Statute.

6. From this viewpoint, no cooperation laws can, due to any excess in their regulation, complicate or hamper the achievement of the strict goals of the Statute. They are instruments meant to facilitate, dynamize and make effective the norms of the Statute itself in terms of cooperation. When adopting a certain procedure, the first question to be asked is whether it really facilitates and favors cooperation as it is. An affirmative response is the best test of efficacy.

7. For the sake of cooperation, it should be borne in mind that cooperation does not only rely on procedures which are mechanically established, but also that it has something of a transversal axis in terms of a system of consultations that will focus on local and very specific situations, and which is essential because it allows finding, in a spirit of cooperation, the

[4] We should also bear in mind the already mentioned drafts in part V.(Special Working Sessions of the CAJP) of this Report and other updatings, such as the approved of the New Criminal Code of Nicaragua including crimes such as Genocide, Crimes of Lese-Humanity and Crimes against Persons and Protected Assets during Armed Conflict.

adequate solutions for specific problems and the continuity of the procedures in case of difficulties.[5.]

8. Another starting point is that, in view of the complexity of the subject, it is important to simplify things as much as possible. Some legislations in force show a high degree of precision, austerity and certainty, but others present considerable development and have addressed extensively, generously and thoroughly the subjects under study. It would probably be good for the model legislation to benefit from balance which, without neglecting some topics, indicate the principles and guidelines on items that might need reinforcement of the domestic institutional machinery in order to enforce a certain norm of cooperation of the Statute, thereby filling gaps.

Trying to move ahead without taking into consideration the peculiarities of each domestic legislation, risks providing solutions which eventually might work in a certain legal framework but not necessarily in others, or even reveal inconsistencies.

9. Identifying criminal norms, either through remission to the Statute or through its full inclusion, is a highly useful element for cooperation, but special care should be taken to complement this with the set of regulations and principles referring, for example, to *Ne bis in idem* (Art. 20); Applicable Law (Article 21); Exclusion of the ICC's jurisdiction over persons under eighteen; Irrelevance of Official Capacity (Article 27) Responsibility of commanders and other superiors (Article 28); Non-applicability of Statute of Limitations (Article. 29) and Grounds for Excluding Criminal Responsibility (article 31) in order to avoid inconsistencies between the criminal norm and its applicability.

10. Cooperation measures, although basically concentrated in Part IX referring to international cooperation and judicial assistance, are in fact complemented by a long variety of situations and provisions in other parts of the Statute which also call for the collaboration of the States or local implementation norms. The Rome Statute, which is in any case an integral and indivisible text, cannot refer to one of its parts alone, without taking into account the others and the interaction among them as links of an indissoluble unity with a common objective and purpose.

11. Cooperation with the Court should be understood in a broad sense, where efforts to adapt domestic legislation to the Statute are also forms of cooperation with the purposes of the international criminal justice. Similarly, it must be borne in mind that States can be active subjects of cooperation with the Court in a two-way process. In this sense, pursuant to Article 93 item 10.a), the Court may cooperate and assist upon request a State Party conducting an investigation or in a suit of a conduct implying a serious crime pursuant to the domestic legislation of the requiring State.

12. When tuning-in domestic legislation, one needs to pay attention to the set of international obligations of each State, which is particularly relevant in the area of International Humanitarian Law with the Geneva Conventions of 1949 and the Additional Protocol I, taking into consideration that crimes do not necessarily coincide with infringements in all cases and that the Statute lists war crimes which are not mentioned in the list of serious infringements and especially that Additional Protocol I lists some crimes which are not listed in the Rome Statute, or which comprise broader elements.

13. States which are not Parties to the Statute are not excluded from cooperation with the Court. Article 87 item 5 a) determines that the Court may invite any State not Party to the Statute to provide assistance under Part IX on the basis of an ad hoc arrangement, an agreement with such State or any other appropriate basis. The rapporteur considers that some of the so-called "Other Forms of Cooperation" may be developed using *–mutatis mutandi-* conventional and internal mechanisms of international criminal cooperation in general.

With these premises in mind, there is a need to review the Statute of the Court in order to assess whether these basic premises are consistent or not with its provisions.

Article 86 of the Statute establishes the general obligation of the States Parties to "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court", but this is performed "in conformity to the provisions of this Statute".

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[5] See for example the case of other forms of assistance, Article 93, item 3 and Article 72 (Protection of national security information).

That is to say, in strict conformity with its provisions. Therefore local legislative developments have to stick to that conformity, by virtue of the obligation of cooperation.

"Conformity" does not mean that they cannot go beyond, but that they have to observe at least the three minimum standards established. It could also be desirable for States to trespass these limits inasmuch as they are true acquisitions and contributions to International Criminal Law, if they so consider.

The value of a model legislation would lie in offering principles and guidelines which can facilitate –within the States- operational cooperation with the Court, whenever possible or otherwise indicate where and in which topics a domestic development is required. But the idea would not limit itself to make the operation of the Court more efficient, but furthermore, the pre-eminent and fundamental exercise of local criminal jurisdictions in view of those crimes, under a broader concept of cooperation. The Preamble of the Statute of the Court recalls in its sixth paragraph that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

It was indicated that the International Criminal Court does not intend to replace the domestic administration of justice, but that the latter may be in condition to safeguard and protect prosecution, suing and punishment of those liable for crimes in the light of the statute. The domestic judge, so to speak, is also the judge fit to apply his/her jurisdiction in the field of criminal international law.

The legislation of Argentina, in line with the Spanish legislation, for example, confirms this statement when it establishes that the law has its field of action in "whatever is not contemplated in the Rome Statute", and complementary legislation. Procedures to be established by laws will be only applied in default of the Statute, that is to say, they will develop what is not included within the Statute because otherwise the procedure indicated in the instrument which generated the International Criminal Court prevails.

It should also be deduced from these norms that the absence of a domestic cooperation norm should not prevent nor would give rise to an allegation to justify any non-compliance with the obligations in the Statute. The purpose is that domestic law should adequately portray the agreements in the international arena.

Thus article 88 (Availability of procedures under national law), establishes that States Parties "shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

VII. GLOBAL VISION OF LAWS APPROVED SO FAR

It is also worth mentioning that in the case of the States which have approved any kind of norms as far as we know, not all of them have followed a uniform procedure. While in some cases they refer to specific laws exclusively related to the topic, in other cases norms are included in the substantive codes and codes of procedure or also using combined techniques. There has been no single way for implementing the Statute as demonstrated by the diverse initiatives. In some cases the technique involving the referral to the provisions of the Statute, while in others a unique and special legislation has been adopted, and also the technique of the systematic implementation in several legislative bodies.

With a larger or smaller development, laws adopted coincide with the basic purpose to ensure the existence of internal procedures ensuring cooperation, in conformity – in general – with the Statute in efforts which deserve to be recognized.

Most laws exceed the field of simple cooperation and make incursion in other aspects such as those referring to crimes, their types and penalties. While some laws do this by referring to the Statute, others provide a peculiar development.

The mandate received by the Juridical Committee consists in the drafting of a model legislation on cooperation by the States with the International Criminal Court. This basically sets out three scenarios:

1. A model instrument which covers, in line with most analyzed legislation, both cooperational aspects strictly speaking and those of another nature, but deeply interlinked to the real possibilities both of cooperation with the Court and fulfillment of the purposes of criminal justice in cases of international crimes in national fora.

2. A model instrument limited to the area of cooperation with the Court, exclusively in light of Part IX of the Statute, and

3. A model instrument comprising certain general principles which enable harmonization between the normative development of local legislation in those areas where procedures complementing their provisions are to be applied, thus concretizing the postulate which indicates that international law needs domestic law to operate properly.

Each one of these possibilities has its weak and strong points. Maybe the main thought for a model legislation is - preferably – to search for a formula that permits addressing the main aspects without necessarily trying to define procedures that only belong to the domestic law and its structure and peculiarities on which we cannot generalize.

That is why the Rapporteur considers it more convenient, at this stage of the work of the Committee, to draft an attached instrument of general characteristics, centered on the great principles[6] and identifying some of the areas where there is need of domestic legislative development and providing, in this case, guidelines or general principles so that domestic legislations – having a reference framework – may implement their respective norms in light of the specific peculiarities of domestic legislation.

This guideline is reinforced by the idea having legal systems of a distinct nature, such as the common law and the civil law systems in the Hemisphere.

This would lead us to refrain from not excluding a priori any of the scenarios, bearing in mind, at last, that this is not the case of an international treaty, but of a model instrument conceived to operate as a guideline and reference framework that the States have to adapt, when necessary, to their own, legitimate peculiarities, provided they do not affect the norms contained in the Rome Statute, the Elements of Crimes and its Rules of Procedure and Evidence.

Document "Guide to the General principles and Agendas for the Cooperation of States with the International Criminal Court", called OEA/Ser.Q CJI/doc.293/08 rev.1 of March 6, 2008, is attached.

CJI/doc.293/08 rev.1

GUIDE TO THE GENERAL PRINCIPLES AND AGENDAS FOR THE COOPERATION OF STATES WITH THE INTERNATIONAL CRIMINAL COURT[7]

(presented by Dr. Mauricio Herdocia Sacasa)

Based on Report CJI/doc.290/08 rev. 1 dated 7 March 2008 and presented by the Rapporteur, the following text is a Guide to the General Principles and Agendas for the Cooperation of States with the International Criminal Court.

I. FOR STATES PARTIES TO THE STATUTE

1. Purpose

1.1 The purpose of this instrument is to ensure the existence of internal procedures with a view to full cooperation between the State of _____ and the International Criminal Court in the exercise of the jurisdiction, competence and functions assigned to said permanent institution in the Rome Statute adopted on 17 July 1998 and the complementary norms, including the Elements of the Crimes and the Rules of Procedure and Evidence.

1.2 To assign competence to organs of the State of _____ for such purposes.

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[6] See for example "Lineamientos en cooperación judicial con la Corte Penal Internacional" (Outlines of judicial cooperation with the International Criminal Court, February 2008, Andean Jurist Committee.

[7] The agendas and principles contained in this instrument are minimal in nature and merely indicate certain topics deemed to be essential and have no pretensions to exhaust or limit the different forms of cooperation and legal assistance with the International Criminal Court and its principles.

1.3 To establish procedures applicable to cooperation not provided in the Rome Statute and complementary norms.

2. Nature

2.1 This instrument is supplementary to the provisions of the Rome Statute and its complementary norms.

2.2 The integrity of the procedures already provided in the Rome Statute and its complementary norms should be respected.

3. Scope

3.1 This instrument is applicable to the following types of crimes within the competence of the International Criminal Court: the crime of genocide, crimes against humanity, war crimes and the crime of aggression, the latter when a provision defining it is adopted, together with the conditions for its application in accordance with the Rome Statute.

3.2 It is also applicable to crimes against the administration of justice, as set forth in article 70 of the Rome Statute.

3.3 The types of crime defined in articles 6, 7, 8 and 70 of the Rome Statute comprise the minimum standards to which the respective national legislations must adapt.

3.4 Adapting the types of crime should be complemented by including the rules and principles relating, for example, to ne bis in idem (art. 20); applicable law (art. 21); restrictive interpretation of crimes (art. 22 (2); non-retroactivity ratione personae (art. 24 (2); individual criminal responsibility (art. 25); exclusion of jurisdiction over persons under eighteen (art.26); irrelevance of official capacity (art. 27); responsibility of commanders and other superiors (art. 28); non-applicability of statute of limitations (art. 29) and the grounds for excluding criminal responsibility (art. 31), in order to avoid any inconsistency between the criminal norm and its form of application.

3.5 Adapting the types of crime to the internal system of law must be in keeping with the obligations springing from the Conventions of Geneva of 1949 and the Additional Protocol I of 1977.

4. Scope of Application

4.1 This instrument applies to crimes committed in (places where committed (inside or outside the territory) or that bear effect on the territory, according to internal law.

4.2 (Universal Obligation to Judge) The State of _____ shall exercise its jurisdiction in respect to any person found its territory associated with the crimes indicated in article 5 of the Rome Statute, regardless of their nationality or the place where the crime was committed, when this State does not determine extradition to a third State or surrender to the International Criminal Court.

5. General obligation of cooperation

5.1 The organs of the State of _____ that are designated as competent shall attend to the requests for cooperation made by the International Criminal Court, in accordance with the terms and conditions set out in the Rome Statute, its complementary norms and this instrument.

5.2 Requests for cooperation shall be attended to expeditiously and in good faith.

5.3 Total or partial absence of procedures in the internal system with regard to cooperation with the International Criminal Court may not use this as an excuse to deny the cooperation requested, which shall be attended to by implementing the necessary legal mechanisms so as to ensure the accused person's right to defense.

5.4 Quick and effective procedures shall be used, ones that do not constitute unnecessary obstacles to full cooperation or that impose conditions that are incompatible with the Rome Statute.

5.5 The consultation processes established in the Rome Statute shall be used by the State of _____ with a view to reaching an understanding, in an attempt either to resolve the questions that motivated the consultation or to find other ways and mechanisms to lend or facilitate assistance.

5.6 Upon providing cooperation, the State of _____ shall take into account possible arrangements for the protection of persons, including victims and witnesses.

5.7 Consider a system of broad diffusion of information without affecting the limited exceptions previously set forth by law.

6. Request for cooperation of the Court

The State of _____ may request the Court (through the competent organ in accordance with the law and in the modality stipulated by same) for cooperation and assistance when it carries out an investigation or substantiates a decision on conduct that constitutes a crime within the competence of the Court or that constitutes a grave crime according to its internal law.

7. Designation of competent bodies

7.1 The State of _____ designates as competent authorities for the effects of setting up cooperation with the International Criminal Court: (in accordance with internal law).

7.2 The State of _____ shall communicate with the Court by means of (diplomatic procedures or any other conduct designated by each State according to its legislation).

7.3 The national organs can only review the contents of their requests according to the parameters and limits established in the Rome Statute and this instrument.

8. Remitting a situation to the Prosecutor

8.1 The State of _____ can remit to the Court Prosecutor, through (the competent body according to and with the characteristics established by the law), a situation in which it appears that one or several crimes have been committed that fall within the competence of the Court, and request an investigation, as provided in articles 13 and 14 of the Rome Statute.

8.2 The State of _____ may formulate, through (the competent body according to and with the characteristics established by the law), a petition to the Pre-Trial Chamber to review a decision of the Court Prosecutor not to proceed to the investigation requested, in accordance with articles 53, paragraph 3. a) of the Rome Statute.

9. Requisition of disqualification of the Prosecutor

9.1 In accordance with article 18, paragraph 2 of the Rome Statute, the State of _____ may inform through (the competent body according to and with the characteristics established by the law), that it is carrying out an investigation among its nationals or other persons under its jurisdiction, into criminal acts that may constitute crimes covered in article 5 of the Rome Statute, and request that the Prosecutor be disqualified to exercise competence in his favor.

9.2 When the Prosecutor is disqualified, the State of _____ , at his request, shall provide him as promptly as possible with periodical information on the progress of its investigations and subsequent procedures.

9.3 The State of _____, through (the competent body according to and with the characteristics established by the law), may appeal before the Appeals Court against the decision of the Pre-Trial Chamber to authorize investigation of the Prosecutor, in accordance with articles 18, paragraph 4 and 82; in this case, the State may impugn the admissibility of a matter by virtue of articles 18 paragraphs 7 and 19 of the Rome Statute.

9.4 If the competent Panel of the Court authorizes the Prosecutor to proceed with the investigation or maintains his competence or the admissibility of the cause, (the

competent body according to and with the characteristics established by the law) of the State of _____ will disqualify itself in favor of the Court and shall upon request remit its records.

10. Impugnation of the competence of the Court or admissibility of the cause

The State of _____ , through (the competent body according to and with the characteristics established by the law), may impugn the admissibility of the cause or else impugn the competence of the Court when it has jurisdiction in the cause either because it is investigating it or filing it or has already done so.

11. Requests for detention and surrender of persons to the International Criminal Court

11.1 The State of _____ establishes the following procedure to comply with a request from the International Criminal Court to detain and surrender a person who may be in its territory: (determination of the competent organ that intervenes and of procedures in accordance with the law).

11.2 The State of _____ will attend to the request, whether it concerns criminal prosecution or execution of a penalty.

11.3 The procedures shall take into account a sufficient system of guarantees for the person who is detained or surrendered.

11.4 In the case of people in transit, the State of _____ shall take all necessary steps to ensure that the person remains detained during transit.

12. Field investigation by agents of the International Criminal Court

The State of _____ shall adopt all necessary mechanisms to facilitate the investigation in the territory of the States by the officers of the Court, according to what is established in the Rome Statute, the Agreement on Privileges and Immunities of the International Criminal Court and the law.

13. Fulfillment of penalty in the area of a Member State of the Rome Statute

13.1 The State of _____ may receive a person condemned by the International Criminal Court to effect execution of the sentence in the penitentiaries under its jurisdiction. It shall consult with the Court regarding the terms and conditions of reclusion in accordance with what is established by the Rome Statute and the law.

13.2 In this case the national system of execution of penalties contained in the criminal codes, code of criminal procedures and codes of criminal execution shall not be applicable. Procedure shall be exclusively as provided in the system set forth by the International Criminal Court.

14. Unprescribability

The judicial actions and the penalties set by the competent authorities for crimes of genocide, crimes against humanity, war crimes and crimes of aggression are unprescribable.

15. Amnestíes and pardons

It is prohibited to grant amnesties, pardons, mercy or similar measures to persons responsible for committing crimes of genocide, crimes against humanity, war crimes and crimes of aggression.

16. Responsibility of superiors and hierarchical obedience

16.1 The military, police or civil commander who orders the committing of crimes established in art. 5 of the Rome Statute shall be sued as the author of the punishable act. Likewise the military, police or civil commander who, in full knowledge or with the obligation to have full knowledge of the fact because of his position, fails to exercise appropriate control to avoid the crime being committed.

16.2 The civil or military personnel who commit international crimes in fulfillment of an order given by a civil or military official, according to the conditions and exceptions established in international treaties and the law, shall not be exempt from criminal responsibility.

16.3 The fact that crimes were committed by a subordinate does not exempt his superiors from criminal responsibility if these persons knew or possessed information that might allow them to conclude, in the circumstances of the moment, that this subordinate was committing such crimes or was about to do so and if they did not take the appropriate steps in their power to prevent or repress commission of the crime.

17. System of immunities

The immunities that may be granted to the Officers of the State of _____, in accordance with what is established by the Constitution and the law, shall not be applicable before denunciations of crimes of genocide, crimes against humanity, war crimes and crimes of aggression.

18. Education and training

The State of _____ shall develop, through (the competent organ according to and with the characteristics established by the law), plans for education, diffusion and training for the authorities entrusted with cooperation with the International Criminal Court.

II. FOR STATES THAT ARE NOT PARTIES TO THE STATUTE

The State of _____ may engage in cooperation with the International Criminal Court as dictated by the provisions in the Rome Statute, either in the declaration provided in article 12, paragraph 3, or else based on a special arrangement, an agreement or in any other appropriate way provided in article 87, paragraph 5. a) of said Statute.

(The State may adapt, with the changes deemed necessary and pertinent, taking into account its condition as non-Party to the Rome Statute, the previous provisions that allow its internal legislation and the international instruments that bind it, especially the part relating to principles and the adjustment of laws to the types of crime contained in the Statute, as provided in item 3 of this Guide).

The State of _____ shall designate an organ (in accordance with the law and the modalities provided therein) to attend to and foster cooperation with the International Criminal Court.

The State of _____ shall undertake a study on the internal legal basis and international instruments that bind it juridically to lend cooperation and assistance to the Court in the areas provided in Part 9 of the Rome Statute.

3. Access to Information and the Protection of Personal Data

	Resolutions
CJI/RES. 145 (LXXII-O/08)	Access to Public Information
CJI/RES. 147 (LXXIII-O/08)	Principles on the right of access to Information
	Documents
CJI/doc.308/08 rev.1	Principles on the right of access to Information (presented by Dr. Jaime Aparicio)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reported that the Carter Center was at that time holding a seminar on access to information in Atlanta, at which a declaration and a plan of action were to be adopted. He also said that the Department of International Law had been instructed by the Committee on Juridical and Political Affairs to coordinate the efforts of various areas of the General Secretariat in drawing up a series of recommendations on the topic, and that the Inter-American Juridical Committee's rapporteur for the topic, Dr. Jaime Aparicio, was also participating in that process.

Dr. Aparicio reported that he had met with various sections of the OAS involved with the topic, with the support of the Department of International Law and with the participation of the Trust for the Americas, the Due Process of Law Foundation, and the Carter Center. He proposed that the rapporteurs prepare a draft resolution recommending that a set of principles be devised and submitted for consideration by the Committee at its next session. In turn, Dr. Dante Negro said that the rapporteurs could study the document being finalized by the Department of International Law and pending presentation to the Committee on Juridical and Political Affairs for revision or relevant comments during August.

At this regular session, the Juridical Committee was visited by Dr. Andrés Bertoni, Executive Director of the Due Process of Law Foundation, an NGO based in Washington, D.C.. Dr. Bertoni said that the Foundation's mandate was to promote and reform criminal justice systems in Latin America, and that it had competence in three areas: judicial accountability and transparency, equal access to justice, and international justice. The Chairman of the Juridical Committee said that Dr. Bertoni had been invited to assist with work on topics of common interest into which the Committee was conducting juridical studies, including access to public information and the promotion of the International Criminal Court.

Regarding the Foundation's work, Dr. Bertoni noted that it was a member of the Alliance for Freedom of Expression and Access to Public Information, which was led by Dr. Darío Soto, who had attended the Committee's previous meeting to discuss issues related to public information access. He explained that his visit to the Inter-American Juridical Committee was intended to open doors for the development of optimal cooperation between the two bodies.

He continued by noting that access to information laws had been adopted in several countries – not only in Latin America, but also in the Caribbean region – and that there was a need to promote the implementation of those laws. He added that there was an absence of references in international law regarding the adoption of laws or their implementation within international intergovernmental organizations that would provide member States with a series of standards and principles to assist them in implementing such laws. He therefore thought that the Juridical Committee could determine minimum standards for implementing access to information laws.

Dr. Bertoni said that the Foundation had compiled a document for distribution containing a series of principles and guidelines drawn up by various nongovernmental organizations and coalitions of NGOs, and that it had been very useful but lacked the weight of a document adopted by the OAS or by the Inter-American Juridical Committee.

He referred to a number of relevant initiatives that could be taken on board in devising international standards, such as the ruling given by the Inter-American Court of Human Rights in a case against Chile that dealt specifically with access to information. He cited the declarations and

resolutions on access to public information adopted by the OAS General Assembly since 2003, along with other efforts made by NGOs, among which he emphasized the work of the Open Society Justice Initiative, which has drawn up ten basic principles for assisting legislative procedures and implementation processes.

He added that one area of the Foundation's work was access to information within the judiciary. Many of the applicable laws do not include the judiciary as an agency that must also observe transparency in information matters, he explained. The Foundation is working for change in that regard, as noted by several delegations at the Brasilia Summit.

He spoke of the topic of the Committee's agenda and the studies undertaken in connection with it, and he suggested separating the question of public information from the topic of personal data (*habeas data*), matters that in many countries are dealt with separately. He said that other OAS agencies, such as the Committee on Juridical and Political Affairs, were gathering information on the topic and that the Committee should coordinate in order to promote the work underway on the matter.

During this regular session, the Inter-American Juridical Committee adopted resolution CJI/RES. 145 (LXXII-O/08), "Access to Public Information", in which it resolved to instruct the corresponding rapporteur and co-rapporteurs to continue to work alongside the OAS and other civil society organizations with a view to submitting, for the Committee's consideration at its next regular session, a proposal of basic principles and indicators on access to public information. At the request of the Inter-American Juridical Committee, on March 26, 2008, that resolution was sent to all the areas and agencies that participated in drafting of the recommendations document under the coordination of the Department of International Law, including the Carter Center and the Trust for the Americas.

At its 38th regular session (Medellín, June 2008), by means of resolution AG/RES. 2414 (XXXVIII-O/08), the OAS General Assembly asked the Inter-American Juridical Committee to include, in its next annual report, a proposal of basic principles and indicators on access to public information and to involve the member States in participating in and contributing to its preparation.

On July 1, 2008, the Department of International Law sent the members of the Inter-American Juridical Committee the study "Recommendations on Access to Information", document CP/CAJP-2599/08, organized by that department and submitted to the Committee on Juridical and Political Affairs on April 24, 2008, in fulfillment of resolution AG/RES. 2288 (XXXVII-O/07), together with the Report on the Questionnaire on Legislation and Best Practices for Access to Public Information, document CP/CAJP-2608/08. It also sent the Declaration and Plan of Action of Atlanta dealing with the topic.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the rapporteur for this topic, Dr. Jaime Aparicio, submitted document CJI/doc.308/08 rev.1, "Principles on the Right of Access to Information", for consideration by the Juridical Committee.

Dr. Aparicio also said that the topic of access to public information is currently being debated in many European countries and that, as an eminently juridical matter of great usefulness, it is tied in with the topics of anticorruption, democracy, transparency, and others. He noted that in Latin America, governments were not yet aware that people had the right to gather information. The judgment of the Inter-American Court of Human Rights in the matter of Claude Reyes v. Chile provided an important reference framework for the topic and has encouraged civil society to work for its inclusion within the sphere of human rights, he said.

The Inter-American Juridical Committee decided that the rapporteur's report should be conveyed to the Permanent Council, along with a resolution. Dr. Aparicio then presented another document, "Principles on the Right of Access to Information" (CJI/doc.310/08), containing ten principles for guiding the drafting and introduction of access to information laws. Dr. Aparicio explained that the principles were drafted in consideration of the broad exchange held with other

agencies specializing in the right of information and the work underway on the topic, and that they also reflected the comments the members had made in discussing the matter.

Following its submission to the members' consideration, the document was finally approved as resolution CJI/RES. 147 (LXXIII-O/08), "Principles on the Right of Access to Information". On September 10, 2008, the OAS Permanent Council noted this resolution and referred it to the Committee on Juridical and Political Affairs for consideration. The following day, a press release containing the text of the resolution was published.

The text of resolution CJI/RES.145 (LXXII-O/08) is transcribed below, along with document CJI/doc.308/08 rev.1 and resolution CJI/RES.147 (LXXIII-O/08):

CJI/RES. 145 (LXXII-O/08)

ACCESS TO PUBLIC INFORMATION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that the Inter-American Juridical Committee has been working on the theme of access to public information in compliance with resolutions CJI/RES. 123 (LXX-O/07) and CJI/RES. 130 (LXXI-O/07);

BEARING IN MIND that the laws that promote the right of citizens to access information on public powers contribute to strengthen the democratic systems, the transparency of public functions, and a greater sense of responsibility on the part of those who work for the State;

CONSIDERING what is provided for in Article 13 of the American Convention on Human Rights and the jurisprudence of the Inter-American Court of Human Rights;

HAVING held during this regular session a productive meeting with Dr. Eduardo Bertoni, Executive Secretary of the Foundation for Due Legal Process (DPLF); and

TAKING INTO ACCOUNT that different Departments of the Organization of American States, together with various organizations from civil society and the rapporteur for Access to Public Information, Dr. Jaime Aparicio Otero, have been working on drawing up principles and indicators on access to public information, so that they can be used by the governments of the Americas on this topic,

RESOLVES:

To commission the rapporteur, Dr. Jaime Aparicio Otero, and co-rapporteurs Drs. Hyacinth Lindsay and Mauricio Herdocia Sacasa, to continue working together with the OAS and other civil-society organizations with a view to presenting for the appreciation of the Inter-American Juridical Committee at its next regular session a proposal concerning basic principles and indicators on access to public information.

This resolution was approved unanimously at the session held on March 12th, 2008, by the following members: Drs. Antonio Fidel Pérez, Hyacinth Evadne Lindsay, Guillermo Fernández de Soto, Mauricio Herdocia Sacasa, Jean-Paul Hubert, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

CJI/doc.308/08 rev.1

PRINCIPLES ON THE RIGHT OF ACCESS TO INFORMATION

(presented by Dr. Jaime Aparicio)

The drawing up of this document took into consideration the all the pertinent documents of the OAS[8], the resolutions of the General Assembly[9], and the documents of the Carter Center, as well as consultations held with the following civil-service organizations such as Due Process of Law Foundation, Carter Center, Acces-Info Europe, Consejo de la Prensa Peruana, Article 19, Pro-Acceso de Chile, Open Society, UNAM de México, Asociación por los Derechos Civiles de la Argentina and Trust for the Americas.

These are the principles that we suggest be taken into consideration as the contribution of the Inter-American Juridical Committee to the member States of the OAS interested in drawing up legislation regarding access to information. It should be understood that such principles are applied in an inter-related manner.

1. In principle, all information are accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions, in accordance with a democratic society and to the extent of the interest that justifies them. States should ensure full respect for the right to access to information through adopting appropriate legislation and putting in place the necessary implementation measures.
2. The right of access to information applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and bodies which operate with public funds or which perform public functions.
3. The right of access to information applies to all information, defined broadly to include everything which is held or recorded in any format or medium and which communicates or contains meaning.
4. Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts provided or awarded to private actors – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.
5. Clear, fair and simple rules should be put in place regarding the processing of requests for information. These should include clear and reasonable timelines, provision for assistance to be given to those requesting information, that access is free or low-cost, and does not exceed the cost of copying and sending the information, and a requirement that where access is refused reasons, including specific grounds for the refusal, be provided in a timely fashion.
6. Exceptions to the right of access to information should be established by law, be clear and narrow.
7. The burden of proof in justifying any denial of access to information lies with the body from which the information was requested.

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[8] CP/CAJP-2599/08. **Recommendations on access to information [AG/RES.2288 (XXXVII-O/07): operative paragraphs 8.a and 13.a].** Joint document: prepared by the Department of International Law, Department of State Modernization and Good Governance, Inter-American Juridical Committee, Special Rapporteurship on Freedom of Expression (EACHR), and the Trust for the Americas, with the representation of the Committee on Juridical and Political Affairs and the participation of The Carter Center and other civil society organizations. Work organized by the Department of International Law of the Secretariat for Legal Affairs. 21 April 2008.

[9] AG/RES.2288 (XXXVII-O/07). **Access to public information: strengthening democracy**; AG/RES.2418. (XXXVIII-O/08). **Access to public information: strengthening democracy.**

8. Individuals should have the right to have recourse to any refusal to provide access to information to an administrative jurisdiction. There should also be a right to bring an appeal to the courts against the decisions of this administrative body.

9. Officials who wilfully obstruct access to information in breach of the rules that guarantee such right should be subject to sanction.

10. Measures should be taken to promote, to implement and to enforce the right to access to information including the creation and maintenance of public archives in a serious and professional manner, training public officials, implementing public awareness-raising programmes, improving systems of information management, and reporting by public bodies on the measures they have taken to implement the right of access, including in relation to their processing of requests for information.

CJI/RES. 147 (LXXIII-O/08)

PRINCIPLES ON THE RIGHT OF ACCESS TO INFORMATION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

ACKNOWLEDGING the right of information as a fundamental human right which ensures access to the information controlled by public organs, including, within a reasonable timeframe, access to past archives;

CONSCIOUS of the decision of the Inter-American Court on Human Rights *in re Claude Reyes y otros v. Chile* of September 19, 2006, in which it was decided that the right to the freedom of expression enshrined in Article 13 of the American Convention on Human Rights comprises the right to access to information;

BEARING IN MIND the resolutions of the OAS General Assembly entitled “Access to public information: strengthening of democracy”, AG/RES. 1932 (XXXIII-O/03), AG/RES. 2057 (XXXIV-O/04), AG/RES. 2121 (XXXV-O/05), AG/RES. 2252 (XXXVI-O/06), AG/RES. 2288 (XXXVII-O/07), and AG/RES. 2418 (XXXVIII-O/08); as well as the Study on Recommendations on Access to Information, submitted to the Committee on Juridical and Political Affairs on April 24, 2008 (document CP/CAPJ-2599/08), in a work organized by the Department of International Law pursuant to the provisions contained in Resolution AG/RES. 2288 (XXXVIII-O/07);

BEARING IN MIND the main international declarations on the right of access to information adopted by several intergovernmental organs and non-governmental organizations, including, among others, the principles of Article 19, The Right to Public Knowledge, The Lima Principles, The Ten Principles of the Right to Know of the Open Society Justice Initiative and the Atlanta Declaration and Plan of Action for the development of the right of access to information, under the auspices of the Carter Center;

EXPRESSING ITS SATISFACTION in view of the adoption and implementation of legislation on access to information by a growing number of States in the Americas, as well as the efforts by other States to adopt said legislation;

CONSIDERING the need to develop principles related to the right of access to information, particularly to support the drafting and implementation of legislation to make this right effective,

RESOLVES:

To adopt the following principles, which are interrelated and that should be construed in an integrated manner:

1. In principle, all information is accessible. Access to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions in keeping with a democratic society and proportionate to the interest that justifies them. States should ensure full respect for the right to access to information through adopting appropriate legislation and putting in place the necessary implementation measures.

2. The right of access to information applies to all public bodies, including the executive, legislative and judicial branches at all levels of government, constitutional and statutory bodies, bodies which are owned or controlled by government, and organizations which operate with public funds or which perform public functions.

3. The right to access to information applies to all significant information, defined broadly to include everything which is held or recorded in any format or medium.

4. Public bodies should disseminate information about their functions and activities – including, but not limited to, their policies, opportunities for consultation, activities which affect members of the public, their budget, and subsidies, benefits and contracts – on a routine and proactive basis, even in the absence of a specific request, and in a manner which ensures that the information is accessible and understandable.

5. Clear, fair, non-discriminatory and simple rules should be put in place regarding the processing of requests for information. These should include clear and reasonable timelines, provision for assistance to be given to those requesting information, free or low-cost access, and does not exceed the cost of copying and sending the information, and a requirement that where access is refused reasons, including specific grounds for the refusal, be provided in a timely fashion.

6. Exceptions to the right to access should be established by law, be clear and narrow.

7. The burden of proof in justifying any denial of access to information lies with the body from which the information was requested.

8. Individuals should have the right to appeal against any refusal or obstruction to provide access to information to an administrative jurisdiction. There should also be a right to bring an appeal to the courts against the decisions of this administrative body.

9. Anyone who willfully denies or obstructs access to information in breach of the rules should be subject to sanction.

10. Measures should be taken to promote, to implement and to enforce the right to access to information, including creating and maintaining public archives in a serious and professional manner, training public officials, implementing public awareness-raising programmes, improving systems of information management, and reporting by public bodies on the measures they have taken to implement the right of access, including in relation to their processing of requests for information.

This resolution was adopted unanimously at the session held on August 7, 2008, by the following members: Drs. Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra, Guillermo Fernández de Soto, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, and Hyacinth Evadne Lindsay.

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

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), the Chairman of the Committee said that it did not at present have a mandate on that topic and that neither had the rapporteurs presented any reports on the matter. At the request of Dr. Mauricio Herdocia, the debate on this topic was recorded textually and can be found in No. 8 of the proceedings.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), Dr. Ricardo Seitenfus suggested a number of discussion points, such as the Charter's preventive functions when there is a danger of constitutional breakdown in a member State, and the mechanisms whereby the Democratic Charter can be activated.

The Chairman, Dr. Jaime Aparicio, noted that laws, Constitutions, and the rule of law were constantly being breached through mechanisms such as popular referenda or other forms of direct popular participation, which legitimize those processes in violation of law and constitutionality.

Dr. Freddy Castillo Castellanos seconded the Chairman's opinion regarding the new elements of direct democracy, which enjoy scant use in Latin America, and which further complicate the matter.

Dr. Antonio Fidel Pérez restated his initial position that the Juridical Committee lacked the competence to discuss this question absent a request made by the Organization's political bodies. He said he thought any opinion issued by the Committee could have undesirable consequences and perhaps even provoke a political dispute among the member States regarding the legitimacy of the Inter-American Democratic Charter. He therefore said the Committee should exercise great prudence in dealing with the topic.

Dr. Mauricio Herdocia said he thought it was important for the Juridical Committee to reflect on the central themes of the Charter. The Charter *per se* provides for a broad margin of interpretation, with vast omissions where the Committee could embark on a major interpretation effort, without necessarily studying its specific applicability. In that regard, he underscored the importance of the Secretary General's report on the framework for interpreting the Inter-American Democratic Charter, regardless of whether or not it had received the desired political support.

As a guideline for the rapporteur's forthcoming report, Dr. Mauricio Herdocia supported Dr. Ricardo Seitenfus's proposal that the rapporteur address the Inter-American Democratic Charter's preventive function: in other words, its anticipation of the causes and roots of conflicts so that they can be prevented.

5. The Struggle against Discrimination and Intolerance in the Americas

Document

CJI/doc.312/08 The Struggle against Discrimination and Intolerance (presented by Dr. Hyacinth Evadne Lindsay)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reported that during the first week of February, his department had submitted document CAJP/GT/RDI-57/07 corr.2, "Consolidated Text: Draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance", containing the results yielded by the working group responsible for the topic. He reminded the meeting that the document was drawn up by the Department of International Law in close collaboration with the Inter-American Commission on Human Rights and the Chair of the Working Group, and that it had received numerous contributions, including some from the Juridical Committee and from civil society. He added that on February 12, based on the consolidated text, the Working Group had recommenced its work. He reminded the meeting that the Juridical Committee had already made a statement on the draft convention but had not yet commented on the consolidated text.

At the request of Dr. Mauricio Herdocia, the session's discussions on this matter were recorded textually in No. 9 of the corresponding proceedings.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), Dr. Hyacinth Lindsay, rapporteuse for the topic, presented report CJI/doc.312/08, "The Struggle against Discrimination and Intolerance", which describes the different forms of discrimination and intolerance in the Hemisphere, covering a wide range of elements such as language, race, gender, religion, sexual orientation, age, lifestyles, ethnic and cultural characteristics, etc. She also spoke of the regional and universal international instruments, which set out the measures and policies that States should put in place to fight discrimination and intolerance.

Dr. Mauricio Herdocia underscored the value of the report in confirming what the Inter-American Juridical Committee had said on an earlier occasion: that is, that discrimination is protected by international instruments. The report also proposes the idea that discrimination arises through a multiplicity of instruments, in terms of the channels it uses – internet, linguistic resources, religion, gender, etc. – to foster the intrinsic perversity that must be combated. Women's participation in fighting discrimination, he added, casts a new light on gender awareness. He suggested that the Juridical Committee adopt a resolution on this question.

Dr. Ricardo Seitenfus said it was important to link Dr. Lindsay's study with the opinion to be adopted by the Juridical Committee in connection with the European Union's Return Directive, an instrument that essentially enshrines discrimination in the form of xenophobia.

Dr. Jean-Paul Hubert reminded the Committee that discrimination is a widely debated topic in his country, which receives more than 300,000 migrants every year, who are different physically, in their religions, in their languages, etc. As a result, new manifestations of discrimination arise every day. States have no option other than to fight discrimination, he said. He suggested publishing Dr. Hyacinth Lindsay's report on the OAS web site, for people to learn about the topics on which the Juridical Committee is working.

Following Dr. Hubert's request, Dr. Dante Negro, Director of the Department of International Law, reported on progress on the Draft Convention against Discrimination and Intolerance within the Committee on Juridical and Political Affairs. He said that a first reading of the Draft Convention had concluded and its text had incorporated all the changes, contributions, and recommendations offered by the delegations, as set out in the document previously distributed among the members of the Juridical Committee. He also reported that the Chair of the Working Group, from Brazil, had been selected and had set the goal of finishing the draft convention this year. He further noted that

before the end of 2008, a special meeting of the Working Group was to be held, in order to hear more contributions from the countries and from civil society. He pointed to two questions that warranted specific mention and were to receive particular attention in this year's work: first, matters relating to Afro-descendants and, second, the topic of sexual orientation. Dr. Negro reminded the meeting that the General Assembly adopted a resolution on the latter question in 2008, in which emphasis was placed on how the phenomenon was addressed. He also indicated that there was one issue regarding which disputes could arise: some delegations wanted the question of racism to be emphasized, whereas others preferred the topic to be that of discrimination and intolerance in general, racism being just one manifestation of discrimination.

Dr. Freddy Castillo Castellanos suggested that consideration could be given to the disputed issues highlighted by Dr. Dante Negro, such as the presence or absence of the term "racism" in the Convention's title or the question of cultural diversity. He pointed out that racism is a form of discrimination, but that discrimination was broader and covered a large array of manifestations.

Dr. Jorge Palacios Treviño suggested addressing the question of discrimination in borderland regions. A second part of the report could address the links between discrimination and migration.

Document CJI/doc.312/08 is transcribed in the following paragraphs:

CJI/doc.312/08

THE STRUGGLE AGAINST DISCRIMINATION AND INTOLERANCE

(presented by Dr. Hyacinth Evadne Lindsay)

INTRODUCTION

The fight against racism, racial discrimination, xenophobia and related intolerance is a fundamental issue of human rights and freedoms and the preservation and promotion of cultural diversity is linked to the security, respect for and participation of all members of society.[1]

The United Nations Commission on Human Rights defined discrimination as "…. 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, which has the purpose or effect of nullifying or impairing the recognition, enforcement or exercise by all persons on an equal footing of all rights and freedoms".[2]

Discrimination is multi-dimensional as aptly illustrated in the following statement "….discrimination takes on as many forms as the biases, prejudices, stereotyping, scapegoating, bigotry and hatreds of individual people do. Discrimination can be passive, as in failure to extend the benefits of society to groups of certain ethnic origins or beliefs. Discrimination also takes the form of some of the most brutal violence in recorded history".[3] [There can be no doubt that the trans-Atlantic slave trade would fall in this latter category].

Intolerance, which is demonstrated by a lack of respect for the practices or beliefs of others and can mean "that people are not treated fairly because of their religious beliefs, their sexuality or even their clothes and hairstyle…" and "lies at the basis of *racism*, *anti-Semitism*, *xenophobia* and *discrimination* in general. It can often lead to violence".[4]

In many societies discrimination and intolerance are not confined to race and certain persons are victims on the basis of age, sexual orientation, lifestyle, religious beliefs,

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1. Publication entitled Canada's approach to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance: Preliminary suggestions for the draft declaration and Plan of Action.
2. UN Compilation of General Comments and General Recommendations adopted by the Human Rights Bodies. 1HR/GEN/51 Rev2 of 29 march 1996, p.27.
3. Article entitled "Won't you Help Fight Discrimination?", published by Jacob Blaustein, Institute for the Advancement of Human Rights of the American Jewish Committee, Revised Sept. 02, 1998.
4. UNITED FOR INTERCULTURAL ACTION, European network against nationalism, racism fascism and in support of migrants and refugees. **Information Leaflet NO. 17: Resistance against intolerance.** Available at: www.unitedagainstracism.org/pages/info17.htm.

immigration status, health status (as in the case of persons living with HIV) and people who are mentally or physically challenged. An individual may also suffer discrimination on more than one level, as for example, a woman who suffers discrimination on the basis of her gender and also her ethnic origin.

The international community has been very active in the struggle against all forms of discrimination, as evidenced by the conventions and other action which seek to provide a means of counteracting or even eliminating such discrimination.

RACIAL DISCRIMINATION

The International Convention on the Elimination of all Forms of Racial Discrimination describes racist ideologies as being "scientifically false, morally condemnable, socially unjust and dangerous and economically devastating".

Racial discrimination differentiates between individuals on the basis of real or perceived racial differences. A statement on the history of the struggle against racism includes the observation that the first cases of resistance against racism can be traced back to the opposition of native peoples of Africa, the Americas and Asia to the European colonial yoke of slavery. The fact that the oppressed peoples maintained their native cultures and identities despite attempts at uprooting whole ethnic groups is also described as another form of resistance.[5]

The primary objective of the international community as outlined at the World Conference on Human Rights held in June, 1993 was the elimination of racism, racial discrimination, in particular their institutionalized forms such as apartheid or resulting from doctrines of racial superiority or excess or contemporary forms and manifestations of racism.

The principle of non-discrimination is enshrined in paragraph (1) of Article 3 of the OAS Charter whereby the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex.

Action by the OAS in relation to the Second Summit of the Americas in sustainable development, 1996, includes the following:

- The development of a series of criteria and suggestions for strengthening the system for the promotion and protection of human rights;
- The work of the Unit for Social Development and Education in creating a forum for discussion and dialogue in relation to public policy in the fight against poverty and discrimination, resulting in the "Inter-American Programme for Overcoming Poverty and Discrimination" and the Plan of Action for anti-discrimination programmes. This was approved by Ministers and Officials.

The International Trade Union Congress (ITUC) and the International Labour Organization held a joint seminar in Geneva on December 4-7, 2007, which was aimed at developing a trade union strategy to fight racial discrimination and xenophobia. A report of the seminar concluded *inter alia*, that:

- Despite ratification of ILO conventions by a large majority of governments, millions of working men and women suffer discrimination based on colour, cultural differences ethnic or national origin; they are prey to racism, xenophobia, intolerance, ethnic and religious tensions in the workplace and in society.
- The action programme against racism and xenophobia will be equipped with an international monitoring implementation and assessment mechanism.
- Legal instruments were essential in the fight against discrimination but it is also necessary to take measures to prevent prejudice and intercommunity tensions which could result in discriminatory or racist acts, o both. The measures will be accompanied by educational campaigns and efforts to promote intercultural relations.

[5] Ibid, op. cit.

The IUTC Deputy General Secretary noted that migrants in particular are often exposed to racism and that the greatest failure of the global economy is its inability to create sufficient jobs there where people live.[6]

The participation by the United Nations in the struggle for the elimination of all forms of discrimination has been described as “a very important element in the efforts of the international community to assure full implementation and observance of human rights”.[7]

Relevant resolutions conventions and declarations adopted by the UN include the following:

- The Convention on the Prevention and Punishment of the Crime of Genocide 1948;
- The Declaration on the Elimination of All forms of Racial Discrimination, 1963;
- The International Convention on the Elimination of All forms of Racial Discrimination, 1965,
- The International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973.

Another very significant achievement is the adoption in the framework of the three Decades for Action to Combat Racism and Racial Discrimination, the First 1873-1982, the Second 1983-1992 and the Third 1994-2003.

Resolution 1996/21 outlines measures to combat contemporary forms of racism racial discrimination, xenophobia and related intolerance. However, at its 1996 session, the Commission on Human Rights expressed grave concern at the continuing instances of hatred and intolerance. States were urged to ensure that their constitutional and legal systems provide effective guarantees of freedom of thought and conscience and to all without discrimination, including the provision of effective remedies in cases involving violation of the right to freedom of religion or belief.

The United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa 31/08/2001 to 7/09/2001, marked a very significant milestone in the struggle. The Conference was authorized by General Assembly Resolution 52/111, 1997, with the aim of exploring effective methods to eradicate racial discrimination and to promote awareness in the global struggle against intolerance. The Conference ended with a condemnation of racism, racial discrimination, xenophobia and related intolerance and a call for action by the international community to eradicate them wherever they may be found. Declaration and Programme of Action was adopted that commits Member States to undertake a wide range of measures to combat discrimination at the international, regional and national levels. States are urged to:

- enhance measures to fulfill the right of everyone to enjoy the highest attainable standard of physical or mental health, with a view to eliminating disparities in health status that might have resulted from racial discrimination.
- implement policies and measures designed to prevent and eliminate discrimination on the basis of religion or belief that many of African descent experience.
- ensure full and effective access to the justice system for all individuals particularly those of African descent.
- promote and protect the rights of indigenous people and ensure their enjoyment of those rights.
- facilitate family reunification which has a positive effect on the integration of migrants.
- promote the full enjoyment of migrants of all human rights .
- develop strategies to address discrimination against refugees
- end impunity and prosecute those responsible for crimes against humanity and war crimes, including crimes related to sexual and other gender based violence against women and girls.
- develop effective legislation to protect migrant workers.

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[6] Publication by Trade Union Confederation of the Americas 3/12/07.

[7] The United Nations System Standard-Setting Instruments and Programmes Against Discrimination: Introductory Remarks by Janusz Symonides.

- ensure accountability for misconduct by aw enforcement personnel motivated by racism.
- eliminate racial profiling.
- protect privacy of genetic information.
- enact laws against trafficking in persons, especially women and children.
- publish reliable statistical data to assess the situation of individuals or groups who are victims of discrimination.
- encourage internet services to establish and disseminate specific voluntary codes of conduct and self regulatory measures against dissemination of racist messages.
- ensure that education or training especially teacher training promote respect for human rights and the fight against racism.
- promote awareness of the causes of racism.
- encourage media to avoid stereotyping based on racism, racial discrimination, xenophobia and related intolerance.

Action by UNESCO in the struggle against discrimination include several meetings of specialists to consider various aspects or manifestations of racism. The Statement on Race in 1950 and the Statement on the Nature of Race and Race Difference emphasized that biological differentiation of races is without foundation and unequivocally rejected theories of racial superiority. Significantly, the Proposals on the Biological Aspects of Race elaborated in 1964 emphasized the predominance of historical, social and cultural factors over biological factors in the explanation of physical differences between populations living in different geographical areas of the world.

The General Conference at its 20th Session in 1978 adopted by acclamation the Declaration on Race and Racial Prejudice, which states that:

- all human beings belong to a single species and are descended from a common stock.
- they are born equal in dignity and rights
- all form part of humanity
- racial prejudice is totally without justification, being historically linked with inequalities in power and reinforced by economic and social differences between individuals and groups.
- diversity of life styles and the right to be different may not in any circumstances serve as a pretext fro racial prejudice.
- the State has the prime responsibility for ensuring human rights and fundamental freedoms and should take all appropriate steps to prevent, prohibit and eradicate racism, racist propaganda, racial segregation and apartheid.

UNESCO also recognized the importance of participation by mass media in the struggle against racial discrimination and apartheid. The General Conference adopted the Declaration on Fundamental Principles Concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and Countering Racialism, Apartheid and Incitement to War.

Article 1 shows the importance of a “free flow and a wider and better balanced dissemination of information in the strengthening of peace and international understanding, the promotion of human rights and the countering of racism, apartheid and incitement to war”.

Article 111 also acknowledged the contribution of the mass media in:

- eliminating ignorance and misunderstanding between peoples.
- Sensitizing a country’s nationals to the needs and desires of others, to ensure respect for the rights and dignity of all nations, peoples and individuals.

The United Nations Special Rapporteur on Measures to Combat Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance recognized the need to adopt measures at the international level to combat the use of the internet to spread racist propaganda. This is an understandable concern given the widespread use and reach of the internet. However, a “counter attack” has been launched by a group called “Anti-Racist Action (ARA)”, whose stated intention is “to do the hard work necessary to decrease racism, sexism, anti-gay bigotry, anti-Semitism and the unfairness which is often suffered by the disabled, the

youngest, the oldest and the poorest of our people…." The ARA has established sites to specifically challenge the profusion of what is referred to as "cyber hate" on the Net.[8] A report of the various conclusions that can be drawn about the ways used by minority group activists to fight racist activity on the net includes the following:

- archiving and disseminating information which represents the history of racial minorities in a non-racist fashion.
- engaging in political organizing including advertising "virtual" and "real life" anti-racist conferences, events and rallies.
- Electronic linking among activists such that local, national and international anti-racist networks are being spun across the Internet.9
- Direct confrontation to challenge, expose and document racist sites and their activities on the Internet.
- Recruitment of Internet users for "virtual" and "real-life" confrontations with racists at both electronic sites and "real-life" events.

A variety of tactics are used by the ARA on the Internet to halt the racist attacks upon minorities, the most common of which is described as virtual combat. The occasions for such use occur via e-mail, mailing lists or in newsgroups. Sites such as Cyberwatch have reportedly provided a space to document incidents of racists e-mail verbal violence as it occurs on the Internet. Other tactics include:

- Shutting down of racist sites by overloading the site from which the racist information originates with e-mail messages.
- Targeting the Internet providers (described as a more controversial technique) with the aim of forcing them to act as censors and not host sites which disseminate racist messages.
- Using the Net to organize for direct confrontation with racist groups and individuals in the real world.
- The planning of counter-demonstrations and the recruitment of "net surfers" to participate in the counter demonstrations at coming racist rallies.

The existence of what is described as "linguistic racism" is the theme of a book entitled "Language and Racism Historicity"[10]. The author asserts in the Introduction that "The bedrock upon which the fomentation and propagation of racism rests is language". In chapter 1, which deals with "ingrained racism", the author opines that "It cannot be reiterated often enough that the most fundamental violation of human rights is in the prejudicial utilization of language to belittle the black race by equating all that's bad with black".

Examples are given of the use of the word "black" in a derogatory sense, one of the many examples being the use of the word to describe the day of the week on which some disastrous or unpleasant event occurs.

DISCRIMINATION BASED ON RELIGION AND BELIEF

Religious intolerance remains a problem in many parts of the world, especially in relation to persons who can be classified as "religious minorities" in a State which has no tradition of religious freedom. A recent example occurred in May, 2008, in a newspaper report that an Algerian Public Prosecutor had demanded a three-year sentence for a convert to Christianity for practicing her faith without a licence.

Article 1 of the United Nations Charter prohibits discrimination on the basis of religion. Article 18 of the Universal Declaration of Human Rights refers to the right of every one to freedom of thought, conscience and religion, including the freedom to change their religion or belief and to manifest the religion or belief in teaching, practice, worship and observance.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted in 1981. Article 18 of the United Nations International Covenant on Civil and Political Rights protects the freedom of individuals to have or adopt their

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[8] BECKLES, Colin A. **Virtual Resistance: A Preliminary Analysis of the Struggle Against Racism via the Internet**. Washington State University, Dept. Comparative American Cultures. Available at: http://www.isoc.org/inet96/proceedings/e6/e6_4.htm

[9] *Op. cit.*

[10] GORDON, Donald K. **Language and Racism Historicity.** Available at www.artbookbinding.com

chosen religion or belief subject only to limitations prescribed by law and necessary to protect public safety, public order, health, morals or the fundamental rights and freedoms of others.

Despite these positive actions, the problem still persists in some States. At its 1996 session, the United Nations Commission on Human Rights noted continuing instances of hatred and intolerance, including violent acts based on religious intolerance. It urged States to ensure that constitutional and legal systems provide adequate and effective guarantees of freedom of thought, conscience, religion or belief to all without discrimination. The Commission also expressed grave concern at attacks on religious places, sites and shrines and called upon States to exert their utmost efforts to ensure that they be fully respected and protected.

At a Conference on Anti-Semitism and Other Forms of Intolerance held in Cordoba, June 8, 2005, the Delegation of the Holy See noted the tragic consequences arising from a denial of human rights. The Delegation also called for equal treatment for all forms of discrimination and stated that it would be ill advised to place anti-Semitism, discrimination against Muslims and against Christians in a type of hierarchical order, pointing out that each of these "sickens" and degrades humanity and must be properly cured.[11]

GENDER BASED DISCRIMINATION

The Preamble to the United Nations Charter includes the commitment "… to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." The Universal Declaration of Human Rights and other covenants on Human Rights recognize the principle of equality of men and women, prohibit discrimination against women, provide for women's political rights, the elimination of violence against women, equal remuneration for men and women workers for work of equal value, the right of women to vote, to be eligible for elections to all public bodies and to exercise public functions established by national law.

The Declaration on the Elimination of Discrimination against Women was adopted in 1979. Article 1 describes discrimination against women as "fundamentally unjust and an offence against human dignity." It requires the repeal of all discriminatory laws, customs, regulations and practices, the embodiment of equality in national constitutions and other appropriate legislation. It also stresses the need to educate public opinion and direct national aspirations towards eradication of prejudice and the abolition of practices based on the supposed inferiority of women. All parties are also required to adopt appropriate measures to combat all forms of traffic in women and exploitation of prostitution.

Women have been identified as "indispensable protagonists in the progress of the struggle against racism, discrimination and related intolerance". A noteworthy example of the active participation of women in this regard is the recommendation made by a group of 50 women leaders of social movements in Latin America and the Caribbean that countries of the region create a fund to fight racism and discrimination. The document containing this recommendation was prepared for presentation to the First Regional Conference of the Americas Against Racism in July 2006 in Brasilia.[12] The proposal for the fund was included in a document presented at a preliminary event before the Conference titled "Dialogue between the Women of the Americas against Racism and All Forms of Discrimination". The final document recommends that the governments and multilateral agencies acknowledge the need for financial investment in efforts to combat racism and other forms of discrimination and proposed that this could be achieved by means of a cooperation fund.

THE WAY FORWARD

The struggle will continue as long as the problems of discrimination and related intolerance exist. The best results will be realized with the achievement of mutual understanding, cooperation and solidarity between all parties. The defeat of apartheid in South Africa is cited as an example of progress but there is the reminder that the dream of a world free of racial hatred and bias remains only half fulfilled with the emergence of "ethnic cleansing". Globalization is described as carrying risks that can lead to exclusion and increased inequality, very often along racial and ethnic lines.

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[11] Statement of the Most Reverend Antonio Canizares, Archbishop of Toledo, Head of the Delegation of the Holy see to the OSCE Conference on Anti-Semitism and other Forms of Intolerance.

[12] UNIFEM newsletter dated 26/7/06.

The heroic efforts and achievements of earlier pioneers in the struggle should and can provide encouragement for the future.

Persons who have been identified as “Icons of Resistance” include:

- Jan Karski (1914-2000), a member of the Polish underground during World War II who became a vocal supporter of Poland’s anti-facist movement in the 1990s.
- Martin Luther King, prominent civil rights leader, preacher, writer and teacher, internationally famous and revered leader of the campaign against racial segregation and inequality in the USA in the 1960s he was awarded the Nobel Peace Prize in 1964.
- Nelson Mandela (born 1918), lawyer and leading activist in the African National Congress, which was banned in 1960 by the apartheid regime. He spent 27 years in prison for his political activities, during which time he became an international figure symbolizing the black struggle in South Africa. After his release in 1990, he conducted negotiations to dismantle the unjust apartheid system and in 1994 he became the first black president of the new democratic South Africa.
- Rosa Parks, the African American who, in a courageous action against segregation, refused to give her seat on a bus to a white man in Montgomery, Alabama on December 1, 1955.
- Sonia Pierre, Dominican-Haitian activist who was awarded the Robert F. Kennedy Human Rights Award (US$30,000) for her work in securing citizenship and education for Dominican born ethnic Haitians. Pierre was 13 years old when she was arrested and threatened with deportation for leading fellow residents of Haitian descent in a march for sugar cane cutter’s rights.

The positive contribution of migrants should be recognized and publicized. Note in particular, the conclusion of some 80% of U.S economists that “immigrants advance economic growth in this country. Immigrants pay far more in taxes than they receive in government benefits, revitalize inner cities, and establish 18% of all new business nationwide.”[13]

There is an urgent need for persons suffering from HIV to have access to affordable treatments, regardless of the WTO obligations of States.

Heed the call to eradicate discrimination and intolerance at the conclusion of the World Conference against Racism in Durban. “Human Rights Education programmes and initiatives aimed at combating prejudice and intolerance, particularly the promotion of human rights should be introduced in schools. Education remains the key to the promotion and protection of values which are essential to prevent the spread of racism, racial discrimination, xenophobia and related intolerance. The following statement on Canada’s experience in dealing with a racially diverse population indicates a possible path to success in the struggle against discrimination and intolerance “Experience has taught Canada to value diversity in all forms beyond language, race and religion, to include characteristics such as gender, sexual orientation, range of ability, age, differences that flow from our lifestyles, our ethno-cultural origins and our attachment to the many regions of Canada. The future depends on success in building a peaceful society where peoples with many differences join together to cultivate the shared values of respect and accommodation.[14]

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[13] See note 3 *supra.*

[14] Article entitled Canada’s approach to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and Preliminary Suggestions for Draft.

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

	Resolution
CJI/RES. 144 (LXXII-O/08)	Seventh Inter-American Specialized Conference On Private International Law (CIDIP-VII)
	Documents
CJI/doc.288/08 rev.1	Status of the Consumer Protection Negotiations at the Seventh Inter-American Specialized Conference on Private International Law (presented by Dr. Antonio F. Pérez)
CJI/doc.309/08	Towards the Inter-American Specialized Conference on Private International Law - CIDIP- VII (presentado por la doctora Ana Elizabeth Villalta Vizcarra)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reported that no additional documents had been received after the Porto Alegre meeting and that the informal meetings among the countries that submitted proposals – Brazil, United States and Canada – remained ongoing.

At the regular session, Dr. Antonio Pérez presented document CJI/doc.288/08 rev.1, "Status of Negotiations on Consumer Protection at the Seventh Inter-American Specialized Conference on Private International Law".

Dr. Ana Elizabeth Villalta underscored the Juridical Committee's leading role in codifying private international law within the inter-American system and its significant contributions to the CIDIP process, with the preparation of drafts that have later been enshrined in conventions. However, she said, at some point the Committee turned its attention more toward public international law topics, and it had produced no work for CIDIP-VI.

She spoke of the preparations carried out for CIDIP-VII and the proposals made by Brazil, the United States and Canada; the virtual forum organized by the Department of International Law; the governmental meeting in Porto Alegre, and the Montreal and Asunción meetings, which were attended by the leading specialists of the Americas, including the rapporteuse as a representative of her country and not of the Juridical Committee.

Dr. Villalta explained that the conclusions of the Porto Alegre meeting had not yet been set down in a final document, which was essential if the rapporteurs were going to issue statements regarding them and submit additional reports for the Juridical Committee's consideration. She also expressed her disagreement with the position adopted by Dr. Antonio Pérez in his document that the work done previously should not be taken into consideration. She said she would like to hear the Committee's opinions on the matter and that, if Dr. Pérez's proposal were accepted, she would submit an explanation of her vote.

The other members of the Inter-American Juridical Committee noted their support for the CIDIP's work and stressed that the Committee should not waste the opportunity of providing that effort with concrete support, particularly in connection with the topic of consumer protection, which affects the everyday lives of common citizens.

Dr. Antonio Pérez then presented the aforesaid document, beginning with the evolution of the CIDIP process and underscoring the major contributions to it that the Committee had made.

Dr. Pérez said that two important steps forward had been taken in the CIDIP process, which had fundamentally changed the potential role of the Inter-American Juridical Committee. First of all, the previous CIDIPs had focused on producing documents in treaty format, which required the experience and technical and drafting skills of experts in public international law, such as the members of the Juridical Committee. With CIDIP-VI and CIDIP-VII, the OAS member States had begun to use those processes to draft model laws and other similar instruments, which required

skills in legislative drafting rather than in the drafting of treaties. In second place, until CIDIP-VI the substance of the CIDIP negotiations was focused on technical problems relating to international legal cooperation, such as the international gathering of evidence and the traditional problems of applicable jurisdiction (specifically, the CIDIP-V Convention on the choice of law in international contracts). With CIDIP-VI and VII, he said, the member States began to address matters that involved questions related to justice. For example, CIDIP-VI drafted a model law on "secured transactions," which would in reality create a new class of property interest that could serve as collateral for lenders; this would in turn create a great similarity with provisional credit and could consequently reduce capital costs and promote investments. This preference for substantive policy, he said, would inevitably have distributive consequences in those countries that chose to adopt the model laws. CIDIP-VII returned, *inter alia*, to the matter of consumer protection, which could potentially have similar distributive consequences. Consequently, the work of CIDIP-VI and VII in areas of substantive policy would lead to distributive justice and could possibly impact international trade, thereby moving away from the Juridical Committee's traditional field of experience and expertise with specialized, technical problems related to the drafting of treaties dealing solely with problems of international civil cooperation in matters of private law. He therefore concluded that given the form and substance of the instruments to be negotiated in this new phase of the CIDIP process, the Inter-American Juridical Committee should play a different role, one in line with those new needs.

Dr. Antonio Pérez also offered a number of general comments about the methodology used to date to organize the negotiations of CIDIP-VII. He first of all noted the Secretariat's innovation in beginning to use the internet to facilitate negotiations by placing national instrument proposals (for both treaties and model laws) on the OAS web page and allowing certain nongovernmental experts to make comments on those proposals. He said this was an important innovation in that it was beginning to involve civil society in the CIDIP negotiation process. In second place, he explained that since the internet discussion group did not begin with a general discussion of the underlying issues requiring resolution, and instead began by discussing specific comments on one of the proposed texts, the web page discussion prevented the member States from reaching an authentic agreement on the goals of the CIDIP process and tended to neglect those topics that really needed to be discussed, debated, and resolved. This was a natural error, he added, since the OAS Secretariat, in seeking to facilitate the CIDIP negotiation process, was using a new electronic forum that was potentially useful and productive but was still at the testing stage. As a result, the Secretariat deserved praise and both the Committee and the Secretariat should consider this first use of the internet as an important learning experience for future CIDIP negotiations, which will increasingly need broader mechanisms for governmental and nongovernmental participation.

Focusing on the preparatory work for CIDIP-VII, Dr. Pérez discussed the impasse that had arisen regarding the question of consumer protection. He explained that the three proposals presented by Brazil, the United States and Canada failed to ensure truly effective consumer protection within international trade and crossborder contracts for consumer goods and did not offer rules and procedures to enforce compliance with foreign judgments or redress of damages in a suit involving a foreign supplier. He also spoke of the high cost of such litigation, compared with the low cost of the products. Thus, one critical issue regarding this topic is consumers' right to redress and the legal resources that must be created at the institutional level, either through collective litigation or class-action suits or through mediation and arbitration.

Dr. Pérez then set out the shortcomings of each of the three proposals and proposed a new analytical approach that would enable the Juridical Committee to reach alternative solutions with practical results, at a low cost, and subject to irrevocable decisions and, in that way, reassume its leading role in the progressive development of private international law and within the CIDIP framework.

The other members of the Inter-American Juridical Committee noted the depth with which Dr. Antonio Pérez had analyzed the CIDIP-VII negotiations and, bearing in mind the range of

substantive issues that the report raised and that still required lengthy reflection, they agreed to adopt resolution CJI/RES. 144 (LXXII-O/08), “Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)”, emphasizing that consumer protection is still one of the key emerging issues in the development of crossborder trade and expressing the hope that the discussions and negotiations will lead to the success of CIDIP-VII. The Juridical Committee also stated that for CIDIP-VII to be a success, it must be guided by the need to provide consumers involved in crossborder commercial transactions with resources that are in line with the value of their claims and that guarantee appropriate, effective, and swift redress. Finally, it suggested that in light of the broad range of substantive topics involved in commercial crossborder contracts between consumers and suppliers, the ongoing negotiations and discussions for tackling and resolving issues of jurisdiction, applicable law, recognition and implementation, and alternative dispute settlement procedures could require innovative forms of international cooperation among the OAS member States. It also reiterated the mandate given to the rapporteurs to assist the preparations for CIDIP-VII.

The Chairman returned to the document submitted by Dr. Antonio Pérez (CJI/doc.288/08 rev.1) and suggested that in light of the thorough analysis it offered regarding the topics of CIDIP-VII, the Committee should forward it to the Permanent Council as a study that would make a significant contribution to the discussion of those issues. With the consent of the other members, he asked Dr. Dante Negro for the Department of International Law to take charge of reviewing the Spanish- and English-language versions of the text, paying particular attention to its constructive aspects.

On May 12, 2008, and after document CJI/doc.288/08 rev.1 had been reviewed by the Department of International Law, the Chairman of the Inter-American Juridical Committee sent a note to the Chair of the Permanent Council forwarding the document, along with resolution CJI/RES. 144 (LXXII-O/08).

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), Dr. Ana Elizabeth Villalta Vizcarra, rapporteuse for the topic, presented document CJI/doc.309/08, “Toward the Inter-American Specialized Conference on Private International Law - CIDIP-VII”, with a report on the current status of the prior discussions for CIDIP-VII. That document set out the background to the Inter-American Specialized Conferences on Private International Law, together with the vital role played by the Inter-American Juridical Committee in contributing to draft conventions, in line with its function of developing and codifying private international law. He also stated that the Juridical Committee’s joint rapporteurs had prepared several reports in connection with CIDIP-VII, the agenda of which deals with consumer rights and secured transactions.

Currently, he explained, the CIDIP-VII process was on hold. Regarding the topic of consumer protection, work was underway on bringing together the three proposals that had been presented – by Brazil, the United States and Canada – dealing, respectively, with applicable law, monetary restitution, and competent jurisdiction. For the present, it was necessary to await the working group’s completion of the final document before comments or observations could be made, said the rapporteur.

Dr. Villalta reminded the meeting that the last occasion on which the General Assembly gave the Inter-American Juridical Committee instructions regarding the CIDIP was in Santo Domingo in 2006. At the two most recent regular sessions of the General Assembly, no mandates have been given to Juridical Committee, thereby isolating it from the CIDIP process. She therefore asked whether it be appropriate to adopt a resolution reaffirming the Committee’s willingness to continue to collaborate with the CIDIP-VII preparations. She concluded by saying that if the States failed to adopt rules for consumer protection, then private institutions would certainly do so in their stead, giving way to the privatization of the process whereby international law is codified in the Americas – a development that would not necessarily serve to protect the most vulnerable.

Dr. Jean-Paul Hubert said that he saw no need for a resolution. As he saw it, the Juridical Committee had contributed enough to CIDIP-VII, and he referred back to the paper presented in March by Dr. Antonio Pérez (CJI/doc.288/08 rev.1), "Status of the Negotiations on Consumer Protection at the Seventh Inter-American Specialized Conference on Private International Law", which had been sent to the Permanent Council and contained substantial contributions on the problems and their possible solutions with a view to overcoming the impasse in the CIDIP-VII preparatory work.

Dr. Antonio Pérez said that the resolution adopted by the Inter-American Juridical Committee on this question, CJI/RES. 144 (LXXII-O/08), urged the member States to adopt effective consumer protection measures, in order to ensure the region's consumers guarantees of due redress of damages. He added that he shared Dr. Hubert's view that the Juridical Committee had already discharged the tasks that were entrusted to it. He also agreed with Dr. Villalta's opinion that other alternative interest groups could impose their own rules through their market power. He also remarked that the negotiators' current recess was useful in that they could reflect on their drafts and approach them in a new light, and that could certainly help produce better conditions for consumer protection in the Hemisphere. Following that process of reflection, the Juridical Committee would be in a position to offer its comments. He added that the incoming member of the Juridical Committee from the United States, Dr. David P. Stewart, whose mandate was to begin on January 1, 2009, was a specialist in issues of economic law, international commercial law, and other areas, and could therefore bring a new perspective to the CIDIP issue.

Dr. Mauricio Herdocia made several points that he believed crucial: one, the reconciliation of the States' proposals; and, two, the active involvement of the Juridical Committee in the topic. He insisted that the 2006 General Assembly resolution was still in force and that the Committee should continue to act within the framework of the mechanisms for consultation.

Document CJI/doc.288/08 rev.1 is transcribed in the following paragraphs, along with resolution CJI/RES. 144 (LXXII-O/08) and document CJI/doc.309/08.

CJI/doc.288/08 rev.1

STATUS OF THE CONSUMER PROTECTION NEGOTIATIONS AT THE SEVENTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW

(presented by Dr. Antonio F. Pérez)

I. INTRODUCTION AND SUMMARY

There is no doubt that one of the key emerging issues in the development of international trade is the question of consumer protection in so-called business-to-consumer (or B2C) commerce. The OAS Member States have recognized as much through including the question of consumer protection in the agenda of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII). This Committee, at its last meeting after having become aware of the apparent difficulty in the CIDIP-VII negotiations, asked this member to submit a study and analysis of the status of the negotiations, with the hope of seeking a reconciliation of the competing proposals.

The essential problem is that effective consumer protection in international B2C commerce consists ultimately of the right to an enforceable remedy against a foreign supplier. However, the cost of obtaining such a remedy may be disproportionate to the value of the largely small value claims that are now becoming so prevalent in international commerce given the rise of the internet as the medium for concluding consumer contracts. Moreover, given the need to obtain recognition and enforcement of domestic judgments against the assets of a foreign supplier whose assets are usually outside the territorial jurisdiction of the consumer's state, the cost of enforcement is likely to be even greater in an international B2C contract than in a wholly domestic transaction. In particular, difficult issues of choice of law and judicial jurisdiction arise which would make enforcement of a domestic judgment against a foreign supplier problematic even in non-consumer cases. Finally,

consumers' rights to a remedy include both the right to a remedy for nonperformance of the contract and the right to avoidance and restitution for payments made when the contract is invalid for fraud, duress or unconscionability (including in some cases certain standard form contracts). Thus, consumer remedies in international B2C e-commerce must address a broad range of substantive issues relating not only to contract validity but also to contract performance, further complicating analysis of the jurisdictional, choice of law, and recognition and enforcement issues that arise in providing consumers effective remedies, and these different substantive issues may require entirely different forms of international cooperation. That said, mechanisms for international cooperation would seem to be indispensable if these problems are to be resolved. On the other hand, these mechanisms cannot be so onerous and expensive for governments and business that they destroy the very commerce from which consumers stand to benefit so much. Yet, notwithstanding the complexity of the task, the need for practicable solutions to these problems will become more and more pressing if B2C e-commerce continues to grow among the OAS Member States at the extraordinary pace it has grown in the last few years.

After careful review, this reporter concludes that none of the competing proposals provides a complete and effective framework for dealing with the emerging problem of consumer protection in international B2C, much less in the special setting of e-commerce. It is submitted, as a result, that the Member States should form a working group to consider creatively new proposals containing the best elements of each of the proposals submitted thus far, but with the objective of creating a scheme that will provide consumers effective remedies for small value claims through low-cost procedures resulting in awards that are immediately enforceable at low cost. Only the establishment of such rules and procedures will adequately address the problem of building consumer confidence and assuring a stable and level playing field in inter-American commerce in consumer goods.

This report describes the negotiating history and the content of the three Member States' proposals. It then discusses the underlying problem in consumer protection the three proposals ought to address and argues that none of the proposals actually addresses the problem effectively. It further argues that, with respect to some elements in the three proposals, the proposed cures could be ineffective. Finally, it makes some suggestions for the set of preliminary issues the negotiators should consider in depth before proceeding to the formulation of a new set of proposals; it also makes some suggestions for how the negotiators ought to view the problem. These suggestions include: a focus on creating alternative institutional options for case-by-case and country-by-country trade in B2C; avoiding a prescriptive approach that imposes a one-size-fits-all solution; and seeking to stimulate further policy experimentation in the future, based on information developed from studying consumer and supplier response in different contexts. Indeed, the negotiators should examine the actual costs and benefits of each possible proposal, both in the short-term and, in light of the likelihood of future technological development in e-commerce, in the long-term.

It would be unfortunate and unforgivable to choose a single solution that not only does not address the real problem in comprehensive manner, but that also can more harm than good. It would be equally regrettable to pursue solutions that do not address the real problems consumers face in finding ways to pursue low value claims through low cost procedures, particularly as international e-commerce increases the likelihood that such claims will arise in circumstances in which the cost of obtaining a remedy through traditional judicial means is prohibitive. If, therefore, CIDIP-VII is to avoid an exercise that will not serve the interests of consumers in the OAS Member States, the Inter-American Juridical Committee (IAJC) should propose alternatives for consideration of the Member States.

II. NEGOTIATING HISTORY

In December of 2006, Brazil hosted a meeting of experts to review the various CIDIP-VII proposals. The meeting was attended by experts from 11 countries. Delegates to the Porto Alegre meeting agreed that it was important for CIDIP-VII "to provide legal protections for consumers in their relationship with suppliers, to provide economic benefits to consumers by increasing the availability and choice and decreasing product costs; and to provide consumer confidence in the marketplace." At this meeting, "a system of bracketing the text

was not adopted," but rather it was agreed there that "drafting should be perfected by the working group organized by the OAS."[1] After the meeting, however, no working group was established by the OAS to seek to harmonize the proposal.[2] Instead, the United States, Brazil, and Canada have submitted revised proposals to the Porto Alegre participants. It now appears that, after the Porto Alegre review process is complete, the proposals will be circulated to all the OAS Member States. The OAS will then determine next steps for the completion of the preparatory work.[3] The date for the CIDIP-VII Conference will be established after the preparatory work is complete.[4]

III. CONTENT OF THE PENDING BRAZILIAN, CANADIAN AND U.S. PROPOSALS

The Member States have made three sets of proposals concerning consumer protection during CIDIP-VII:

A. Brazil Proposal

Brazil has introduced a draft convention on the law applicable to all B2C cross-border transactions. Article II(2) of the draft convention, as revised after the Porto Alegre meeting, provides that consumer contracts will be governed by the law where the consumer resides (if there is no choice of law in the contract) and the law most favorable to the consumer (if there is a choice of law provision in the contract).[5]

B. Canadian Proposal

Canada has introduced a model law on jurisdiction and choice of law. The Canadian proposal's primary purpose, however, is to address electronic B2C cross-border transactions. The jurisdictional proposal contemplates worldwide jurisdiction for the consumer transaction, which would presumably enable the consumer always to sue in his or her home jurisdiction or sue in any other jurisdiction in which the supplier's assets can be found. The Canadian proposal, like the Brazilian proposal for a treaty, would adopt the law of the consumer's home as the default law and would impose limits on party autonomy in choice of law as well as choice of forum. However, while the Brazilian proposal employs a substantive criterion (namely, the law most favorable to the consumer"), article 7(3) of Canada's proposed model law employs a subjective criterion that turns on behavior of the parties. It would allow the consumer to void a choice of court/law clause in a contract and sue in his/her home forum and apply the home forum choice of law "unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing" in that State.[6]

C. United States Proposal

The United States has proposed a draft legislative guide and model laws and rules on redress mechanisms designed to assist consumers recover monetary damages suffered in consumer transactions. The United States proposal includes: (1) a model law on government

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1 See Report on the Porto Alegre Experts Meeting, available at http://www.oas.org/dil/experts_meeting_porto_alegre_2-4_2006.pdf.

2 See PÉREZ, Antonio Fidel. Informe sobre la CIDIP-VII con respecto a la negociación de instrumentos legales concernientes a la protección al consumidor / Report on CIDIP-VII with respect to the negotiation of legal instruments concerning consumer protection [CJI/doc.243/07], San Salvador, El Salvador, 23 February 23, 2007.

3 See Report of the January 7, 2007 meeting of the Permanent Council of the OAS and the Committee on Juridical and Political Affairs concerning CIDIP VII, available at http://www.oas.org/dil/Report_Session_January_18_2007.pdf.

4 See Resolution on the Seventh Inter-American Specialized Conference on Private International Law, approved by the Permanent Council of the OAS, May 21, 2007.

5 See http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_proposal_consumerprotection_applicablelaw_brazil_17dec2004.htm. (providing documents relating to the Brazilian proposal, including an earlier version of the draft convention)(copy of the current proposals are attached at Tab A); s*ee also* MARQUES, Cláudia Lima. Insufficient Consumer Protection in the Provisions of Private International Law: The Need for an Inter-American Convention (CIDIP) on the Law Applicable to Certain Contracts and Consumer Relations. Available at: http://oas.org/dil/AgreementsPDF/Inglesdocumento%20de%20apoyo%20a%20la%20convencion%20propuesta%20por%20br%E2%80%A6.pdf, (providing a discussion of the rationale for the Brazilian proposal) [Lima Marques]; and Ricardo Morishita Wada and Claudia Lima Marques, The Brazilian Proposal for an Inter-American Convention on Consumer Protection in Terms of International Consumer Contracts (which offers the most recent explanation available by the Heads of the Brazilian Delegation to the CIDIP-VII of the rationale for the current formulation of the Brazilian proposal) [Morishita Wada and Lima Marques] (copy available at Legal Department, OAS].

6 See http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm (providing documents relating to the Canadian proposal, including earlier versions of the draft model law) (copies of the revised proposals are attached at Tab B).

consumer protection authority to provide redress and cooperation across borders against fraudulent and deceptive commercial practices; (2) a draft model law on simplified tribunals for small consumer claims; and (3) a draft legislative guide for collective and/or representational dispute resolution and redress for common injuries to consumers; and (4) model rules for electronic arbitration of small B2C cross-border claims.[7]

IV. NATURE OF THE PROBLEM – REMEDIES AND INSTITUTIONS

A. Core Problems

At its core, the problem the CIDIP-VII negotiators face is a problem facing the entire global community in the global cross-border supply of consumer goods, as the costs of cross-border supply decrease with improved communication and transport. Electronic communications facilitate search for suppliers and purchasers and bargaining at lower cost, and the delivery of intellectual property products electronically also reduces the cost of transport and performance in some areas, thus opening up new market opportunities for suppliers and consumers almost everywhere. That said, most consumer purchases are for relatively low-cost products or services. The value of such products or services, as almost all parties agree, almost never warrants use of extremely expensive enforcement mechanisms characteristic of ordinary civil litigation in all countries. This problem can be surmounted for claims that are virtually identical by lumping them together in a single lawsuit. This procedural device has the effect of reducing the per claim cost of litigation so that the per claim benefits of such collective or class action litigation exceed the per claim cost of such litigation.

However, when a foreign supplier is involved, additional barriers impair the consumer's ability to seek and obtain a remedy. It is unlikely that the foreign supplier will be amenable to suit in the jurisdiction of the consumer, has assets in that jurisdiction that can be used to provide the consumer an effective remedy, or comes from a state that would recognize and enforce a judicial judgment issuing from the consumer's home jurisdiction (and, even if so, at a cost that is not prohibitive to an individual consumer or class of consumers bringing a collective or class action). With these obstacles, the consumer who purchases from a cross-border supplier is without an effective remedy when that consumer has been a victim of duress or fraud, breach of contract, or suffers some injury to person or property because of the supplier's breach. In short, any solution to the problem must address the cost problem in litigation and cross-border enforcement problem without raising unduly new costs, such as increased legal uncertainly in choice of law.

B. General Considerations

Even though the cost of litigation and enforcement in cross-border supply for small-value claims is the core of the problem, and therefore a sufficient basis to begin a discussion of the competing proposals in CIDIP-VII, this report nonetheless considers it worthwhile to review some of the basic issues relating to the question of consumer protection, especially in an international context. Such a discussion might enable the members of the IAJC or the Member States participating in CIDIP-VII to address these matters more systematically.

It would seem axiomatic that, even in a discussion of how to advance consumer protection, consumer and suppliers both have interests and rights that need to be balanced in any legislative process. Consumers' interests include the right to a free and fair bargaining process (i.e., a valid contract), the right to performance of the contract, and the right to be free from consequential harm that flows from nonperformance of a contract. This report first discusses consumers' interests in those rights. It then turns to consumers' broader interest in access to foreign supply. This report assumes, for purposes of discussion, that taking account of the consumers' interest in foreign supply for the most part adequately also captures the foreign supplier's interests in cross-border supply.[8] It then discusses the

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[7] See http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_monetaryrestitution.htm. (providing documents relating to the proposal of the United States, including earlier versions of the draft legislative guide)(copies of the current proposals are attached at Tab C); see also DENNIS, Michael. Developing a Practical Agenda for Consumer Protection in the Americas, XXXIV Curso de Derecho Internacional (2007)(forthcoming) [Dennis]..

[8] This is because whatever legal regime adequately addresses the consumer's interest in foreign supply (that is to say, by providing foreign suppliers adequate incentives to participate in the consumer's home market) should also serve to satisfy the

interaction of consumers' interest in obtaining remedies for violation of their substantive rights and consumers' interest in foreign supply in the context of different national situations.

1. Consumers' Rights to Remedies

When their rights are violated, consumers are entitled to effective remedies. In the first instance, those rights include the right not to be victims of fraud, duress or unconscionability in the formation of their contracts. For example, it is possible that standard form contracts can reflect unfair bargaining power or business compulsion or duress so that consumers are victims of force; failure to provide sufficient information or ineffective consumer choice because of lack of capacity to understand the nature of the bargain has effects comparable to cases of pure fraud. Thus, fraud, duress and unconscionability call into question whether the consumer should be held morally and economically accountable for his or her choices and whether bargains between suppliers and consumers truly reflect exchanges that increase the welfare of both parties, as they judge their own welfare. If the contract is invalid, at a minimum, the consumer ought to be entitled to restoration of the status quo ante, which usually entails avoidance of the contract and restitution for both sides of the exchange, thus assuring the consumer return of the price paid less any gain in value.

While the interests consumers have in valid procedures for the making of their contracts is important, as a practical matter their interests in the actual performance of contracts is vastly greater. Enforcement of the contract as made generally requires specific performance by the supplier or, depending on the legal system, a substitutional remedy in the form of damages for nonperformance. This usually entails a monetary equivalent of the value of the performance to the consumer, which is usually comprised by the cost of replacement, the incidental cost of finding a replacement, and the consequential loss of not having the full performance that was promised for the time period during which it was not given. In principle, these latter costs are insignificant for most consumer items and can be disregarded, because most consumer items are easily substitutable on the market. Consequential losses become significant only in cases of significant injury to person or property, and in these cases the losses are more comparable to torts in common law jurisdictions and *quasi*-delictual liability in civil law systems. Because these interests in consequential harm are more properly understood to fall within a body of law that raises complex questions of national policy that is sometimes studied and litigated under the rubric of products liability law, and because the parties do not appear to have addressed it in any of their proposals, this report sets aside the question of the consumer's interest in compensation for consequential harm.

Thus, at a minimum, the consumer's direct interest in the cross-border transaction entails an interest in the validity and performance of supplier's commitment. Practically speaking, this means ultimately the provision of a remedy, because only the credible threat of a remedy can assure that suppliers, whether foreign or domestic, will perform their contractual obligations adequately. The provision of remedies, however, requires the successful navigation of many steps in a complicated process; these steps include assuring legal clarity as to the rules that govern the transaction, which enable the consumer to know the true value of what the supplier promises to supply; providing a forum that is both procedurally adequate and reasonably costly in relation to the remedy sought to resolve disputes as to validity or performance; and establishing reliable mechanisms for assuring enforcement of the forum's decisions.

One can imagine dispute resolutions of varying degrees of effectiveness and cost, with different degrees of governmental involvement. At one extreme, highly-judicialized processes could involve individual or class action litigation by private persons or governmental lawsuits on behalf of individuals. An intermediate approach would include partially-privatized systems, such as arbitration, with a modest degree of judicial supervision to address a limited class of errors. At the other extreme, highly-privatized systems, such as dispute resolution systems

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foreign supplier's own interests in reasonable access to the home consumer's market. Accordingly, this report will not separately discuss the independent interests of foreign suppliers, assuming that these interests in a first approximation are addressed adequately in a discussion of consumers' interests in inducing foreign suppliers to participate in the consumer's home market.

that are now emerging in some countries, could involve intermediaries, such as credit card companies, which would provide immediate redress to individual consumers for their relatively low-cost claims. These intermediaries would then take upon themselves the right and duty to consolidate those claims and resolve those disputes with suppliers. The cost for the provision of this service could be borne by the suppliers, the purchasers, or both (since both benefit from the availability of credit ex ante and reliable compensation for consumer claims ex post provided by the intermediary). In any event, whatever system or combination of systems states or groups of states choose, at a minimum the dispute resolution mechanism should yield prompt, adequate and effective compensation for the consumer buying from a cross-border supplier, in the same way that a foreign investor is entitled to prompt, adequate and effective compensation when the state expropriates that foreign investor's property in the consumer's home state.[9]

2. Consumers' Interest in Supply

Yet, the problem of consumer protection also requires recognition that consumers have interests in the widest and deepest possible choices in consumer products, in addition to security of expectation in each individual transaction. Consumers' choices are the widest possible when all potential producers, including foreign suppliers, have access to the particular market and the prices at which those goods and services are offered reflect the full cost of production, including the cost of providing effective remedies. On one hand, the absence of effective remedies against foreign suppliers harms consumers by operating as an implicit subsidy for foreign goods and services, leading consumers to purchase foreign goods based on a misperception of their true value. In this scenario, foreign suppliers receive the functional equivalent of a subsidy. By contrast, foreign suppliers bear the functional equivalent of a tax when choice of law rules or jurisdictional systems impose greater burdens on foreign suppliers than domestic suppliers, thereby harming consumers by forcing foreign producers to sell at artificially higher prices that do not reflect the true costs of production. In such a case, rules of private international law can operate as most-favored nation or national treatment violations or as disguised discrimination in international trade. Both subsidies and taxes applied without justification on foreign suppliers distort the incentives for foreign supply and deny consumers the level of foreign supply that serves their interests.

At the same time, consumers' choices are deep when producers make available to consumers the maximum, efficient mixture of products reflecting the individual consumer's particular preferences, which means sometimes that a consumer might be willing to exchange less contract security for a lower initial price. Accordingly, consumers have an interest in assuring producers that the costs of vindicating consumer's interests in contract validity and performance are not excessive in relation to the benefits that suppliers will receive from participating in the consumer's markets. It is also essential that a supplier's costs in providing remedies in cases of invalidity and nonperformance correspond to the essential bargain between the parties that made the product or service available in that market. If bargains that reflect an agreement for less value at lower cost are unenforceable, eventually suppliers will simply not supply to that market on those terms, depriving at least some consumers of market access to lower value versions of goods and services at prices they can afford.

In determining the precise level of protection for consumers a particular state wishes to provide, a critical factor is the effect the level of consumer protection is likely to have on the behavior of foreign suppliers, both in absolute and relative terms. In absolute terms, the foreign supplier response may depend on the size of a consumer's home market, because foreign suppliers may well accept higher transactional costs for participating in a large

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[9] Compare Opinion of the Inter-American Juridical Committee on Resolution AG/doc.3375/96 "Freedom of Trade and Investment in the Hemisphere" (also known as the "Inter-American Juridical Committee Opinion Examining the U.S. Helms-Burton Act), §§ 5(a) and (b), Rio de Janeiro, August 27, 1996 [stating: "a) Any State that expropriates, nationalizes or takes measures tantamount to expropriation or nationalization of property owned by foreign nationals must respect the following rules: such action must be for a public purpose, nondiscriminatory, and accompanied by prompt, adequate and effective compensation, granting to the expropriated party effective administrative or judicial review of the measure and *quantum* of compensation. Failure to comply with these rules will entail State responsibility" and that "b) The obligation of a State in respect of its liability for acts of expropriation consists of the restitution of the asset expropriated or adequate compensation for the damage caused, including interest up to the time of payment."]; reprinted in 35 I.L.M. 1322, 1331 (1996).

market than they would in a smaller market. States with small markets need to pay particular attention to the risk that their choice of law rules, together with procedurally inadequate and costly dispute resolution mechanisms, may make the cost of participating in their market prohibitive for foreign suppliers in relation to the gains those suppliers can foresee from participating in those markets. Suppliers in states with small markets might suffer higher per unit costs than suppliers in states with large markets, because marketing and distribution in small markets may not allow suppliers to take advantage of increasing returns to scale in marketing, distribution, sale, and follow-on performance of warranty and other obligations that may follow a sale. States with larger consumer markets may have more freedom in this connection to experiment in ways that increase the costs for foreign suppliers, in effect exercising a degree of market power. Thus, taking into account the relevant costs of consumer protection rules for its stakeholders,[10] each state may reach its own independent judgment of the preferred level of consumer protection, particularly with respect to its interest in obtaining foreign supply for its consumers. Given the diversity of circumstances, therefore, one would expect to see different national standards for consumer protection. In the parlance of students of regulatory competition, diversity in national standards reflect a beneficial race-to-the-top.

On the other hand, some forms of diversity in national standards may reflect harmful competition leading to a race-to-the-bottom. A lower level of consumer protection in a particular market may result in increased foreign supply that reflects merely diversion of supply from states with higher levels of protection. Theoretical risk of competitive diversion might also increase in the future. With the rise of e-commerce, suppliers will have lower costs for finding potential purchasers in international markets, and both suppliers and governments will have greater access to information concerning the applicable consumer protection rules in each market. Accordingly, there will be a danger that suppliers will fail to supply markets with higher levels of consumer protection, putting pressure on those states to lower their levels of consumer protection. If so, then lower levels of consumer protection in some jurisdictions may be evidence of a competitive race-to-the-bottom in consumer protection law in which small market countries with lower levels of consumer protection drive all states down to sub-optimal levels of consumer protection.

3. The Interaction of Remedies and Supply in National Contexts

Because both the race-to-the-top hypothesis and the race-to-the-bottom hypothesis are merely theoretical possibilities, however, they deserve further study in evaluating how states deal with the problem of assuring their consumer adequate access to foreign supply. In this connection, measuring whether national systems of consumer protection truly reflect a sound national policy choice or a race-to-the-bottom driven by substandard protection afforded by other countries may be extremely difficult in practice, because national systems vary in their characteristics for perfectly legitimate reasons. Whatever levels of consumer protection a particular country deems desirable needs to be achieved through a particular set of institutional arrangements. The precise mode of state regulation in the protection of the consumer to achieve the greatest consumer benefit at the least cost to taxpayers may reflect comparative institutional advantages available of a particular country's history and institutional capabilities.

In this connection, it should be noted that both validity and performance questions can be addressed either before or after the bargain using different institutional mechanisms. After the bargain, or ex post, they can be addressed through individual private litigation, collective or class action private litigation, and public litigation by state agencies on behalf of consumers, or non-judicial mechanisms for dispute resolution such as mediation or

[10] In addition, the demand for consumer protection rules might be greater in large states. States with large consumer markets might also have sufficiently large consumer groups and the capacity to organize in the political process that the rules these states choose would be more likely to reflect a reasonable balance between domestic consumer and domestic supplier interests. It is widely believed by students of comparative politics that, because the per unit costs of organizing in the political process are greater for consumers than for producers, that legislation in more likely to reflect the interests of producers rather than consumers. This report offers no analysis of the relative access consumers may have in their domestic political processes, individually or collectively, because that is a question of democratic theory and practice that is currently beyond the scope of CIDIP-VII.

arbitration. Before the bargain, or ex ante, they can be addressed through legislative or administrative intervention. This can take the form of procedural regulation of private contracting, such as mandating express forms of consent for at least certain kinds of commitments after the provision of required information, or substantive regulation of the terms of the bargain, such as prohibiting particular types of clauses, including perhaps choice of forum or choice of law clauses, on the theory that they are sufficiently likely to reflect fraud or force in a sufficient number of cases to warrant absolute prohibition irrespective of whether or not those factual elements can be demonstrated in a particular case. One plausible generalization is that ex ante methods of regulation are more likely to be over-inclusive, thus preventing consumer transactions that are valid and will be performed; meanwhile, ex post methods of regulation are likely to be under-inclusive, permitting some transactions that should be deemed invalid or involve breach to escape detection and remediation. The precise mix of ex ante and ex post modes of consumer protection, therefore, may reflect different national situations concerning the risk of forgoing valuable contracts relative to the risk of not preventing harmful contracts. These factors might play an even larger role in explaining the level and kind of consumer protection afforded in a particular country than the role played by the level of protection in inducing foreign suppliers to shift to that jurisdiction.

In sum, the national choice for a system of consumer protection can turn on a number of factors: First, whether the state's relative institutional capacities make ex ante and ex post methods of policing less costly and more effective; second, whether the problem of deterring and punishing good bargains between consumers and suppliers is greater than the problem of not deterring or punishing bad bargains between consumers and suppliers; third, whether the size of the local market makes foreign supply more costly and therefore calls for lower levels of protection in order provide compensation for that additional cost; and, finally, whether the small size of the local market, or other factors, lead to races-to-the bottom resulting in lower levels of consumer protection in all countries, as states compete for foreign supply. Of course, a more comprehensive analysis would reveal an even larger set of factors. However, taken together, these factors suggest that some forms of diversity in consumer protection may be desirable and reflect genuine welfare gains for consumer, while other forms of diversity may reflect collective action problems that produce welfare losses, not just for some states but also perhaps for all. Accordingly, states should pursue progress in international consumer protection through mechanisms that allow them to take into account their special situations without causing undue harm to the interests of other states, paying due regard to the factors that threaten welfare losses. That said, negotiators should evaluate these factors in the context of addressing consumers' specific concerns: namely, the problem of high cost litigation for low value claims; and the availability of international enforcement mechanisms, whether they come in the form of traditional enforcement of judicial judgments or other, less conventional dispute resolution mechanisms.

V. REVIEW OF PENDING PROPOSALS IN LIGHT OF THE NATURE OF THE PROBLEM

With the nature of the problem clearly in mind, it appears likely that none of the proposals submitted thus far by the Member States participating in CIDIP-VII can eventually provide consumers the relief they deserve.

A. Analysis of the Brazilian Proposal

Briefly, the Brazilian approach addresses only the choice of law dimension of the consumer's ultimate interest in a remedy. In doing so, it does not sufficiently address the problem of small value consumer claims individually not warranting the costs of litigation, the question of amenability to suit or jurisdiction over a foreign supplier in the consumer's home jurisdiction, or the extra-territorial enforceability of any awards rendered even if the size of claim or jurisdictional problems were resolved.

The proposal appears to be premised on the view that virtually all choice of law agreements in consumer contracts do not reflect consumer choice and are harmful to consumers. It employs a choice of law criterion ("the law most favorable to the consumer") that is unprecedented, unmanageable and arguably discriminatory against international

trade, and may ultimately be harmful to consumers. Indeed, there seems to be discrepancy between the logic of the Brazilian proposal and its own stated rationales, all of which seems to suggest the need for further proposals relating to jurisdiction, as contemplated by the Canadian proposal. Finally, in undermining party autonomy in choice of law, it directly disregards an earlier CIDIP agreement and thus distances itself from the private law harmonization process contemplated by the CIDIP as an ongoing process that builds on earlier achievements. Each of these concerns requires further explanation.

1. Empirical Basis for the Brazilian Proposal

First, while some, and perhaps many, choice of law clauses may reflect adhesion and unconscionability, it is an empirical question whether all do. A blunt, over-inclusive rule displacing the law chosen by the parties prevents consumers and producers from making agreements that would make both better off, such as an exchange of a lower price or better warranty commitment in return for the selection of the supplier's home law. Even if individual consumers lack bargaining power with individual firms, it may be possible that consumer groups or governmental representatives can effectively bargain on behalf of consumers to encourage the development of standard forms in contractual choice of law that do effectively serve consumer interests. This is a question that deserves empirical study. Yet, it does not appear that the CIDIP-VII negotiators have to date collectively presented, much less analyzed and discussed, the kind of evidence that would be necessary to draw conclusions in so complex a matter.

2. Legal Uncertainty and the Brazilian Proposal

Second, the formula proposed by the Brazilian draft for limiting party autonomy, "the law most favorable to the consumer," adds to legal uncertainty in at least two ways. First, it introduces an unmanageable criterion for which there is no precedent in commercial law. For example, if the formula requires selecting the law of a particular jurisdiction to govern the whole dispute, determining whether one body of law is more favorable to the consumer than another body of law depends on a complex calculation of all the relevant provisions of law in a particular claim; in some cases, the claim may benefit from one jurisdiction's remedial laws but suffer from that jurisdiction's substantive laws. If, instead, the proposal were interpreted to provide for a form of issue-by-issue choice-of-law selection process (sometimes know in private international law as "scission" or "*dépeçage*"), then the complexity of the process would be even greater. Courts would ignore the balance of advantages between consumers and suppliers reflected in the total scheme of remedial, substantive and procedural rules of a single body of law and instead would create a new combined law for international consumer disputes, furthering adding to legal uncertainty.

Second, even if it were possible clearly to determine which law was most favorable to the consumer, the application of that choice of law rule would create the opportunity for disguised discrimination in international trade, which in turn would increase the uncertainty foreign suppliers and domestic consumers already experience in making rational cost-based comparisons of competitive opportunities. By assumption, a law that is more favorable to the consumer would be more costly to the supplier. For example, the foreign supplier might be subject to its own law or the law of some other jurisdiction determined to be in whole or in part "more favorable to the consumer," when the domestic supplier would be bound by the common law of the domestic supplier and domestic consumer. Therefore, the proposed Brazilian choice of law rule, in an international transaction, would burden a foreign supplier with treatment inferior to that afforded to a domestic supplier in an otherwise identical case, either directly violating the national treatment principle of applicable trade agreements or operating as a disguised restriction on international trade. Thus, either because of the unmanageability of the proposed criterion or because of its discriminatory impact in international trade, the proposed Brazilian choice of law rule would increase costs for suppliers and reduce the willingness of foreign suppliers to participate in the consumer's home market, thereby harming domestic consumers. [11]

[11] See generally PÉREZ, Antonio Fidel. Séptima Conferencia Especializada Interamericana Sobre Derecho Internacional Privado (CIDIP-VII): protección al consumidor [CJI/doc.227/06], Rio de Janeiro, Brazil, August 9, 2006.

3. The Internal Logic of the Proposal

The stated rationales for the Brazilian proposal also give no express attention to the problem of enforceability, although the proposal's effort to assure the application of the mandatory provisions of the law of consumer's home state (and in the case of choice of law clause, mandatory provisions of law that are no less protective of the consumer's interests) should ultimately be understood as a concern about forum bias, which in turn is ultimately a question about the likelihood that the consumer will receive an adequate remedy. The primary rationale for the Brazilian proposal is that the mandatory provisions of the law of the consumer's home jurisdiction do not ordinarily apply under current law to international consumer transactions, thus denying consumers the full protection of his or her home state law. It is argued that, in most Latin American systems, applicable choice of law principles for consumer contracts would apply the law of the foreign supplier's jurisdiction. The short answer to this objection is that, as a matter of domestic choice of law governing domestic adjudications, states are free to change their law to make the law of the consumer's home state apply in cases involving performance in the consumer's home country. Thus, the proposed treaty is not necessary to solve the problem it identifies.

The Brazilian proposal also identifies another choice of law problem that actually stands for an entirely different concern relating to jurisdiction. The explanation of the Brazilian proposal maintains that, in a case in which the consumer is a tourist, the mandatory provisions of the consumer's home country law would almost never apply, since the likely forum in such cases would not be the consumer's home country but rather the place where the tourism occurred.[12] The issues raised by this objection are both factual and theoretical. The factual question, when the tourist services are provided outside the consumer's home state, is whether consumers would nonetheless be able obtain jurisdiction in their home state over those over entities on some basis, such as the fact that the service provider did business in, or had some other contact, with that jurisdiction. The answer would appear to depend on the facts of the particular case and the particular jurisdictional rules of the consumer's home state. The theoretical question is whether a solution to a jurisdictional issue in those cases in which it actually arises should be sought in choice of law reform rather than through directly addressing the jurisdictional issue, perhaps through requiring consent to jurisdiction in the consumer's home state as a condition for allowing entities that seek to avoid adjudication in a particular country's courts to do business with that country's consumers. If the problem is that the state that has jurisdiction (whether the supplier's home state or the place where the services are provided, if that is yet another state) is not an accessible and unbiased adjudicator of a consumer's claims, then compelling that foreign jurisdiction to apply the law of the consumer's country will not solve that problem. Rather, it will instead merely invite the foreign state to distort the application of that consumer's home country law. Thus, in cases of forum bias, no additional consumer protection would be afforded by requiring the application of the mandatory law of the consumer's state rather than the mandatory law of the foreign forum. A realistic solution would be to avoid the problem by finding a neutral forum or manage the problem by creating incentives, such as the risk of retaliation by other jurisdictions, that would reduce the risk of forum bias.

Thus, the premises underlying the Brazilian proposal ultimately depend on confidence in the suitability of the forum as the appropriate venue for vindicating the consumer's interests, but the means chosen to address that concern are not calculated to address the problem of forum selection.

4. The Logic of the Proposal in relation to the CIDIP Process

Finally, as to inter-American private law harmonization, the Brazilian proposal's tension with the principle of party autonomy arguably undercuts CIDIP-V's commitment to encourage party autonomy in contractual choice of law. A final evaluation of this concern will depend on a close reading of the Brazilian proposal and further study of CIDIP-V, but a preliminary review may serve to raise the question.

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[12] See MARQUES, Cláudia Lima. Insufficient Consumer Protection in the Provisions of Private International Law: The Need for an Inter-American Convention (CIDIP) on the Law Applicable to Certain Contracts and Consumer Relations, p.22, 33-40 (http://oas.org/dil/AgreementsPDF/Inglesdocumento%20de%20apoyo%20a%20la%20convencion%20propuesta%20por%20br%E2%80%A6.pdf).

At the outset, it seems clear that the Brazilian proposal does not favor party autonomy. Article 2(2) of the most recent version of the Brazilian proposal provides:

> If the parties have selected the law of the place of celebration, the place of performance or the law of the domicile or seat of the goods or services supplier, such law will be applicable as long as it is more favorable to the consumer.

This would appear to rule out any party autonomy, because the chosen law would be applicable only if the substantive criterion (that is, "the law most favorable to the consumer") were met. However, the proposal goes on to suggest that a choice of law clause might be enforced if certain traditional, often called "localizing" or *lex loci*, criteria are also satisfied. Article 2(3) provides, as follows:

> The prior choice of the parties of the applicable law to the contract will be considered more favorably (sic) to the consumer:
>
> a) if the chosen law is the one of the consumer's domicile;
>
> b) if the chosen law is the one of the common domicile of the consumer and one of the branches of the professional or goods or services supplier;
>
> c) if the chosen law is the law of the place of celebration or the place of performance and coincides with the law of the domicile or seat of the goods or services supplier.[13]

The effect of these provisions is unclear, because Article 2(3) could be interpreted either as a presumption or as a binding determination as to the applicable law. If the latter, then the drafting should be revised to make clear that the parties are free to choose the law when the contacts described in Article 2(3) – namely, the consumer's domicile, supplier's seat, place of formation, or place of performance – are satisfied. As written, the language is capable of being interpreted to allow the court to draw the inference that the law selected by the parties is the "law most favorable to the consumer" but not to require the court to draw that conclusion. Furthermore, one could imagine that courts would be likely, particularly in the e-commerce setting in which the place of formation or performance is contestable, to manipulate application of Article 2(3) to yield application of the law of the state whose law would be selected under Article 2(2), the law "most favorable to the consumer."

In fact, because the traditional criteria for localization in choice of law – the so-called traditional *lex loci* rules – are difficult to implement in an e-commerce setting, the drafters might have considered implementing an exception for party autonomy under an alternative approach, such as a "significant relationship" or "close connection" test. It may be that any court trying to implement traditional localization rules in the e-commerce setting is likely to engage in the process of weighing and balancing called for by a test that looks to the overall relationship of the forum, the parties and the transaction to the chosen law. If so, it would be better to draft an exception for "party autonomy" in terms likely to yield a sensible pattern of results for e-commerce, rather than one employing the localization criteria that were developed for a pre-cyberspace world.[14]

In sum, at best Article 2(3) as drafted may operate to add complexity and doubt to the enforcement of procedurally adequate and substantively fair choice of law agreements without any real scope for party autonomy. At worst, it reflects the intent of the Brazilian proposal to place insuperable limits on party autonomy in choice of law.[15]

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13 See *supra* note 5.

14 The literature on choice of law in cyberspace is now vast. An adequate discussion here would easily exceed the bounds of this paper. But this report urges the negotiators to study the problem of choice of law in international B2C commerce in light of current scholarship that is being produced in a large number of countries rather than through mechanical applications of traditional learning on the subject.

15 Morishita Wada and Lima Marques expressly state that the proposal would "allow a limited exercise of party autonomy. The parties being the consumer in its country of domicile (for example, the contracting through e-commerce or distance sales) can validly choose four laws, i.e. the law of the consumer's domicile, the place of celebration, the place of performance or the seat of the provider of goods or serves; such law will be applicable as long as it is the most favorable to the consumer." See Morishita Wada and Lima Marques, supra note 5 at 11.

If the proposal does, in fact, preclude or at least substantially burden party autonomy in choice of law, it directly challenges the earlier achievements of the CIDIP process. CIDIP-V of Mexico City [the Mexico City Convention], in which the OAS Member States endorsed the principle of party autonomy in contractual choice of law but balanced against that principle the forum's prerogative to assure the application of the mandatory provisions of its own law.[16] Article 7 provides that: "The contract shall be governed by the law chosen by the parties." However, article 11 provides: "Notwithstanding the provisions of the preceding articles, the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements." Admittedly, only Mexico and Venezuela have ratified the Mexico City Convention and, therefore, are bound by its recognition of the forum's right to apply its own mandatory law.[17] Therefore, strictly speaking, nothing prevents other OAS Member States from changing their own choice of law rules when the forum is within their jurisdiction to assure that the mandatory provisions of the consumer's law will apply even when the consumer's domicile is not the forum. In all cases not involving a contractual choice of law clause, of course, the Mexico City Convention does not bar the OAS Member States from adopting choice of law principles to ensure the application of the law of the consumer's home, including its mandatory provisions, rather than the law of the supplier's home country. Yet, if CIDIP-VII were to derogate from the principles agreed to at Mexico City under the auspices of CIDIP-V, it would place the CIDIP process at war with itself.

That said, the mere fact that the Brazilian proposal challenges the letter of what was agreed to at CIDIP-V is not necessarily a compelling reason for rejecting it. The strength of this objection might may depend on one's view of the scope of the CIDIP-V agreement and whether applying its precise language to consumer contracts was a question that was sufficiently studied at the time the Mexico City Agreement was concluded. (This might be a matter for further research and discussion among the negotiators in CIDIP-VII.) In addition, even if the CIDIP-V constituted an agreement in the mid-1990'a to extend the principle of party autonomy to consumer contracts, the subsequent rise of international B2C commerce, especially via the internet, could give rise to new facts that would justify a fundamental rethinking of CIDIP-V. Nevertheless, if in fact the policy expressed in the Mexico City Treaty needs to be refined to address the special context of B2C commerce, certainly intermediate positions are available, somewhere between, on one hand, the Mexico City formula of full party autonomy subject to the forum's mandatory provisions and, on the other, no protection at all for autonomy of contract.

The parties need to consider more options than the current extremes reflected in their negotiating positions. For example, an intermediate approach that might be found in the approach the European Community employed in 1980 in its Convention on the Law Applicable to Contractual Obligations (the Rome Convention).[18] Article 3 of the Rome Convention provides that "A contract shall be governed by the law chosen by the parties," subject to the protection of the mandatory rules of the consumer's state when the supplier engages in particular acts that warrant application of those mandatory rules.[19] On the other hand, article 7(1) of the Rome Convention does permit reference to the mandatory rules of another jurisdiction, providing that: "When applying under this Convention the law of a

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[16] See Inter-American convention on the law applicable to international contracts, signed at Mexico, D.F., Mexico, on March 17, 1994, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP-V) (available at: http://oas.org/dil/CIDIPV_convention_internationalcontracts.htm)

[17] See http://www.oas.org/juridico/english/sigs/b-56.html; see also Lima Marques, supra, at p. 31 n. 200 (noting that Venezuela and Mexico made no reservation to exclude consumer transactions from the scope of the Mexico City Treaty). The U.S., however, appears to be considering ratification. See Dennis, supra note 7 at note 48.

[18] See Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC), Official Journal L 266, 09/10/1980, p. 0001 - 0019 [the Rome Convention] (available at: http://www.rome-convention.org/instruments/i_conv_orig_en.htm.).

[19] Specifically, article 5(2) provides that: "Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy."

country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract." Yet, Article 7(2) provides that "Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract," which makes clear that Article 7(1) does not require the application of another forum's mandatory law in conflict with the forum's own mandatory law.

In sum, the Rome Convention could offer at least one alternative to either extreme of full party autonomy or no party autonomy. The Rome Convention provisions indicate that the EC approach was balanced: on one hand, favoring party autonomy, subject to the mandatory provisions of forum law; on the other, ensuring respect for the mandatory provisions of the consumer's home law in a narrowly-defined set of cases in which the reasonable balance between supplier and consumer expectations warranted application of the consumer's home state mandatory law, again subject to the mandatory provisions of forum law. This effort at balance renders the Rome Convention a suitable basis for further negotiation. Indeed, its provisions are arguably consistent with a narrow interpretation of CIDIP-V's commitment to party autonomy and with a revision or clarification of the Brazilian proposal to provide more space for party autonomy.

Parenthetically, it is worth noting that, under the approach employed by the EC at the intergovernmental stage of its integration project – given the supremacy of the mandatory provisions of forum law – the determination of applicable law turns on the prior question of forum selection. In other words, the choice of forum implicitly rules out a foreign forum without a prior determination of the procedural quality of the foreign forum; and it rules out foreign law without a prior determination of the substantive quality of its applicable provisions of mandatory law for consumer protection. The further effect of an agreed forum in the EC context, given the nearly automatic recognition and enforcement of judgments within the EC, was to provide an enforceable remedy throughout the EC.[20] In short, agreement on jurisdiction resolves the choice of law question and gives a virtually complete solution to the problem of recognition and enforcement, giving consumers effective remedies.

Accordingly, drawing on the EC's experience, attempts to revise the Brazilian proposal should focus on the ultimate issue of whether any forum, whether foreign or domestic, can provide an adequate and enforceable remedy for consumer claims. In this connection, the Canadian proposal makes a modest advance by focusing on the question of jurisdiction. As the internal logic of the Brazilian proposal reveals, jurisdiction is a necessary preliminary question in any effort to find a basis for securing consumers enforceable remedies against a foreign supplier when the foreign supplier's assets are outside the consumer's home jurisdiction and the consumer lacks the means to prosecute a lawsuit in the supplier's home jurisdiction. Recognition and enforcement in the state where the defendant's assets can be found of a foreign judgment rendered by the courts of the consumer's home state is predicated, foremost, on the adequacy of the rendering court's exercise of jurisdiction. The Canadian proposal makes a welcome advance, therefore, in beginning to address this question.

B Analysis of the Canadian Proposal

The Canadian proposal is aimed primarily at cross-border electronic commerce. By focusing on jurisdiction, it addresses the central concern that consumers should have access to a procedurally adequate forum that is in turn likely to protect their substantive interests and purports to provide some space for party autonomy. It thus begins to get at the heart of the question, which is moving toward affording consumers adequate remedies. However, like the Brazilian proposal, it plainly does not address the central problem of small-claims consumers whose costs of litigation, even if the foreign supplier is subject to jurisdiction in

[20] See 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Official Journal L 299/32 [1972][the Brussels Convention] (available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:HTML); and the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 [the Lugano Convention] (linking the Brussels system to European Free Trade Association member states not yet members of the EC) (available at http://curia.europa.eu/common/recdoc/convention/en/c-textes/lug-idx.htm).

the consumer's state, exceed the benefits of such litigation. Framed as a model law, moreover, it does not directly address the ultimate question of the enforceability of judgments issued by courts having jurisdiction under the terms of the proposal. That said, the proposal's respect for party autonomy, like the Brazilian proposal, is more theoretical than practical, and its attempt to regulate jurisdiction arguably promises more than can be delivered.

Like the Brazilian proposal, the Canadian proposal in effect would radically undercut party autonomy. To begin with, Article 6(1) of the Canadian proposal rules out choice of forum agreements until after the proceeding has commenced.[21] This alone radically reduces the likelihood that the parties could come to an agreement. Even more important, the Canadian proposal would allow the foreign supplier to enforce a choice of court or choice of law clause only in circumstances that would appear to exist more in theory than fact. Article 6, regarding choice of forum, and article 7, regarding choice of law, respectively, would allow the consumer to void a choice of court or a choice of law clause in a contract, sue in the consumer's home forum, and apply the home forum choice of law. The only exception would be when "the vendor demonstrates, under articles 6(2) or 7(3), that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing" in that state.[22] "Reasonable steps" to avoid such a contract would arguably include a notice on the vendor's website to that effect (or perhaps some other measures or screening devices to ensure that the consumer did not identify as its place of residence a particular jurisdiction). If a contract were concluded in such a case, it would seem to follow that the contract may have been fraudulently induced by an assertion, or conduct amounting to an assertion, by the consumer that he or she did not reside in the state. Under the law of most jurisdictions, such contracts would arguably be void *ab initio* or, at the instance of the vendor, voidable. Thus, the Canadian provision would appear to give the vendor and consumer the right to select the forum or applicable law only in cases in which the contract would be unenforceable.[23] If so, the Canadian proposal closes the door to any significant party autonomy in consumer contracts, disabling consumers from even the theoretical opportunity of improving their positions by obtaining more effective alternative means of dispute resolution and enforcement than what may be currently available under their domestic law. Accordingly, the tension between the Canadian proposal and CIDIP-V raises questions that are comparable to those raised by the Brazilian proposal. That said, depending on how the drafting of this provision evolves, it may ultimately be consistent with the basic policy of the Mexico City Agreement.

As to the regulation of jurisdiction, the Canadian proposal, in contrast to the Brazilian proposal, does seek to increase legal certainty, since it provides for jurisdiction virtually exclusively in the courts of the consumer's home state and makes the law of the consumer's state controlling in virtually all cases. Yet, while the Canadian proposal's attempt to address both choice of law and jurisdiction as a means to increasing the likelihood of providing consumers with enforceable remedies is laudable, it may not be practicable. The substance of the proposal contemplates worldwide jurisdiction and thus ignores important limitations, sometimes of a constitutional nature, on the exercise of jurisdiction under the law of many national systems. On the other hand, were the Canadian proposal re-drafted to limit jurisdiction to a finite set of countries having a connection to the transaction, surmounting some of the barriers imposed by some constitutional systems, a model law of this scope would still be difficult to negotiate. These difficulties became clear in the recent failed effort at the Hague Conference on Private International Law to negotiate a global convention on jurisdiction and recognition and enforcement of commercial judgments, which ultimately excluded consumer transactions.[24] Indeed, the exclusion of consumer transactions from the

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21 See http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm (providing documents relating to the Canadian proposal, including earlier versions of the draft model law) (copy attached at Tab C).

22 Id.

23 Legal rules often have unintended consequences. The Canadian proposal may fall prey to that risk by creating incentives for consumers to mislead supplier about their domicile (since the consumer would otherwise be precluded from making the purchase) and for suppliers to remain ignorant of such deception (since the supplier otherwise would be precluded from enforcing the agreement's choice of law or choice of forum clauses). Indeed, the proposed formula may even encourage consumer and supplier behavior that would give the supplier, but not the consumer, the option of either avoiding the agreement or enforcing the choice of law or choice of forum clause. It is doubtful the CIDIP negotiators wish to encourage such behaviors.

24 Compare Article.8, Interim Text - Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic

scope of the proposal was a harbinger of the ultimate failure of the negotiators to achieve agreement on the global recognition and enforcement of judgments of any kind. Therefore, the negotiators abandoned that ambitious effort in favor of a narrower proposed global convention for the enforcement of choice of court clauses, which was intended simply to place choice of court clauses on an equal footing with agreements to arbitrate that have become enforceable under the New York Arbitration Convention.[25]

It is possible that the Canadian proposal could ultimately result in some agreement in the narrow geographical context of an exclusively Western Hemispheric agreement. However, even that effort would require much more thought and research than has been exhibited thus far in CIDIP-VII. This is because the precedents for successful recognition and enforcement of judgments agreements and agreements allocating jurisdiction from the U.S. and EU are simply inapposite to the circumstances facing OAS Member States. The Full Faith and Credit Clause of the U.S. Constitution of 1787 played a central role in transforming previously sovereign states into a federal union.[26] Also, more recently, first under the Brussels-Lugano Treaty system of the European Economic Community (EC) and then as implemented through a Regulation adopted in 2001, which has direct effect in the states of the European Union (the EU), recognition and enforcement of judgements is guaranteed in the new, supranational Europe.[27] In these two cases, economic integration has presupposed increasing political integration. Moreover, both cases involved extremely high absolute levels of trade and interdependence that warranted recognition and enforcement of judgments as a vehicle for providing the legal certainty that enables cross-border investment. In this connection, as a practical matter, lower transportation costs in the U.S. and EU reduce the burden of foreign litigation, which in turn facilitates localizing all consumer claims in the courts of the consumer's home state. OAS states as a group do not benefit from similarly low transportation costs, although some grouping of those states might be similarly situated. Finally, in the case of both the U.S. and EU, commonly accepted concepts of procedural due process, under the U.S. Constitution's 14th Amendment and parallel concepts in EU law, provide due process floors beneath which assertions of jurisdiction and enforcement of foreign judgments may not fall.[28] Accordingly, in the U.S. and EU, claims by one member state that another member state has failed to satisfy basic notions of justice would not usually provide a plausible pretext for a decision to resist recognition and enforcement that was actually motivated by naked protectionism. Thus, localizing jurisdiction for consumer claims in the OAS Member States in the home state of the consumer would require careful consideration of the costs and benefits, rather than a simple transplantation of practices that have been effective in the U.S. and EU.

Conference (6-22 June 2001), prepared by the Permanent Bureau and the Co-reporters (providing various options addressing the subject of jurisdiction, choice of law, and recognition and enforcement with respect to enforcement of consumer contracts)(available at http://www.hcch.net/index_en.php?act=publications.details&pid=3499&dtid=35); with Article 2(a), Preliminary Result of the Work of the Informal Working Group on the Judgments Project (Prel. Doc. No 8 of March 2003 for the Special Commission on General Affairs, (specifically excluding consumer contracts from the scope of the proposed convention) (available at: http://www.hcch.net/index_en.php?act=publications.details&pid=3506&dtid=35).

25 Compare Convention on the Recognition and Enforcement of Foreign Arbitral Awards, entered into force on June 7, 1959 (available at: http://www.uncitral.org/uncitral/en/uncitral_texts/rbitration/NYConvaention.html); with Convention on Choice of Court Agreements, concluded June 30, 2005 (not yet entered into force) (available at: http://www.hcch.net/index_en.php?act=conventions.text&cid=98).

26 See Constitution of the United States of America, Article IV, Section 1 (available at: http://www.usconstitution.net/const.html) ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.")

27 See Article 15, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters [EC Regulation 44/2001] (available at http://eur-lex.europa.eu (governing consumer contracts). See also supra note 20 (discussing Brussels-Lugano Treaties).

28 Compare Constitution of the United States of America, Amendment 14, Clause 1, supra ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"); with EC Regulation 44/2001, preambular §§ 16-18, supra (referring to mutual trust in the EU as the basis for the regulation).

C. Analysis of the U.S. Proposal

The U.S. proposals focus on institution-building, consumer-monitoring redress (i.e., domestic small claims procedures), and consumer fraud. The proposals, unlike the Canadian and Brazilian proposals, have the advantage of building on other, generally-accepted international understandings negotiated at the Organization on Economic Cooperation and Development (OECD) Recommendations on Consumer Dispute Resolution and Redress.[29] They also reflect an emerging consensus that mass-market fraud is a significant threat to economic performance, as a recent Canadian study confirms.[30] The focus on consumer fraud and deceptive practices also builds on the success the U.S. has had domestically in developing relatively effective mechanisms for circumventing the problem of low-value claims not warranting individual high-cost litigation by consumers; these mechanisms involve alternative institutions, such as class-action procedures in private litigation and federal litigation on behalf of groups of consumers (i.e., *parens patriae*), which yield monetary awards that are then distributed pro rata to claimants.[31] The private class action procedure now appears to be finding favor in a number of OAS Member States as well,[32] a development also under consideration in Europe.[33] Accordingly, the private domestic class action procedure and government-sponsored action elements of the U.S. proposal may be adaptable to the contexts of other OAS Member States. However, effective implementation of such proposals would require further study of institutional mechanisms currently available, or which would need to be developed, in each of the Member States for investigation and prosecution of consumer fraud cases.

However valuable these proposals may be for domestic cases, the U.S. proposals by their own terms do not extend to international cases. Accordingly, the U.S. proposals are deficient for the purposes set forth in the CIDIP-VII agenda. In part, this may be because these proposals may have been drafted to address perceived limits on federal power in international commerce rather than to address the actual problem of protecting consumer interests. In the U.S. at least, federal jurisdiction for government-sponsored consumer claims is limited to claims arising from supplier fraud or other deceptive practices,[34] since substantive contract law claims are usually committed to the regulatory authority of individual states under the U.S. system of federalism.[35] There is no constitutional reason why international consumer claims cannot be made the subject of federal law, however, since international claims affect international commerce, which is subject to federal regulation, and

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29 See OECD Recommendation on Consumer Dispute Resolution and Redress, July 12, 2007, at 10-11, available at http://www.oecd.org/dataoecd/43/50/38960101.pdf. Similar recommendations were contained in the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Practices Across Borders, June 2003 (available at http://www.oecd.org/dataoecd/24/33/2956464.pdf).

30 See Final Report: 2007 Consumer Mass Marketing Fraud Survey (commissioned by the Competition Bureau, Government of Canada, Feb. 2008) (available at http://www.ic.gc.ca/epic/site/ic1.nsf/vwapj/Environics-Competition%20Bureau-MMF-FinalRReport-Feb2008.pdf/$file/Environics-Competition%20Bureau-MMF-FinalRReport-Feb2008.pdf).

31 See A Brief Overview of the Federal Trade Commission's Investigatory and Law Enforcement Authority (Office of the General Counsel, U.S. Federal Trade Commission, 2002)(referencing suits for consumer redress under Section 19 of the FTC Act, 15 U.S.C. Sec. 57b) (available at http://www.ftc.gov/ogc/brfovrvw.shtm).

32 See Dennis, supra note 7, text accompanying notes 34-35 (discussing Mexican and Brazilian innovations).

33 See Laurel Harbour and Marc Shelley, The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World, at p. 4. 2006 ABA Annual Meeting, Section of Litigation, August 3-6, 2006 (reporting early discussion on possibility of European-wide class action proceeding for consumer contract claims to supplement existing authority for consumer associations to seek European-wide injunctive relief) (available at: http://www.shb.com/FileUploads/the_emergin_european_class_action_expanding_multi-party_litigation_to_a_shrinking_world_1496.pdf.).

34 As the FTC's own website describes its mission, the FTC focuses on transnational fraud and cooperation in international and domestic policy development, but this does not include enforcement of consumer claims in contract performance in transnational cases. See "International Consumer Protection" ("Globalization is one of the central consumer protection developments of the 21st century, commanding the attention of businesses, consumers, law enforcers, and policymakers around the world. The FTC pursues the development of an international market-based consumer protection model, which focuses on protecting consumers from significant harm while maximizing economic benefit and consumer choice. The FTC is working toward its goals by participating in an international cooperation network to combat cross-border fraud and by promoting effective market-oriented consumer protection and privacy policies.") (available at http://www.ftc.gov/oia/consumer.shtm#docs); compare also The US SAFE WB ACT: Protecting Consumers from Span, Spyware and Fraud: A Legislative Report to Congress (discussing international cooperation in suppressing spam and spyware as a species of fraud) (available at http://www.ftc.gov/reports/ussafeweb/USSAFEWEB.pdf).

35 See Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938)(interpreting U.S. Constitution as requiring the federal judiciary to apply state common law, including state contract law, in the absence of a federal statue regulating inter-state commerce).

this theory has been invoked to justify the ratification and implementation by the U.S. of the 1980 UNCITRAL Convention on the International Sale of Goods (CISG).[36]

In sum, these limitations make the U.S. proposal problematic from the perspective of ensuring that consumers receive adequate remedies in international B2C e-commerce. Specifically, because the U.S. proposal is limited to fraud and deceptive practices, it does not cover the full range of consumer claims minimally necessary to provide security of contracts. The vast majority of consumer claims relate to simple nonperformance, sometimes framed as breach of warranty claims for simple loss of value of the contract. (More complicated claims for consequential loss arising from property damage or personal injury – namely, products liability claims – arise in common law tort or civil law quasi-delictual theories of liability and are properly outside the scope of CIDIP-VII's focus on pure consumer claims. These are matters best left for resolution in the next CIDIP.) In any event, class action procedures for small-claims relating to fraud will not be effective unless the proposal also addresses the question of recognition and enforcement of any judgment that emerges from such procedures. Furthermore, the U.S. proposals do not provide sufficient details on the implementation of consumer arbitration schemes to assure that consumer and producers will have confidence in such mechanisms as an alternative to judicial mechanisms. Also, the proposals make no effort to provide a roadmap for addressing the question of funding for arbitration, which may turn out to be its Achilles' Heel.[37]

VI. SUMMARY AND RECOMMENDATIONS

At this stage in the process, it would seem that none of the current proposals would serve as an effective framework for providing consumers confidence that their legitimate expectations in contract performance by foreign suppliers will be protected through effective remedies. The Brazilian proposal offers a choice of law solution that is over-inclusive, because it prevents potentially efficient consumer-producer agreements in resolving problems of legal uncertainty, and ultimately ineffective, because it does not address jurisdiction or, for that matter, enforcement of judgments in the jurisdiction in which the foreign supplier's assets can be found. Similarly, the Canadian proposal closes the door to potentially efficient non-judicial modes of dispute settlement and enforcement without a plausible roadmap for solving complex problems raised by the difference between different national systems for determining jurisdiction. These differences, moreover, already have been found to be insuperable in negotiations at the Hague Conference on Private International Law for a global convention on the recognition and enforcement of civil judgments. The Hague Conference's failure suggests that – even within the Western Hemisphere, which also experiences the tension between different conceptions about judicial jurisdiction – a convention on agreed bases for jurisdiction in B2C electronic commerce also may not be negotiable. Finally, the U.S. proposal addresses only the question of institutional cooperation in cross-border fraud, which constitutes only a subset of the cases of interest to consumers of foreign-supplied products. Neither does the U.S. proposal directly address the question of enforcement of claims once they are arbitrated or adjudicated other than through pure inter-governmental cooperation (and then only in cases of fraud). In sum, none of the proposals – Brazilian, Canadian, or U.S. – provides a comprehensive framework that will achieve real world results, either in furthering consumer interests or producer interests, much less in achieving a workable and just balance between those interests.[38]

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[36] See United Nations Convention on Contracts for the International Sale of Goods (CISG), adopted April 11, 1980, entered into force on January 1, 1988 (available at http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf).

[37] One interesting possibility, however, would be for suppliers, individually or collectively, to fund arbitration. Admittedly, this could increase the risk, and certainly the perception, that the arbitral process was biased towards the paying party. Yet this risk might be reduced through negotiation between supplier and consumer groups, or legislative imposition, of so-called "due process" protocols, under which arbitral procedures funded by suppliers would provide consumers fair procedures and neutral decision-making.

[38] It would be an exaggeration to say, as did Shakespeare's Mercutio in his dying breath. "a plague a'both your houses!" See William Shakespeare, Romeo and Juliet, Act 3, Scene 1, lines 90-92 (available at http://www.enotes.com/shakespeare-quotes/plague-o-both-your-houses). But consumer empowerment in the OAS member states requires nothing less than an accommodation between the three houses reflected in the Brazilian, Canadian and U.S. proposals.

A. A New Negotiating Framework

In light of the forgoing, it seems necessary to undertake a wholesale revision of current progress before continuing with the process. In that new framework, the negotiators could together address the issues raised by the current proposals, drawing on the positive elements of each of these proposals. Notably, the Porto Alegre meeting asked the OAS Legal Department to address the issues raised by the competing texts. It is perhaps time to create a working group so that the Member States may consider new proposals through which they might ensure the fulfillment of their common goals.

Certain elements of each of the current proposals may still be worth resurrecting as basic concepts in this new procedural context. For example, it might be useful to explore the U.S. idea for low-cost individualized arbitration as supplemented where necessary by class action procedures. However, that recommendation comes with three provisos. First, the idea must be radically transformed and expanded to cover all relevant contract non-performance risks (except perhaps products liability theories that raise even more complicated problems that should be framed as questions of tort or delicts). Second, the idea must be supplemented to include proposals for the funding of arbitration, which address the question whether that cost should be borne by suppliers, suppliers and consumers, or only those consumers most directly benefiting from arbitration. Third, the idea must include enforcement mechanisms, providing either for funds within the consumer's jurisdiction as a source of payment or legal reform assuring enforcement at low cost in the supplier's jurisdiction or wherever the supplier's assets are be found. Additionally, the core Brazilian idea that a default rule that favors consumers may be necessary ought to be a central part of any proposed model law or treaty. But it would seem that the consumer's home law would provide sufficient protection for that purpose, particularly if it were coupled with ironclad assurances that the mandatory provisions of the consumer's home law will be applicable in any forum, even in the face of an otherwise valid contractual choice of law or choice of forum clause. Finally, the essence of the Canadian proposal that vendors ought to be able to avoid the law of the consumer's state through a choice of law clause in a narrowly-defined set of circumstances should also be a central part of any proposed model law or treaty.

Admittedly, these various elements are related in many ways; for example, there is an obvious connection between how much consumers and suppliers are willing to pay for arbitration and how effective it is in resolving their disputes by providing enforceable and final adjudications. Comparative law experts understand that substantive law is comprehensible only within a procedural and remedial context. Thus, a working group negotiating on the basis of the objective of seeking reasonably-certain, enforceable remedies at low institutional cost should structure its work by considering these issues in terms of the all the relevant issues (namely, the substance of applicable law, the procedure for dispute settlement, and finally the mechanisms for enforcement). The real tragedy of CIDIP-VII thus far is that each of the proposals in isolation has sought to address the larger problem by addressing only a subset of these issues. A comprehensive analytical approach is necessary; a true working group is required.

At a minimum, therefore, the OAS should move immediately to constitute the working group contemplated by the Porto Alegre document. To facilitate this process, the Member States should analyze how to achieve their common objectives through an agreed set of principles and a common roadmap for a discussion, rather than continued elaboration of the existing proposals. In that discussion, it would be useful for the working group explicitly to take into account the following threshold questions:

1) the conditions under which choice of law and choice of forum clauses may be acceptable even in consumer transactions, in light of CIDIP-V's Mexico City Treaty and the current CIDIP-V commitment to respect the mandatory law of forum should be maintained in B2C cases;

2) the conditions under which judicial class action procedures should be employed to vindicate claims that are so small that they would otherwise go un-adjudicated or under-enforced;

3) the conditions under which arbitration or other forms of private intermediation, such as through financial or credit institutions, may be acceptable forms of dispute resolution for those consumer claims that are so small that they would otherwise go un-adjudicated and under-enforced;

4) the conditions under which the cost of private judicial class action, arbitration or other forms of private intermediation should be funded, as well as the implications of the funding mechanism for forum neutrality; and

5) the conditions under which funds might be made available in advance, or other escrow or security devices might be created, to provide for the timely payment of the remedies awarded by the applicable dispute resolution procedure.

Exhaustive analysis of these questions would yield a wealth of information and creative thinking, perhaps with the input of other inter-governmental and non-governmental organizations, which would provide the negotiators with a menu of possible solutions.

B. A New Analytic Approach

In addition to a systematic consideration of the issues that have already arisen before new efforts at drafting move forward, it might be useful also for the CIDIP process to approach the negotiation from an analytical perspective that takes into account the variety of interests and different institutional capacities prevalent among all the states that are participating in the negotiation. That perspective might yield a potential mix of options under which consumer's interests could be protected. A model law or treaty might allow states and consumers to choose from a menu of options with different likelihoods of leading to enforceable remedies. For example, a model law or treaty could provide consumers with a pre-dispute choice to select less costly arbitration and/or pay a premium on the price for a more effective remedy. In return, a supplier might consent to jurisdiction in the consumer's home state in the enforcement of an arbitral judgment and/or deposit of funds in the consumer's home country in order to satisfy future claims. With appropriate adjustments, post-dispute consent mechanism for arbitration or class action litigation might also be constructed. Finally, one could imagine a set of state-to-state cooperation agreements for prosecuting collective or class action claims, not only for fraud or deceptive practices but also for contract performance issues. The legal issues relating to private intermediation of consumer claims might also be explored to determine whether additional governmental or private enforcement mechanisms are needed to buttress the existing capabilities of financial intermediaries. Each option should be calculated to achieve effective remedies for consumers, but the options might be presented as a menu from which states or groups or states should be free to choose, taking into account their own objectives and institutional capacities.

In adopting this kind of analytical perspective, one might need to lower one's expectations for what could be achieved in this CIDIP to take on the challenge of transnational consumer protection. Obviously, a piecemeal approach that seeks to elicit information about true social costs and benefits perceived by consumer, suppliers and states is not likely to provide global solutions covering all possible issues. Attention will therefore need to be paid to whether diversity of consumer protection is rational and reflects the true interests of consumers, suppliers and states, or merely constitutes a market or governance failure.

A positive explanation of lower levels of protection might be that the interests of some consumer in contract validity and contract performance flows from a national policy subordinating consumer protection through enforcement to the greater goal of expanding market opportunities for consumers. A more negative explanation of lower levels of protection might flow from the possibility that suppliers may not be willing to make commitment to more credible remedies utilizing the institutional options available in the consumer's home country. On the other hand, these negative supplier concerns may not be unrealistic or illegitimate, if there are genuine deficiencies in the quality of legal institutions in the consumer state. Such concerns could include the transparency of the role of the government or private parties in those procedures given the risk of disguised discrimination in international trade. In that case, a foreign supplier's unwillingness to employ those

institutions may actually be beneficial for consumers in that jurisdiction in the long run, because it will create competitive pressure for improved performance by that country's institutions. The fact that consumers in other countries will receive better, more-enforceable contract commitments in providing remedies would draw attention to relative failures in institutional performance and might have the salutary effect of helping to build a culture of consumer empowerment. Similarly, low-cost dispute resolution mechanisms might have the salutary effect of lowering supplier overhead costs, enabling small business more effectively to participate in the markets and thus empowering individual producers as well as individual consumers. In countries that do not supply higher levels of mandatory protection, such a culture of empowerment would placing additional pressure on governments that have substandard domestic legal institutions to improve those institutions as a means for inducing foreign suppliers to lower their prices and increase their supply to consumers in that state.

Thus, a variety of outcomes in levels of consumer protection might even create pressure not only for the correction of market failures but also for the correction of governance failures. Lowering one's expectations for what can be achieved in the CIDIP process might, therefore, have the counter-intuitive result of providing even greater benefits for improved markets and governance in the Member States than would an effort to seek a final and universal solution to the issue of consumer protection in cross-border B2C.

C. Final Thoughts

Good analysis and policymaking through the CIDIP process needs to respect the law of unintended consequences. A variety of options suitable for a range of states, which must seek to achieve consumer protection at the lowest cost possible within the context of their respective institutional capabilities and interests, would be better than a single solution that would be framed in terms of the institutional capabilities and interests of any state. B2C commerce in the transnational setting is a new and as yet little understood phenomenon. Accordingly, the CIDIP should serve as a laboratory for policy experimentation. Enabling consumers to have a menu of options for protecting their interests also will enable governments to receive necessary feedback to evaluate the performance of their policy experimentation.

One thing is clear, however. Low value cross-border B2C commerce claims can not be addressed through the traditional model of private litigation by individual claimants, seeking judgments rendered in the consumer's home state that are enforceable in the supplier's home state or wherever its assets can be found. The benefits of such litigation simply do not warrant its costs for consumers, and the costs of transnational litigation are even greater than the costs of domestic litigation. The OAS Member States need to consider alternative models, such as transnational class action, arbitration or private means of dispute resolution, if the CIDIP process is to be of any relevance to the problem it seeks to address. If governments are not more creative and flexible in their search for solutions, the only available solutions will be those offered by markets themselves. The risk of governmental irrelevance, therefore, should compel the Member States participating in CIDIP-VII to target a narrow, clearly defined problem – namely, the issue of small claims whose value far exceeds the ordinary costs of dispute resolution and enforcement. Serving the true needs of consumers by solving that problem will be difficult enough. Any more ambitious agenda may well do more harm than good.

Attachments:

A. The Brazilian Proposal III – Treaty on Choice of Law

B The Canadian Proposals – Model Laws on Jurisdiction and Conflict of Laws Rules for Consumer Contracts on the context of CIDIP-VII
   – Jurisdiction for Consumer Contracts (Draft Model Provisions) (October 2006)
   – Choice of Law Rules for Consumer Contracts (Draft Model Propositions) (November 2006)

C. The U.S. Proposals: - Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers submited by the United States of America for CIDIP-VII;
   – Draft Model Law on Small Claims (Annex A);
   – Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims (Annex B)
   – Draft Model Law on Government Redress for Consumers Including Across Borders (Annex C)

PROPOSAL OF THE BRAZILIAN DELEGATION – III
after the Preparatory Meeting of Porto Alegre
December 12, 2006 – for the Working Group

PROPOSAL OF AN INTER-AMERICAN CONVENTION
ON THE LAW APPLICABLE TO SOME
INTERNATIONAL CONSUMER CONTRACTS AND TRANSACTIONS

The States Parties to this Convention,[1]

REAFFIRMING their desire to continue the progressive development and codification of private international law among member States of the Organization of American States;[2]

HAVING IN MIND the convenience of harmonizing the solutions to questions relative to international consumption as a means to contribute to the development of international trade in the region, the need to provide for an adequate protection to the consumer, in accordance with the UN General Assembly Resolution A/RES/39/248 (Guidelines for Consumer Protection, 16. April 1985), and to give greater juridical security to all the parties intervening in consumer transactions;[3]

CONSIDERING that the priority finality of this Convention is to give in the matter of conflict of laws special protection to consumers in their international contracting, relations and transactions with professionals and goods and services suppliers, avoid discriminations and thus give them economic benefits, lowering the costs, increasing the availability and the possibilities of choice with the greater circulation of goods and services in the regional market, which tends to grow;[4]

RESPONDING to the exponential growth of contracts and transactions between consumers and professionals or goods and services suppliers in the region, and that in order to stimulate this process it is necessary to have in mind the increasingly less local nature of the consumer transactions, the increase of mass tourism and the complexity of the new consumer contracts with contacts in various States, making it necessary to create new legal instruments in the choice of applicable law to international contracts, that stimulate the consumer's reliance in international consumer contracts;[5]

HAVE AGREED to approve the following Convention:

CHAPTER 1
GENERAL PROVISIONS

I. Scope of application

Article 1. Definition of consumer

1. For the purposes of the contracts, relations, [operations][6] and transactions comprehended in this Convention, consumer means any natural person who, in a transaction with a professional trader or supplier of goods or services, acts with personal, family-related

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[1] Source: suggestion of the OAS Forum, particularly from the honorable delegation from the Republic of El Salvador in the Expert Forum, Inter-American Convention on Applicable Law to International Contracts, Brazilian, Argentinean and German doctrine on e-commerce, especially Lorenzetti/Lima Marques, Fuhrmann y Jayme. Preambulatory Clauses of the United Nations Convention on the Use of Electronic Communications in International Contracts, NY, 2005.

[2] Standard preambulatory clause, Inter-American Conventions.

[3] Preambulatory clause about the concern of the honorable Delegation of Mexico of harmonious solution between the interests of commerce and the international consumer. Text suggestion by Diego Fernandez Arroyo and Paula All.

[4] New preambulatory clause (text by Claudia Lima Marques) based on the "Introducción explicatoria de la Reunión de especialistas realizada por la OEA" ["*Explanatory introduction of the experts' meeting made by the OAS*"], Porto Alegre, Brazil, December 2-4, 2006, second paragraph and suggestion of the honorable Delegations of Argentina and the USA in the Porto Alegre preparatory meeting. Its goal is to clarify three aspects: it is a Convention on Conflict of Laws, only applicable to consumer contracts and operations, and its main goal is to protect consumer interests, but considering the interests of all the parties by giving the possibility of growth of this market.

[5] Preambulatory clause to give greater clarity about the goal of the Convention which is only of choice of applicable law to the contract (*lex contractus*) or *contractual choice of law*. Response to the concerns of the honorable Delegation of the USA in the Porto Alegre preparatory meeting.

[6] Inclusion to harmonize with the USA proposal of Model Law, nr. 2.1. Suggestion from the honorable Delegation of Mexico in the Porto Alegre preparatory meeting.

or domestic purposes,[7] or purposes not belonging to his professional activity or with the purpose of reselling.[8]

2. Regarded as consumers are also third parties or other bystanders who directly enjoy, as final consignees, the services and products contracted for.[9]

[2b. The person who acts at the same time with purposes belonging to his professional activity and of consumption shall not be considered a consumer.][10]

Option in case art. 1.2 is eliminated:

[1. For the effects of the contracts, relations, [operations] and transactions comprehended in this Convention, consumer means any natural personal who is the final consignee of goods and services that, before a professional or goods and services supplier, acts with personal, family-related or domestice purposes, or purposes not belonging to his professional activity or with the purpose of reselling. [11]

2. The person who acts at the same time with purposes belonging to his professional activity and of consumption shall not be considered a consumer.]

3. In the case of travel and timesharing (multipropriedad, multi-property) contracts, the following ones are regarded as consumers:

a. the main contracting party or the natural person who buys or agrees to buy the travel, the package holiday package or the timeshare for his own use;

b. the beneficiaries or third parties on behalf of whom the main contracting party buys or agrees to buy the travel, the package holiday or the timeshare and those who enjoy the travel, the package holiday or the timeshare for a length of time, even though they are not the main contracting party;

c. the assignee or the natural person to whom the main contracting party or the beneficiary assigns the travel, the package holiday or the timeshare;[12]

Option in case art. 1.2 is eliminated:

[3.In the case of travel and timeshare (multipropriedad, multi-property) contracts, the following ones shall also be regarded as consumers:

a. the beneficiaries or third parties on behalf of whom the main contracting party buys or agrees to buy the travel, the package holiday or the timeshare and those who enjoy the travel, the package holiday or the timeshare for a length of time, even though they are not the main contracting party;

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[7] Source: art. 2, exclusion of consumer contracts, of the United Nations Convention on the Use of Electronic Communications in International Contracts, NY, 2005. Inclusion to harmonize with the USA proposal, nr. 2.1. Suggestion from the honorable Delegation of Mexico in the Porto Alegre preparatory meeting.

[8] Inclusion to harmonize with the USA proposal, nr. 2.1. Suggestion from the honorable Delegation of Mexico in the Porto Alegre preparatory meeting. Sources: US Eletronic Commerce Signatures Act; Art. 5 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations (EU), Art. 2,1 of the Directive 85/577/EEC on contracts outside of business premises, Art. 2, b e c of the Directive 93/13/EEC on unfair terms in consumer contracts, Art. 2,2 of the Directive 97/7/EC on distance contracts, and Art. 1, 2 of the Directive 1999/44/EC on associated guarantees. Doctrine of Jayme (an International Private Law of protection of the human person in globalization). Suggestion from Adriana Dreyzin de Klor and Paula All to include the supplier of goods and services. Language correction in the text by the honorable Delegation of El Salvador.

[9] Final text: Diego Fernandez Arroyo. Critical manifestation for the striking out of “belonging to the family of the main consumer” from the honorable Delegation of Mexico in the Porto Alegre preparatory meeting. Support from the honorable Delegation of Argentina.

[10] Suggestion from Thomas Richter (Hamburg/UFRGS) before the Porto Alegre preparatory meeting, text by Claudia Lima Marques, kept in brackets by suggestion of the honorable Delegation of the USA. Suggestion of inverting the sentence (Marcelo de Nardi-Judge in the preparatory meeting) and Claudia Lima Marques (Brazil). Original text: "In case the person acts, simultaneously, with purposes belonging to its professional and consumer activities (dual-use-contracts), the person shall not be considered a consumer."

[11] In case there are no longer open definitions of “bystander” consumer or not the main contracting party, it is necessary to include the user consumer from the consumer’s family, as it is done in the USA proposed Model Law, nr. 2.1. Final Text Claudia Lima Marques (Brazil).

[12] Critical manifestation from the honorable Delegation of the USA (brackets and option) in the preparatory meeting. Sources: Art. 2.4 and 4.3 of the Directive 90/314/EEC on package travel and the European Directive 94/47/EC on timesharing or multi-property, Spanish doctrine (LETE ACHIRICA, Javier, El Contrato de Multipropriedad y la Protección de los consumidores [*The Multi-Property Contract and Consumer Protection*], Ed. Cedec, Barcelona, 1997, p. 258).

b. the assignee or the person to whom the main contracting party or the beneficiary assigns the travel, the package holiday or the timeshare.] [13]

[4. If the law indicated as applicable by virtue of this Convention or other law closely connected to the case defines in a wider or more favorable manner who is to be regarded as a consumer or treats other agents as consumers, the judge entitled to adjudicate the matter may take into consideration such an expanded scope of application of this Convention, as long as it is more favorable to the consumer's interests.] [14]

Option to other definitions [in different articles]:

[**Art. 1b. Definition of international consumer contract or transaction.**

1. It is considered to be an international consumer contract or transaction when the consumer has its domicile in a country different from the domicile or seat of the professional or goods or services supplier, that acted in the transaction, operation or contract. [15]

2. As international consumer contract or transaction it is understood the operations, the transactions or the act celebrated between a consumer and a professional or goods or services supplier, that has real and objective contacts with more than one State. Real and objective contacts are, among others, the domicile, the branches or the customary residence of the parties, the places of celebration and performance, the international distance contracting and the situation of the goods object of the international contract or transaction.][16]

[**Art. 1c. Definition of international distance consumer contracting**[17]

1. By international distance consumer contract it is understood the act or negotiation of a contract celebrated between a professional or products or services supplier and a consumer, that have their domiciles or branches in different States by the time of the conclusion of the contract between the parties.

2. The act or negotiation will not be considered as international distance consumer contract if the consumer and the professional or goods or services supplier are physically present in the same State by the time of the conclusion of the contract between the parties.]

[**Art. 1d. Definition of consumer domicile**. The domicile of the consumer natural person shall be determined by the following circumstances in the order indicated:

1. The location of his habitual residence;

2. In the absence of the foregoing, the place of mere residence or the place where the person is located.

3. The domicile of incompetent persons is that of their legal representatives, except when they are abandoned by those representatives.][18]

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[13] If there are no longer open definitions of "bystander" consumer or not the main contracting party, it is necessary to include in a special way the time-sharing and travel packages consumers, since seldom they are the main contracting parties, but rather the final users of the goods or services. Final Text Claudia Lima Marques (Brazil).

[14] Article to allow the exceptional inclusion of legal persons as consumers, if the applicable law or other law closely connected with the case so allows. It is a prerogative of the judge or arbiter, not an obligation ("may take into consideration "). Suggestion of maintaining from the honorable Delegations of Argentina, El Salvador and Mexico, experts of Paraguay and Uruguay. Suggestion of striking out from the honorable Delegation of the USA. Sources: the proposed solution answers to the need to authorize the use of municipal law if it is more favorable to the consumer in the definitions, including the protected subject. Inspired in the Hague Project of 1980 and its open rules of definition.

[15] Sources: Observations from the honorable Delegation of the USA in the Preparatory Meeting. Proposal from Tellechea Bergmann. Correction in the Spanish text by the honorable Delegation of El Salvador.

[16] Sources: Argentinean Project on a Private International Law Statute with "objective contacts". Proposal from Tellechea Bergmann. Canadian Proposal of Model Law with definition of "real and substantial connection". Final text by Claudia Lima Marques and Marcelo De Nardi (Brazil).

[17] New article. Observations from the honorable Delegations of the USA and Mexico in the Preparatory Meeting to consider the UNCITRAL convention. As a response to these critical manifestation, text by Claudia Lima Marques. Spanish Text correction by the honorable Delegation of El Salvador. Sources of inspiration: Suggestions by José Ângelo Faria (UFRGS-UNCITRAL) send to the preparatory meeting in Porto Alegre. European Directive on Electronic Commerce. Art. 1.1 of the United Nations Convention on the Use of Electronic Communications in International Contracts, NY, 2005. Purpose: to facilitate the distinction between e-commerce and tourism consumer contracts (art.2.1, 2.3 and art. 6 and 7) of the Brazilian proposal. Critical response from the honorable Delegation of Mexico about the uncertainty about (definition) distance contracts today.

[18] Observations of the honorable Delegation of Mexico in the Preparatory Meeting of Porto Alegre. Sources: Proposal from Tellechea Bergmann; Inter-American Convention on Domicile of Natural Persons in Private International Law. Suggestion of Adriana Dreyzin

II. CONTRACTUAL PROTECTION

Article 2. General contractual protection – Determination of the Applicable Law[19]

1. If there is no valid choice of law by the parties, the contracts made being the consumer in its country of domicile are governed by the law of this place.[20] Such rule is especially applicable to contracts celebrated at distance, electronically, by telecommunications or by any analogous means of international distance consumer contracting.[21]

2. If the parties have selected the law of the place of celebration, the place of performance or the law of the domicile or seat of the goods or services supplier, such law will be applicable[22] as long as it is more favorable to the consumer.[23]

3. The prior choice of the parties of the applicable law to the contract will be considered more favorably to the consumer:

a) if the chosen law is the one of the consumer's domicile;

b) if the chosen law is the one of the common domicile of the consumer and one of the branches of the professional or goods or services supplier;

c) if the chosen law is the law of the place of celebration or the place of performance and coincides with the law of the domicile or seat of the goods or services supplier. [24]

4. The contracts celebrated by the consumer being outside of his country of domicile are governed by the law chosen by the parties, who may choose the law of the place of celebration of the contract, the law of the place of performance or the law of the consumer's domicile. [25] In case of absence of valid choice, the contracts are governed by the law of the place of celebration. [26]

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de Klor and Paula All on the need to clarify that the consumer's domicile is his habitual residence. Useful to harmonize with the proposals of the honorable Delegation of Canada.

[19] New title of the article by Claudia Lima Marques, clarity about the purpose of the determination of the applicable law to international consumer contracts (in general) as a response to the critical manifestation of the honorable Delegation of Canada in the Preparatory Meeting of Porto Alegre.

[20] New text of art. 2, in the Preparatory Meeting of Porto Alegre, by Diego Fernandez Arroyo (Argentina) and Manoel André da Rocha (UFRGS-ABDI-Brazil) to give greater clarity to the rule in the Lima Marques project.

[21] New text of art. 2, negotiated at the Preparatory Meeting of Porto Alegre, by Diego Fernandez Arroyo (Argentina) and Manoel André da Rocha (UFRGS-ABDI-Brasil). In the original: "it will be of application", suggestion of "will be applicable" by the honorable Delegation of El Salvador. Suggestion of Technological Neutrality by Adriana Dreyzin de Klor and Paula All, as well as the documents of the honorable Delegation of Canada. Definition of international distance consumer contracting in art. 1c and inclusion by Claudia Lima Marques (Brazil).

[22] New text of art. 2, negotiated at the Preparatory Meeting of Porto Alegre, by Diego Fernandez Arroyo (Argentina).

[23] New text by Diego Fernandez Arroyo (Argentina) of the rule of *favor consumidor* (application of the law most favorable to the consumer) of the Lima Marques project, in the Preparatory Meeting of Porto Alegre. Criticism to the final test of the law most favorable to the consumer by the honorable Delegation of the USA. Praising by the honorable Delegations of Argentina and El Salvador. Maintenance by the Delegation of Brazil as the symbolic and value point of the Convention. It is more important to Brazil to accept the freedom of contract (limited choice of applicable law) in B2C contracts and not having a worse situation to B2C than the current situation in B2B. Direct sources: doctrine of Neuhaus, von Hoffmann, Zweigert, Kropholler (limiting the freedom of contract of the stronger parties), Jayme (allowing for the freedom of contract with limits to consumer contracts), Boggiano and Toniollo (choosing the connection most favorable to the consumer), Lando and Lorenzetti (choosing the law of the consumer's domicile), Lima Marques project.

[24] New text by Claudia Lima Marques to give more clarity and predictability to the test of the most favorable law, with the help from the honorable delegations of the USA and Argentina, in the Preparatory Meeting of Porto Alegre. Response to the criticism from the honorable Delegation of the USA, since small- and medium-sized companies can choose (in their adherence contracts) in a valid, predictable and safe way the law of their domicile or seat, if it coincides with the law of the place where the contract was celebrated (in case of contracts with tourists) or with the law of the place of performance (in case of consumer e-commerce). To keep the symbolic and value point of the Convention (*favor consumidor*). Language correction from the honorable Delegation of El Salvador.

[25] Original text of the Lima Marques proposal with the distinction of contracts of the tourist or active consumer (without the test of the law most favorable to the consumer), with the freedom of contract limited to some possible connections.

[26] Suggestion from Heinz-Peter Mansel (Köln-DLJV) to complete art. 2, with a fixated point of connection, in case of no choice by the parties, prior to the Preparatory Meeting of Porto Alegre. Lima Marques option for the connection of the law of the place of celebration, since it is not about e-commerce, but the tourist consumer. Language correction of the text by the honorable Delegation of El Salvador.

Article 3 – Choice and determination of applicable law[27] (formerly art. 2, paras. 5, 6, 7 and 8)

1. The choice of the parties of the State law applicable to the consumer contract must be expressed in writing and be contained within the contract itself. [28] In the event of choice by the supplier to adherence by the consumer, the law chosen as applicable must be expressed clearly in the prior information to the consumer. In case of on-line or distance choice by the consumer, the options of laws to be selected must be communicated clearly in the prior information to the consumer. [29]

2. In the event of prior choice of the applicable law, the parties may select only one applicable law to the contract, which must be a State law. [30]

[3. The parties may, after the conflict or dispute has initiated, choose another State law other than that expressly provided for in the contract, if they do so in common agreement and within the options of article 2. In such case, paragraph 2 applies and such modification shall not affect the formal validity of the original contract nor the rights of third parties.] [31]

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provision of the *lex fori*. [32]

Article 4. Internationally mandatory rules[33] (formerly art. 3)

1. Notwithstanding the preceding articles, the internationally mandatory rules of the country of forum shall necessarily apply for the protection of the consumer. [34]

[2. In case the conclusion of the contract was preceded in the country of the consumer's domicile by any negotiations or marketing activities by the supplier or its representatives, especially advertising material, mail, e-mail messages, prizes, invitations, maintenance of branch offices or representatives, and other similar activities focused on the commercialization of products and services and on the creation of a captive customer base in the country of the consumer's domicile, this country's internationally mandatory rules shall necessarily apply for the protection of the consumer, in addition to those of the country exercising jurisdiction and to the law applicable to the contract or consumer relation.] [35]

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[27] New Article made with formerly art. 2, paras. 5, 6, 7 and 8. With the changes done in the Preparatory Meeting of Porto Alegre, art. 2 would have 8 paragraphs. Decision to separate them by the Delegation of Brazil.

[28] Sources: Modification of art. 7 of CIDIP V. Brazilian opinion on the current Art. 3 of the Rome Convention of 1980 and European doctrine on the proposal of a new Rome I and option for the State law to international consumer contracts. Inspiration of express choice in writing from the proposal of the honorable Delegation of Canada (Canadian Model Law on choice of applicable law to consumer contracts, Preliminary Version of Disposition Model, November 2006).

[29] Sources: Modification of art. 7 of CIDIP V. Brazilian opinion on the current Art. 3 of the Rome Convention of 1980 and European doctrine on the proposal of a new Rome I. Suggestion of rule on the status of information by Erik Jayme, of Art. 3 number 4 of the Directive 2002/65/CE. Suggestion from Nadia de Araujo on the possibility of on-line choice prior to the Preparatory Meeting of Porto Alegre. Final text suggestion by the honorable Delegation of El Salvador.

[30] Text by Claudia Lima Marques. Sources: opinion on the current Art. 3 of the 1980 Rome Convention. Opinion on the Rules of Procedure proposal Rome I. Commentaries of Erik Jayme on the case of choice of the "The Glorious Sharia" or principles of Islamic Law (JAYME, Erik. Choice-of-law clauses in international contracts: some thoughts on the reform of art. 3 of the Rome Convention, in Seminário Internacional sobre a Comunitarização do Direito Internacional Privado, Almedina, 2005, p. 53-61). Doctrine to combat *depéçage*.

[31] Suggestion from the Argentinean delegates in the Expert Forum. Art. 8 of CIDIP V, with modifications. Text by Claudia Lima Marques.

[32] Text by Claudia Lima Marques. Source: Art. 12 of CIDIP V, with modifications. No observations in Porto Alegre.

[33] Suggestion from Javier Toniollo (Argentina) and the honorable Delegation of Argentina in the Preparatory Meeting of Porto Alegre to aggregate "internationally imperative".

[34] Suggestion from Javier Toniollo (Argentina) and the honorable Delegation of Argentina in the Preparatory Meeting of Porto Alegre. Response to the criticism of insecurity from the honorable Delegations of the USA and Mexico. Sources: Brazilian, Uruguayan and Argentinean doctrine. Art. 6, second sentence of the Hague Convention Project of 1979.

[35] Maintenance of the Brazilian proposal (Lima Marques project), with modifications. Suggestion by Paula All and Adriana Dreyzin de Klor, since "*filiais*" in Portuguese is not the same as in Spanish, so there was an option for "*sucursales*". Sources: Art. 7 of the 1980 Rome Convention (EU), doctrine of Neuhaus, Kroppoller, Jayme, Boggiano and Toniollo, Lorenzetti, Art. 29 and 29a of EGBGB. Spanish text correction by the honorable Delegation of El Salvador.

New Options to article 4.2 after the Porto Alegre meeting: [36]

[**Option 1 of maintaining the accumulation of laws and the application of imperative laws conserving the party autonomy of art. 2 to all consumers, European model of the 1980 Rome Convention**

2b. In case the conclusion of the contract is preceded in the country of the consumer's domicile by any by any negotiations or marketing activities by the supplier its branches or representatives, especially advertising material, mail, e-mail messages, prizes, invitations, and other similar activities focused on the commercialization of products and services and on the creation of a captive customer base in the country of the consumer's domicile, the choice of applicable law to the contract shall not deprive the consumer of the protection of his country of domicile's internationally mandatory rules.] [37]

[Option 2 of total nullity of the choice of law in accordance with art. 2 for passive consumers, Canadian model. Proposal of Canadian Model Law on applicable law, November 2006, Article 7.

2bb. The choice of article 2 will be null as long as it deprives a consumer of the mandatory protection to which he is entitled according to the internationally mandatory rules of his country of domicile if:

a) the conclusion of the contract or the consumer contract has been preceded in the country of the consumer's domicile or resulted from a solicitude of business or of any negotiation or marketing activity by the supplier its branches or representatives, especially advertising material, mail, e-mail messages, prizes, invitations, and other similar activities focused on the commercialization of products and services and on the creation of a captive customer base in such country.

b) the seller of goods, the professional or goods and services supplier has received the consumer's request from his country of domicile, or

c) the seller of goods, the professional or goods and services supplier has induced the consumer to travel to another country different from the consumer's country of domicile in order to configure the consumer contract.] [38]

Article 5. Loophole clause (formerly art. 4)

1. The law indicated as applicable by virtue of this Convention may not be applicable in exceptional cases, if, considering all the circumstances relevant to the case, the connection with the law indicated as applicable is superficial and the case itself is more closely related to another law, more favorable to the consumer.][39]

[Option to complement for greater security and foreseeability. Modeled alter article 19, para. 1, second sentence of the Belgian Code of Private International Law of 2004:

2. In case of application of para. 1, the judge must take into account especially:

a) the need for predictability by the parties as to applicable law, and

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[36] As a response to the observations from the honorable Delegation of Canada in the Preparatory Meeting of Porto Alegre on the interplay among the 3 projects and rules. Text of the new options by Claudia Lima Marques (Brazil) for incorporation (eventually) in nr. 4.2 of the Brazilian proposal.

[37] Adaptation by Claudia Lima Marques of art. 5 of the 1980 Rome Convention (EU), also inspired in art. 3117 of the Quebec Civil Code of 1991, adaptation to current contracts and marketing practices.

[38] Option to harmonize with the spirit of the Canadian Model Law on the choice of applicable law to consumer contracts (Preliminary Version of Provision Models), November 2006. Adaptation by Claudia Lima Marques *italicized* of the Canadian model of November 28 2006 (OAS Virtual Forum), of total nullity of the choice of law in consumer contracts by the passive consumer (relation with Art. 2.1, 2.2, 2.3 of the Brazilian proposal and Art.7(1) of the Canadian Model Law, application of the law of the country of the consumer's domicile or the law of the habitual residence of the consumer after the nullity). Use of the initial documents of the proposal of the honorable Delegation of Canada, on protection only in accordance with internationally imperative or mandatory laws and not as presented in the Canadian Final Proposal of Model Law (November 2006) of nullity by difference in relation to [all] the consumer protection laws of the country of the consumer's habitual residence or domicile.

[39] Suggestion to separate the paragraphs of art. 4 by Claudia Lima Marques. Criticism to the exception clause by the honorable Delegation of the USA in the Preparatory Meeting of Porto Alegre. Praising by the honorable Delegation of Argentina. Maintenance by the Delegation of Brazil. Suggestion of the Bolivian Expert, Erika Tinajeros Arce, in the Porto Alegre meeting, that this article may be useful to consumers in countries where consumer protection laws are merely administrative, such as Bolivia.

b) the circumstance of the relation or contract in dispute having been established regularly, in accordance with the rules of the States with which they had relations in the moment of its creation.] [40]

[Article 6. Harmonization clause[41] (formerly article 4, paras. 2 and 3)

[1. The law designated by this Convention shall be applied even if said law is that of a State that is not a party.] [42]

[2. The different laws that may be applicable to various aspects of one and the same juridical relation shall be applied harmoniously in order to attain the purposes pursued by each of such laws in favor of the consumers. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of the protection of the consumers and of equity in each specific case.][43]

III- EXCLUDED MATTERS

Article 7. Excluded matters (formerly article 5)

1. The following is excluded from the field of application of this Convention:

a. transport contracts governed by international instruments in force;[44]

b. nsurance contracts and obligations deriving from securities transactions;

c. questions arising from the civil status or legal capacity of natural persons;

[d. questions arising from products extra-contractual liability][45]

e. contractual obligations the main object of which are wills and successions, matrimonial property regimes or those derived from family relationships;

[f. arbitration agreements and agreements on the choice of forum;][46]

[g. questions of jurisdiction, international procedural law, representation by attorneys before courts and alternative dispute resolution;][47]

h. questions of company law, social security, taxation, labor matters, domain names and intellectual property.[48]

i. contracts for international commercial transactions conducted between professionals or goods and services suppliers;[49]

j. obligations between bankrupts and their creditors and other analogous procedures, especially pre-bankruptcy and analogous;[50]

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[40] New sub-article. Suggestion by Claudia Lima Marques (Brazil) to soften the criticisms to the exception clause made by the honorable Delegation of the USA in the preparatory meeting. Source of inspiration: art. 19, paragraph 1, second sentence of the Belgian Private International Law Code of 2004.

[41] New article with formerly article 4, paras. 2 and 3. Criticism in the Preparatory Meeting were about other paragraph 1. Observations by the honorable Delegation of Argentina, in the Porto Alegre meeting, on the distinction of the topics dealt with in former article 4. Suggestion to separate the paragraphs of art. 4 by Claudia Lima Marques (Brazil).

[42] Source (former art.4.2): art. 2 of the Inter-American Convention on the Law Applicable to International Contracts (CIDIP V) Mexico 1994.

[43] Suggestion to separate the paragraphs of art. 4 by Claudia Lima Marques. Source (former art.4.3): Art. 9 of the Inter-American Convention on General Rules of Private International Law of 1979 indicating the harmonization of such rules always favorably to the consumer.

[44] Suggestion of text by the honorable Delegation of El Salvador and precision by Diego Fernandez Arroyo. No observations in the Porto Alegre Meeting.

[45] Text by Claudia Lima Marques. Suggestion from the honorable Delegation of the USA to exclude topics of *product liability* in the Porto Alegre Meeting. Correction of the text by Diego Fernandez Arroyo.

[46] Text by Claudia Lima Marques. Suggestion from the honorable Delegation of the USA in the Porto Alegre Meeting.

[47] Text by Claudia Lima Marques. Suggestion from the honorable Delegations of the USA in the Porto Alegre Meeting.

[48] Language correction of the text by the honorable Delegation of El Salvador. Suggestion to expressly exclude topics of intellectual property rights (very common in blogs, Orkut, You Tube, etc.) by the Delegation of Brazil, especially Marcelo De Nardi.

[49] Suggestion from the Delegation of Brazil to eliminate the mention to traders and replace by suppliers of goods and services.

[50] Sources: CIDIP V, Santa Maria Protocol (MERCOSUR), Art. 5 of the 1980 Rome Convention (EU), Art. 2 of the 1980 United Nations Convention on Contracts for the International Sales of Goods (UNCITRAL). Discussions in the Expert Forum, art. 5 and 6 of CIDIP V on international contracts, 1980 Rome Convention, suggestion from the doctrine about e-commerce on the exclusion of the topic of domains. Considering some countries (like the USA) have specific legislation on consumer bankruptcy, express exclusion also of labor, tax and social security topics. Suggestions from the honorable Delegation of the USA in the Preparatory Meeting of Porto Alegre.

2. From the field of application of this Convention are excluded other consumer contracts, transactions and relations, and the obligations arising thereof that, including consumers, are governed by specific conventions in force.[51]

IV – PROTECTION IN SPECIFIC SITUATIONS

Article 8. Travel and tourism contracts (formerly article 6)

1. Individual travel contracts concluded in package or with combined services, such as a tourist group or together with other hotel and/or tourist services, shall be governed by the law of the consumer's place of domicile, if it is also the place of business or branch of the travel agency which sold the travel contract, or where the offer was made, or advertising or any prior negotiations by the dealer, carrier, agency or its representative occurred.

2. In all other cases, to individual travel contracts concluded in package or with combined services, such as a tourist group or together with other hotel and/or tourist services, the law of the place where the consumer declares his acceptance of the contract shall apply.

3. To travel contracts not governed by international conventions, and that have been concluded through standard contracts or standard terms, the law of the place where the consumer declares his acceptance of the contract shall apply. [52]

Article 9. Timesharing contracts and similar contracts of use of immovable property in turns[53] (formerly article 7)

1. The consumer protection mandatory rules of the country of physical location of the leisure and hotel facilities, which rent, lease or sell the right of use in timeshare property and similar systems or contracts of use by turns of immovable property, located in States parties to this Convention, apply cumulatively to these contracts in favor of the consumers.

2. The rules of the country where the offer is made, where advertising or any marketing activity, such as phone calls, invitations for receptions, meetings, parties, shipment of prizes, invitation to offers, raffles, all-paid trips or free sales, among other business activities, are conducted by representatives or owners, organizers and managers of the timeshare and similar systems or contracts of use by turns of immovable property, or where pre-contracts or contracts for the right of use/enjoyment by turns of immovable property are signed, shall be considered in favor of the consumer, regarding information, cooling-off periods and other causes for termination of the contract or pre-contract, as well as the rules relating to the exacted content of the concluded contract and the possibility or not of payment or of signing credit card receipts during this period.[54]

CHAPTER 2
GENERAL AND FINAL CLAUSES

Article. 10. Information and proof of consumer law

1. In order to facilitate the application of this Convention, each one of the States parties can designate a Central Authority to facilitate the information about foreign and national law for the protection of consumers and changes thereto. In Federal States it shall be possible to designate more than one Central Authority. [55]

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[51] Suggestion to divide art. 5 by Claudia Lima Marques and greater clarity by the honorable Delegation of the USA. Manifestation of the honorable Delegation of the USA in favor of excluding expressly financial services in art. 5 in the Porto Alegre Meeting. No inclusion of such proposal by the Brazilian Delegation by now.

[52] Text by Claudia Lima Marques. Correction of the text by Paula All (Argentinean expert). Sources: German Law on Tourism Packages, Brazilian case law, n. 41 of the Austrian Law and doctrine of Kropholler (RabesZ 42(1978), p. 643). n. 12 of the 1976 German *AGB-Gesetz* and n. 11 of the 1976 German Law on Distance Education, incorporated into the BGB.

[53] Suggestion from the honorable Delegation of México not to define time-sharing contracts but rather the genre of complex contracts, with contacts in many countries, with services and involving shift-use real state. Correction of the text by Paula All, Tellechea Bergman and Diego Fernandez Arroyo.

[54] Sources: Art. 9 and Art. 5, European Directive 94/47/CE, Art. 15 of the Uruguayan Law, Ley 17.189/99, Art. 2 of the Paraguayan Law, Ley 1334/98, Brazilian case law on Art. 1 of the Consumer Defense Code (CDC), Lei 8.078/90, former n. 8 of the German Law on multi-property or time-sharing, TzWrG, of December 20, 1996, incorporated into the BGB. Language correction of the text by the honorable Delegation of El Salvador.

[55] Suggestion by Claudia Lima Marques in response to the critical manifestations from the honorable Delegation of Mexico, in the Preparatory Meeting of Porto Alegre, that the Inter-American Convention on Proof of and Information on Foreign Law is not in force

2. To accomplish such ends States can also rely on mechanisms provided for in the Inter-American Convention on Proof and Information of Foreign Law or other international instruments in force in such States. [56]

[Options to the final clauses not negotiate at the Porto Alegre meeting:]

Article 11. Exclusion of *renvoi*

The application of a country's law as determined by this convention shall be understood as the application of the current law in a State, excluding rules concerning conflict of laws. [57]

Article 12.

Relative to a State that has, in matters dealt with by this Convention, two or more applicable legal systems in different territorial units: a) any reference to the State's law contemplates the law of the corresponding territorial unit; b) any reference to regular residence or the seat in the State is to be understood as referring to regular residence or seat in a federal unit of the State.[58]

Article 13.

A State composed of different territorial units that have their own legal systems in questions dealt with by the present Convention is not bound to apply the rules of this Convention to conflicts arising among the legal systems in force in such territorial units.[59]

Article 14.

The States that have two or more territorial units in which different legal systems apply in questions dealt with by the present Convention can declare, at the moment of their signature, ratification or adherence, that the Convention shall be applicable to all of its territorial units or only to one or more of them.

Such declarations can be modified through posterior declarations, which shall specify expressly the territorial unit or units to which the present Convention shall apply. Such posterior declarations shall be transmitted to the General Secretariat of the Organization of American States and shall have effects ninety days after they are received.[60]

Article 15.

This Convention is open to signature to the members of the Organization of American States.[61]

Article 16.

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.[62]

Article 17.

This Convention shall be open to the adherence of any other State after its entry into force. The instruments of adherence shall be deposited with the General Secretariat of the Organization of American States.[63]

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in all States. Facilitation of the test of the most favorable law of art. 2. Also, afterwards, States can agree that in order to facilitate the application of this Convention, the Department of International Legal Affairs of the OAS can keep in its webpage a space for consulting the laws about consumer protection and consumer contracts, with the cooperation of the expert group and the States Parties.

[56] New paragraph in response to the critical manifestations from the honorable Delegation of Mexico, in the Preparatory Meeting of Porto Alegre, that the Inter-American Convention on Proof of and Information on Foreign Law is not in force in all States. Text suggested by the honorable Delegate of Argentina, Diego Fernandez Arroyo.

[57] Sources: Tellechea Bergman Project, CIDIP V, 1980 Rome Convention (EU). Suggestion from the honorable Delegations of Argentina and Uruguay to avoid *dépeçage* and *renvoi*.

[58] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

[59] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

[60] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

[61] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

[62] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

[63] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

Article 18.

This Convention shall enter into force for the ratifying States thirty days after the date in which the second instrument of ratification is deposited.

For each State that ratifies this Convention or adheres to it after the second instrument of ratification is deposited, the Convention shall enter into force in the thirtieth day after the date in which the State has deposited its instrument of ratification or adhesion.[64]

Article 19.

This Convention shall be in force indefinitely, but any of the States Parties can denounce it. The instrument of denounce shall be deposited with the General Secretariat of the Organization of American States. After one year counted from the date of the deposit of the instrument of denounce, the Convention shall cease to have effects for the denouncing State.[65]

Article 20.

The original instrument of this Convention, the texts of which in Spanish, French, English and Portuguese are equally authoritative, shall be deposited with the General Secretariat of the Organization of American States, that shall send an authentic copy of its text for registration and publication to the Secretariat of the United Nations, in conformity with article 102 of its constitutive Charter. The General Secretariat of the Organization of American States shall notify the member States of such Organization and the States that have adhered to the Convention the signatures, the deposit of instruments of ratification, adherence and denounce, as well as the reservations that may occur and the withdrawal of the latter.[66]

IN THE FAITH OF WHICH the plenipotentiaries subscribed, duly authorized by their respective governments, sign this Convention.[67]

MADE IN THE CITY OF....., ... on .....

[64] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.
[65] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.
[66] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.
[67] Source: rules of style of other Inter-American Conventions, for example, CIDIP V.

DESCRIPTION OF CANADA'S PROPOSAL ON THE DEVELOPMENT OF A MODEL LAW ON JURISDICTION AND CONFLICT OF LAWS RULES FOR CONSUMER CONTRACTS IN THE CONTEXT OF CIDIP-VII

In the context of CIDIP-VII, Canada proposes to develop a Model Law on consumer contracts that deals with the grounds on which a court could hear a case involving parties in crossborder situations and which State's laws would be applied to determine the case.

The purpose of this would be to set out uniform jurisdictional rules with respect to cross-border business-to-consumer contracts. While jurisdictional issues have always existed, the increase in the number of cross-border transactions taking place over the Internet has elevated the importance of jurisdictional issues. With cross-border transactions increasing, it is important that the legal framework supporting consumer transactions across borders be governed by consistent principles that lead to predictable results regardless of the State in which a particular consumer or vendor is located.

One of the consequences of numerous consumer contracts being made every day with consumers and vendors situated in different States is that inevitably some of these dealings result in disputes that must be resolved. Whenever a dispute crosses borders, questions arise concerning the court which has jurisdiction to hear the dispute (the forum) and which State's laws should apply to govern the resolution of the dispute (applicable law). While these two issues are distinct, they raise many of the same considerations. These issues are collectively referred to as conflict of laws rules.

Although consumer transactions, whether carried out electronically or otherwise, are subject to traditional rules relating to jurisdiction, electronic commerce poses challenges to this existing framework. The absence of boundaries, which characterizes the Internet, makes it difficult to determine where a contract was concluded. The courts have used various tests to determine whether they have jurisdiction and which State's laws should govern the resolution of Internet disputes.

By unifying the conflict of laws rules applicable to consumer contractual disputes, the proposed instrument would ensure that the same solution would be applied irrespective of the court hearing the case. Model legislation would provide greater certainty and predictability of results for resolving disputes relating to cross-border consumer contracts. The instrument would apply where the dispute involves more than one State and would not be limited to Internet disputes. It would apply to all consumer contractual disputes, online or offline.

Canada is proposing the drafting of a Model Law and not a convention because this it is the first time an instrument on the subject is developed and because the rules in this field are different from one OAS State to another. Realistically, to achieve any harmonisation in this context, a first step would be to have an instrument that allows States some flexibility in adopting it. As a binding international instrument, a convention does not provide such flexibility and would be less likely to achieve broad acceptance. A Model Law would.

For the Model Law to provide greater certainty and predictability, it should address the following issues:

Effectiveness of consumer protection online compared to transactions conducted through traditional means of communication – online protection should be no less effective;

- Application of consumer protection laws of the consumer's residence – consumer should benefit from the protection normally afforded him or her.
- Technological neutrality of the Model Law – the Model Law should not discriminate between different forms of technology;
- Certainty in the rules that apply to participants and their transactions - Participants should be able to predict their legal situation before engaging in commerce;
- Vendor's connection to the forum's law and courts – The legal risk of operating online should not be disproportionate to a vendor's connection to the relevant forum's laws and courts;
- Vendors should be able to choose whether or not to operate under a particular State's legal framework; and

- Growth of electronic commerce – The conflict of laws rules should not be an impediment to the continued growth of electronic commerce.

More particularly, the Model Law should include the following elements:

DEFINITIONS:

All the critical terms should be defined. Because the proposed Model Law is intended to be part of the States' legislation on consumer protection or on conflict of laws, it would be important to define the terms in a consistent manner with the rest of the legislation and each State will have to determine what definitions are required. However, some terms, including the following, may need to be defined for the purpose of the Model law, if not otherwise defined:

- Consumer contract;
- Consumer contract proceeding;
- habitual residence;
- Plaintiff;
- Vendor;
- Vendor's jurisdiction.

- **Exclusive application of the Model Law**: the Model Law needs to clarify whether a court's jurisdiction to hear a dispute relating to a consumer contract is to be determined according to the rules in the Model Law only and not according to any other jurisdictional rules that might otherwise be applicable to consumer contracts.

- **Grounds for jurisdiction**: the Model Law needs to address the specific grounds of jurisdiction of the court. It may outline the following grounds for jurisdiction of courts in the context of consumer contracts. The court of an enacting State would have jurisdiction in consumer contracts against a person if:

- that person is habitually resident in the enacting State at the time of the commencement of the consumer contract proceeding,
- there is a link between the enacting State and the facts on which the consumer contract proceeding against that person is based,
- there is a written agreement between the plaintiff and that person to the effect that the court has jurisdiction in the consumer contract proceeding,
- during the consumer contract proceeding, that person submits to the court's jurisdiction, or
- the consumer contract proceeding is a counterclaim in another proceeding in the court.

- **Link between the enacting State and the facts and the facts on which the consumer contract proceeding against a person is based:** The Model Law needs to outline the cases where it will be presumed that there is a link between the enacting State and the facts on which the consumer contract proceeding against a person is based, if that ground is included in the Model Law. The Model Law also needs to specify whether the list of cases is not an exhaustive one and does not limit the right of the plaintiff to prove other circumstances that constitute a link between the enacting State and the facts on which a consumer contract is based. Presumption of a connection with the forum may be drawn from the following conditions:

- the plaintiff is a consumer habitually resident in the enacting State and brought proceedings under a consumer contract in the courts of that same State against a vendor who is habitually resident in a State other than the enacting State, and
- one of the following circumstances exists:
  - the consumer contract resulted from a solicitation of business in the enacting State by the vendor (a consumer contract is deemed to have resulted from the solicitation of business in the enacting State by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the enacting State)
  - the vendor received the consumer's order in the enacting State (this presumption should not apply if the consumer and the vendor were in the presence of one another in the vendor's jurisdiction when the consumer contract was concluded), or

- the vendor induced the consumer to travel to a jurisdiction other than the enacting State for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

- Discretion in the exercise of jurisdiction: one additional issue to be discussed is whether it is appropriate for the court to decline to exercise its jurisdiction if there was a more appropriate forum to hear the consumer contract proceeding.

- Limitation on choice of forum clauses: because it is considered unlikely that most consumers would turn their minds to a choice of forum clause at the time of contracting and would only become aware of such a clause if a dispute arose, the Model Law may provide that the court should only enforce a choice of forum clause, if the clause was entered into by the parties after the commencement of the proceedings. Consequently, the Model Law may provide that a choice of forum clause would be void in the following circumstances:

- the agreement was entered into before the commencement of the proceeding,
- the agreement provides that the court of a State other than the State in which the consumer is habitually resident has jurisdiction in the consumer proceeding, and
- one of the following circumstances exists:
  - the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by the vendor and the consumer and vendor were not in the presence of one another in the enacting State when the consumer contract was concluded (a consumer contract may be deemed to have resulted from the solicitation of business in the consumer's jurisdiction by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the consumer's jurisdiction)
  - the vendor received the consumer's order in the consumer's jurisdiction, or
  - the vendor induced the consumer to travel to a jurisdiction other than his or her jurisdiction of habitual residence for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

- Conflict of laws rules: Once a court determines that it has jurisdiction to hear a consumer contract proceeding, it must then determine which substantive law should be applied to decide the merits of the dispute. Determining applicable law involves many of the same considerations that were mentioned above in relation to determining the proper jurisdictional forum:

- Essentially, the Model Law may need to establish a special choice of law rule for certain contracts made by consumers while generally allowing the parties to select the law that will apply to their contract at the time of its formation or later on, by agreement in writing, during their contractual relationship. However, it should be considered whether the Model Law should take the approach that the choice of law agreed to by the parties cannot deprive the consumer of the protection of the mandatory rules of the State in which he or she habitually resides. The mandatory rules are those substantive rules in the State's laws that cannot be derogated from in a contract in such a way that the consumer is left with less protection.
- There would also be a need to explore the necessity to provide a general rule for situations where the parties have not made a valid choice of law. In the absence of a valid choice of law agreement, the laws of the enacting State would apply to a consumer contract between a consumer who is habitually resident in the enacting State and vendor who is habitually resident in another State.
- Finally, the Model Law may need to provide that the agreement on choice of law is to be "in writing" and whether such an agreement would or should be effective in law if made electronically.

JURISDICTION FOR CONSUMER CONTRACTS
(DRAFT MODEL PROVISIONS)
October 2006

Canada

PART 1: JURISDICTION

Definitions

1. In this Part,

"consumer contract" means [A State may legislate to define the term "consumer contract" under this Act to have the same meaning as it does under its national law],

"consumer contract proceeding" means a proceeding brought in connection with a consumer contract,

"ordinarily resident" means [A State may refer to an existing definition of resident under its national law or leave it open as to its meaning],

[Alternatively, under a different provision]

1.1(1) Subject to paragraph 2), a person is an ordinarily resident of the place of usual residence as indicted in the contract.

(2) A business is ordinarily resident in [name of State] where:

(a) it has or is required by law to have a registered office in [name of state];
(b) it has registered an address in [name of State] at which process may be served generally;
(c) it has nominated an agent in [name of State] upon whom process may be served generally;
(d) it has a place of business in [name of State]; or
(e) its central management is exercised in [name of state].

"plaintiff" means a person who has commenced a consumer contract proceeding,

"vendor" includes a vendor's agent,

"vendor's jurisdiction" means the jurisdiction in which a vendor is ordinarily resident.

Commentary: While the definitions of consumer contract proceeding varies, for the most part, the main features of a consumer contract can be identified as follows:

- the contract is for the provision of goods or services for personal, family or household use;
- the vendor is acting in the course of his or her business; and
- the purchaser is an individual acting outside his or her trade or profession.

Exclusion of other ground for jurisdiction

2. The jurisdiction of a court in [name of the State] in a consumer contract proceeding where one party to the consumer contract is ordinarily resident in[name of the State] and another party to the consumer contract is ordinarily resident in a jurisdiction other than [name of the State] is to be determined solely in accordance with this Part.

Jurisdiction Rules for Consumer Contracts

3. A court has jurisdiction in a consumer contract proceeding that is brought against a person if:

(a) that person is ordinarily resident in [name of State] at the time of the commencement of the consumer contract proceeding,
(b) there is a real and substantial connection between [name of State] and the facts on which the consumer contract proceeding against that person is based,
(c) there is a written agreement between the plaintiff and that person to the effect that the court has jurisdiction in the consumer contract proceeding,
(d) during the consumer contract proceeding that person submits to the court's jurisdiction, or

(e) the consumer contract proceeding is a counterclaim in another proceeding in the court.

Real and Substantial Connection

4.(1) Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between [name of State] and the facts on which a consumer contract proceeding is based, a real and substantial connection between [name of State] and those facts is presumed to exist if:

(a) the plaintiff, a consumer ordinarily resident in [name of State], has brought a proceeding under a consumer contract in the courts of [name of State] against a vendor who is ordinarily resident in a jurisdiction other than [name of State], and

(b) one of the following circumstances exists:

(i) subject to subsections (2) and (3), the consumer contract resulted from a solicitation of business in [name of State] by the vendor,

(ii) the vendor received the consumer's order in [name of State], or

(iii) the vendor induced the consumer to travel to a jurisdiction other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

(2) For the purposes of subclause (1)(b)(i), a consumer contract is deemed to have resulted from the solicitation of business in [name of State] by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in [name of State].

(3) Subclause (1)(b)(i) does not apply if the consumer and the vendor were in the presence of one another in the vendor's jurisdiction when the consumer contract was concluded.

Discretion about the Exercise of Jurisdiction

5.(1) After considering the interests of the parties to a consumer contract proceeding and the public interest, a court may decline to exercise its jurisdiction in the consumer contract proceeding on the ground that the court of another State[1] is a more appropriate forum in which to try the consumer contract proceeding.

(2) In deciding the question of whether it or a court of another State is the more appropriate forum in which to try a consumer contract proceeding, a court shall consider the circumstances relevant to the consumer contract proceeding, including

(a) the comparative convenience and expense for the parties to the consumer contract proceeding and for their witnesses in litigation in the court or in any alternative forum,

(b) the law to be applied to issues in the consumer contract proceeding,

(c) the desirability of avoiding a multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fairness and efficiency of the legal system as a whole.

Limitation on Forum Selection Clauses

6.(1) Notwithstanding that an agreement pursuant to clause 3(c) purports to give a court jurisdiction in a consumer contract proceeding, that agreement is void if

(a) the agreement was entered into before the commencement of the proceeding,

(b) the agreement provides that the court of a jurisdiction other than the jurisdiction in which the consumer is ordinarily resident has jurisdiction in the consumer proceeding, and

(c) one of the following circumstances exists:

(i) the consumer contract resulted from a solicitation of business in the consumer's jurisdiction by the vendor and the consumer and vendor were

[1] States with sub-national entities, such as provinces or states, may wish to have a rule recognising them as «another jurisdiction» for the purpose of this law and to the extent it is desirable. For example, an enacting State may wish to enact the following: ,«each province is regarded as a country for the application of this Part».

not in the presence of one another in [name of State] when the consumer contract was concluded,

(ii) the vendor received the consumer's order in the consumer's jurisdiction, or

(iii) the vendor induced the consumer to travel to a jurisdiction other than his or her jurisdiction of ordinary residence for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

(2) For the purposes of subclause (1)(c)(i), a consumer contract is deemed to have resulted from the solicitation of business in the consumer's jurisdiction by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in the consumer's jurisdiction.

CHOICE OF LAW RULES FOR CONSUMER CONTRACTS

(DRAFT MODEL PROVISIONS)

November 2006

Canada

PART 2: CHOICE OF LAW[1]

7.(1) Subject to subsection (2), a consumer who is ordinarily resident in [name of State] and a vendor who is ordinarily resident in a jurisdiction other than [name of State] may agree in writing that the law of a particular jurisdiction will apply to their consumer contract.

(2) An agreement pursuant to subsection (1) is invalid to the extent that it deprives a consumer who is ordinarily resident in [name of State] of the protection to which he or she is entitled pursuant to the laws of [name of State] if:

(a) the consumer contract resulted from a solicitation of business in [name of State] by the vendor and the consumer and the vendor were not in the presence of one another in the vendor's jurisdiction when the consumer contract was concluded,

(b) the vendor received the consumer's order in [name of State], or

(c) the vendor induced the consumer to travel to a jurisdiction other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

(3) For the purposes of clause (2)(a), a consumer contract is deemed to have resulted from solicitation of business in [name of State] by the vendor unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers residing in [name of State].

(4) In the absence of a valid agreement pursuant to subsection (1), if one of the circumstances described in clauses (2)(a) to (c) exists, the laws of [name of State] apply to a consumer contract between a consumer who is ordinarily resident in [name of State] and a vendor who is ordinarily resident in a jurisdiction other than [name of State].

[1] Enacting States would want to ensure that definitions described in Part 1 (Jurisdictions for Consumer Contracts) also apply to this Part.

Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers submitted by the United States of America for CIDIP-VII	**Directrices legislativas para una ley modelo interamericana respecto a la disponibilidad de medios de solución de controversias y restitución a favor de los consumidores presentada por Estados Unidos de América para la CIDIP- VII**
1. Introduction	**1. Introducción**
1.1 Strong, measured, and effective consumer protection laws and institutions can contribute to consumer welfare and economic development in OAS member states. There is thus significant value in developing mechanisms to protect and compensate consumers who have suffered economic injuries from businesses, particularly for injuries with a relatively small monetary value. The small values of most consumer claims make access to justice very difficult given the high costs of proceeding with litigation. It is important for governments to consider establishing viable mechanisms for monetary consumer redress through low cost expedited small claims tribunals, administrative adjudication of small claims, and through mechanisms for collective actions. There is also a need for States to consider developing means of governmental enforcement of consumer protection laws and for addressing cross-border consumer claims.	1.1 La existencia de leyes e instituciones fuertes, mesuradas y efectivas para la protección de los consumidores pueden contribuir al bienestar de los consumidores y al desarrollo económico en los Estados Miembros de la OEA. En consecuencia, resulta de gran valor el desarrollar mecanismos para proteger y compensar a los consumidores que han sido perjudicados económicamente por empresas, en particular cuando los perjuicios tienen un valor monetario relativamente pequeño. El bajo valor de la mayor parte de los reclamos de los consumidores hace que el acceso a la justicia resulte muy difícil en virtud del alto costo de tramitar un juicio. Es importante que los gobiernos consideren la creación de mecanismos viables para la restitución monetaria a los consumidores a través de tribunales de menor cuantía con procesos ágiles y de bajo costo, de la solución administrativa de reclamos de bajo valor, y de mecanismos para acciones colectivas. Existe asimismo la necesidad de que los Estados consideren el desarrollo de mecanismos para la ejecución gubernamental de las leyes de protección al consumidor y para el procesamiento de reclamos transfronterizos de los consumidores.
1.2 The purpose of these Legislative Guidelines is to encourage the adoption of effective mechanisms that provide effective redress in appropriate cases for consumers suffering economic harm in business-to-consumer transactions, and to provide useful principles, examples, and models.	1.2 El objetivo de esta Guía legislativa es promover la adopción de mecanismos efectivos para lograr una restitución real en los casos apropiados en los cuales los consumidores sufran un daño económico en las operaciones de empresa a consumidor, así como proporcionar principios, ejemplos y modelos que sean de utilidad.
1.3 Currently, OAS member states have varying legal and cultural approaches to consumer dispute resolution and redress issues. OAS member states have adopted various types of dispute resolution and redress mechanisms, including alternative dispute resolution; judicial mechanisms, such as small claims tribunals; administrative adjudication of small claims; and private, associational, and governmental collective court actions. Some have less developed systems.	1.3 Actualmente, los Estados Miembros de la OEA cuentan con una amplia gama de recursos culturales y legales en cuanto a la solución de controversias planteadas por los consumidores y los aspectos restitutorios. Los Estados Miembros de la OEA han adoptado distintas clases de mecanismos de solución de controversias y de restitución, incluidos los medios alternativos de solución de controversias, mecanismos judiciales, los tribunales de menor cuantía, solución administrativa de reclamos de bajo valor, y mecanismos privados, asociativos y gubernamentales para acciones judiciales colectivas. Algunos Estados cuentan con sistemas menos desarrollados.

1.4 Given these differing national systems, and different substantive laws on the protection of consumers, these Guidelines offer a flexible common framework of general principles to enable OAS members to improve access to redress for consumers, rather than a single model law for all member states.	1.4 En virtud de estas diferencias en los sistemas nacionales y de la variación en las leyes sustantivas que regulan la protección de los consumidores, estas Directrices proporcionan un marco común y flexible de principios generales para permitir a los Estados Miembros de la OEA mejorar el acceso a la restitución a favor de los consumidores, en lugar de una ley modelo única para todos los Estados Miembros.
1.5 At the same time, accompanying annexes provide more particular guidance on three discrete subjects: (A) small claims, (B) cross-border arbitration, and (C) government redress. These annexes supplement the general principles set forth in the Guidelines, to aid in their implementation. Annex A provides sample legislative language for implementing a domestic small claims procedure, for those jurisdictions with no such procedure in place. Annex B provides draft model rules for electronic arbitration of cross-border consumer claims. Annex C is a model law on government authority to provide redress and cooperate across borders against fraudulent and deceptive commercial practices.	1.5 Paralelamente, los anexos adjuntos proporcionan guías más detalladas en torno a tres temas en particular: (A) reclamos de menor cuantía, (B) arbitraje transfronterizo y (C) restitución gubernamental. Estos anexos sirven como suplemento a los principios generales que se detallan en las Directrices, y como apoyo para la implementación de los mismos. El Anexo A proporciona un modelo de texto legislativo para la implementación de un procedimiento para los reclamos de menor cuantía en el ámbito nacional para aquellos países que no cuenten con un procedimiento de esta naturaleza. El Anexo B proporciona un borrador de normas modelo para el arbitraje por medios electrónicos de reclamos transfronterizos de consumidores. El Anexo C es una ley modelo para la autoridad gubernamental en materia de restitución y cooperación en los aspectos transfronterizos de las prácticas comerciales fraudulentas y engañosas.
2. Scope and General Application	**2. Alcance y aplicación general**
2.1 These Guidelines are intended to complement existing civil, administrative, criminal laws and other rules regulating or affecting business-to-consumer transactions.	2.1 El objetivo de estas Directrices es el de complementar la normativa legal existente en material civil, administrativa y penal, así como otras normas que regulen o afecten las operaciones de empresa a consumidor.
2.2 These Guidelines are not intended to provide details or procedures for all attempts by individual businesses and consumers to resolve disputes directly and informally. In the ordinary course, consumers and businesses should first attempt to resolve disputes directly and informally. Accordingly, businesses and industry groups should offer dispute resolution that initially attempts to resolve disputes arising from business-to-consumer transactions through more informal procedures. These procedures should be voluntary and consumers should not be required to exhaust these mechanisms before pursuing their claims.	2.2 Estas Directrices no tiene como finalidad el proporcionar detalles o procedimientos para regular todas y cada una de las situaciones en que las empresas y los consumidores intenten resolver las controversias de manera directa e informal. En el curso ordinario de las operaciones, los consumidores y las empresas deberían, en primera instancia, intentar resolver sus controversias en forma directa e informal. En consecuencia, las empresas y agrupaciones industriales deberían ofrecer mecanismos de solución de controversias que, de manera inicial, intenten resolver las controversias que se generen en operaciones de empresa a consumidor a través de procedimientos más informales. Estos procedimientos deberían ser de naturaleza voluntaria y no se debería exigir que los consumidores agoten estos mecanismos como condición para plantear sus reclamos.
2.3 These Guidelines are not intended to provide businesses or industry groups with mechanisms and systems to proceed with claims against consumers arising from	2.3 Esta Guía no tiene como fin el proporcionar a las empresas o agrupaciones industriales mecanismos y sistemas para procesar reclamos

business-to-consumer transactions for the sale of goods or services, including such transactions across borders. They are intended to apply solely to proceedings initiated by or on behalf of consumers, and not to proceedings initiated by businesses or industry groups against consumers or another business.	en contra de los consumidores que surjan en virtud de operaciones de empresa a consumidor por la venta de bienes o servicios, incluidas las operaciones transfronterizas. Su objetivo es el de ser aplicada exclusivamente a aquellos procedimientos que hayan sido iniciados por o en representación de consumidores, y no a procedimientos iniciados por empresas o agrupaciones industriales contra consumidores o contra otras empresas.
3. Dispute Resolution and Redress for Consumers Acting Individually	**3. Solución de controversias y restitución para los consumidores que actúan de manera individual**
3.1 Member states should adopt laws providing effective mechanisms for the resolution of consumer disputes and the provision of consumer redress. Because of the various mechanisms already in place in some OAS countries, and the existence of different legal traditions and frameworks within the region, the Guidelines outline basic principles that can be adapted by each member state to fit their particular needs and legal systems.	3.1 Los Estados Miembros deberían adoptar leyes que proporcionen mecanismos efectivos para la solución de controversias planteadas por los consumidores y para la restitución a los consumidores. En virtud de los diversos mecanismos que existen actualmente en algunos Estados Miembros de la OEA, y de la existencia de distintas tradiciones y marcos legales dentro de la región, en estas Directrices se describen los principios básicos que pueden ser adaptados por cada Estado Miembro para satisfacer sus propias necesidades y las de su sistema legal.
3.2 Dispute resolution and redress for consumers acting individually should be available to consumers through judicial or administrative tribunals and/or through a consumer protection enforcement agency. Such systems and mechanisms may include but are not limited to:	3.2 La solución de controversias y la restitución para los consumidores que actúen de manera individual debería encontrarse disponible para dichos consumidores a través de tribunales judiciales o administrativos, o a través de una autoridad ejecutora de protección al consumidor. Dichos sistemas y mecanismos podrán incluir, de modo no limitativo, los siguientes:
3.2.1 Alternative dispute resolution services, including online dispute resolution, by which consumers and businesses engage in an out-of-court process to reach a settlement or by which consumers submit their complaint against a business to a public agency for investigation and finding.	3.2.1 Servicios alternativos de solución de controversias, incluida la solución de controversias por computadora, por medio de los cuales los consumidores y las empresas lleven a cabo un proceso extrajudicial a efectos de llegar a un acuerdo, o por medio de los cuales los consumidores presenten sus reclamos en contra de una empresa ante un organismo público para su investigación y resolución.
3.2.2 Consumer complaints boards, including those provided by self-regulatory industry associations;	3.2.2 Comisiones de reclamos de consumidores, incluidos aquellos que sean proporcionados por asociaciones industriales autorreguladas;
3.2.3 Simplified procedures for small claims, which offer consumers the opportunity to obtain a judicial determination through less formal and expedited procedures than those used in traditional court proceedings, including court-based small claims procedures, special tribunal, and agency-based mechanisms. This may include simplified proceedings in separate courts or tribunals of limited	3.2.3 Procedimientos simplificados para reclamos de menor cuantía que ofrezcan a los consumidores la oportunidad de obtener un fallo judicial a través de procedimientos más expeditos y menos formales que los que se utilizan tradicionalmente, incluidos los procedimientos judiciales de menor cuantía, tribunales especializados y mecanismos administrativos ante la

jurisdiction or simplified proceedings in the regular courts of first instance.	autoridad competente. Estos procedimientos pueden incluir procedimientos simplificados ante juzgados o tribunales independientes de jurisdicción limitada o procedimientos simplificados ante los juzgados ordinarios de primera instancia.
3.3 The systems and mechanisms in Section 3.2 above should provide for an appropriately wide range of legal and other remedies, including redress as defined in Section 6.4, below.	3.3 Los sistemas y mecanismos mencionados en el numeral 3.2 anterior deberían proveer una gama lo suficientemente amplia de recursos legales y de otra naturaleza, incluida la restitución según se define en el numeral 6.4, más adelante.
3.4 Businesses and industry groups should also make voluntary dispute resolution and redress available to consumers through private alternative dispute resolution mechanisms.	3.4 Las empresas y las agrupaciones industriales también deberían asegurarse de poner a disposición de los consumidores mecanismos voluntarios de solución de controversias y restitución a través de mecanismos privados para la solución alternativa de controversias.
3.5 The mechanisms in this Section, whether offered by the public or private sector, should not impose a cost on the consumer that is disproportionate to the value of the claim at stake.	3.5 Los mecanismos que se contemplan en esta Sección, ya sea que los mismos se proporcionen por el sector público o por el sector privado, no deberían imponer al consumidor un costo que sea desproporcionado en comparación con el valor del reclamo correspondiente.
3.6 The special needs of disadvantaged or vulnerable consumers should be considered so that they, or their representatives, can access these mechanisms.	3.6 Se deberían tomar en cuenta las necesidades especiales de los consumidores en situación desventajosa o vulnerables a efectos de que dichos consumidores o sus representantes puedan tener acceso a esta clase de mecanismos.
3.7 Consumers should be provided with clear, comprehensible, and accurate information on the procedure, including the process for initiating a complaint, the process for selecting a dispute resolution provider, expected costs of the procedure, expected duration of the procedure, the possible outcomes, and the enforceability of those outcomes, including but not limited to avenues for appeal of a decision, the enforcement of an injunctive order, and the collection of any monetary award.	3.7 Los consumidores deberían recibir información clara, comprensible y precisa con respecto al procedimiento, incluido el proceso para plantear un reclamo, el proceso para seleccionar un proveedor de mecanismos de solución de controversias, los costos anticipados del procedimiento, la duración anticipada del procedimiento, los posibles resultados y la ejecutabilidad de dichos resultados, incluida de modo no limitativo, la posibilidad de apelación de un fallo, la ejecutabilidad de una medida cautelar y las vías de cobro de los laudos de naturaleza monetaria.
3.8 These mechanisms should be designed to be widely accessible and easy to use to enable the consumer to conduct the procedure without formal legal representation or assistance.	3.8 Estos mecanismos deberían estar diseñados de modo que sean ampliamente accesibles y fáciles de utilizar a efectos de permitir que los consumidores lleven a cabo el proceso sin necesidad de representación o asistencia legal formal.
3.9 Consumers should be provided with assistance or instruction in the completion and submission of necessary forms and documents.	3.9 Los consumidores deberían contar con asistencia o instrucciones respecto a cómo completar y presentar los formularios o documentos necesarios.
3.10 These mechanisms should be designed to permit a consumer located in one member state to bring a claim against a business	3.10 Estos mecanismos deberían estar diseñados de tal manera que permita a un consumidor domiciliado en un Estado Miembro iniciar un

located in another member state without undue burden and expense. To facilitate such proceedings, the use of written proceedings and communication by telephone, videoconferencing, email, and online technologies should be promoted.	reclamo contra una empresa domiciliada en otro Estado Miembro sin sufrir gastos o contratiempos excesivos. A efectos de facilitar tales trámites se debería promover el uso de procedimientos por escrito o a través de medios de comunicación telefónica, videoconferencias, correo electrónico o tecnología por computadora.
3.11 Annex A to these Guidelines, entitled Model Law on Small Claims, provides sample legislative language for implementing a small claims procedure. Member states, in particular those with no current small claims procedures, should make appropriate use of such provisions in light of their particular needs and existing legal systems. The Model Law on Small Claims omits detailed sections regarding topics such as choice of court, venue, service of process, and motions to vacate judgments; member states can include such sections as best fit within their own overall legal frameworks.	3.11 En el Anexo A, titulado Proyecto de Ley Modelo para Reclamos de Menor Cuantía, se proporciona un modelo de texto legislativo para la implementación de un procedimiento para reclamos de menor cuantía. Los Estados Miembros, y en particular aquellos que no cuenten en la actualidad con procedimientos de menor cuantía, deberían recurrir a estas normas teniendo en cuenta sus necesidades particulares y las de su actual sistema legal. La Ley Modelo para Reclamos de Menor Cuantía no incluye artículos detallados respecto a temas tales como la selección del tribunal, competencia, notificaciones y procedimientos de nulidad; los Estados Miembros podrán incluir estas secciones según mejor se ajuste a sus respectivos marcos legales, considerados en su totalidad.
3.12 Annex B to these Guidelines, entitled Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims, provides rules for resolution of certain common types of consumer disputes.	3.12 En el Anexo B, titulado Proyecto de Normas Modelo para el Arbitraje por Medios Electrónicos de Reclamos Transfronterizos de Consumidores, se proporcionan normas para la solución de ciertas clases de controversias comunes que se plantean a los consumidores.
4. Collective and/or Representational Dispute Resolution and Redress for Common Injuries to Consumers	**4. Solución de controversias y restitución colectiva o representativa en caso de perjuicios comunes a los consumidores**
4.1 Member states should adopt laws establishing collective or representational legal actions for consumer injuries with the following principles:	4.1 Los Estados Miembros deberían adoptar leyes que creen mecanismos legales colectivos o representativos respecto a los perjuicios causados a los consumidores, en base a los siguientes principios:
4.2 One or more types of collective or representational legal actions should be available in a formal judicial proceeding to consumers who are seeking redress and/or other restorative relief for economic harm to consumers who have been similarly harmed by the same entity or legally-related entities.	4.2 Se debería contar con una o más clases de mecanismos de acción legal colectiva o representativa bajo la forma de un procedimiento judicial formal disponible para los consumidores que busquen la restitución u otra reparación por el daño económico causado de manera similar por la misma entidad o por entidades vinculadas legalmente.
4.3 Such actions should provide for a wide range of legal and other remedies, including redress as defined in Section 6.4, below.	4.3 Dichos mecanismos deberían proveer una gama lo suficientemente amplia de recursos legales y de otra naturaleza, incluida la restitución según se define en la sección 6.4, más adelante.
4.4 Such actions should be fair to consumers and businesses, transparent, and efficient, due to the small size of the typical consumer claim. They should include procedures that:	4.4 Dichos mecanismos deberían ser transparentes, eficaces y justos tanto para los consumidores como para las empresas en virtud del pequeño monto de los reclamos típicos de los consumidores. Los mismos deberían incluir la creación de procedimientos a efectos de:
4.4.1 provide redress for consumers and	4.4.1 brindar restitución a los consumidores y

adequately protect the interests of consumers who have suffered harm;	proteger en forma adecuada los intereses de los consumidores que hayan sufrido daños;
4.4.2 ensure that settlements, particularly those involving non-monetary relief (i.e., discount coupons), provide adequate compensation to consumers;	4.4.2 asegurar que los acuerdos de solución de controversias, y en particular aquellos que no tengan naturaleza monetaria (por ejemplo, cupones de descuento) brinden una adecuada compensación a los consumidores;
4.4.3 ensure that attorneys or others who represent consumers in such actions do not benefit disproportionately at the expense of harmed consumers (e.g., by receiving excessive attorneys' fees in light of the work performed or the result achieved);	4.4.3 asegurar que los abogados y otras partes que actúen en representación de los consumidores no se beneficien de manera desproporcionada a expensas de los consumidores perjudicados (por ejemplo, mediante el cobro de honorarios excesivos a raíz de la labor realizada o de los resultados obtenidos);
4.4.4 include prohibitions against abusive collective actions, particularly when economic harm to consumers is trivial, speculative, non-existent or non-proportional to the remedies sought; and	4.4.4 incluir prohibiciones contra las acciones colectivas abusivas, en particular cuando el daño económico a los consumidores es insignificante, especulativo, inexistente o no guarda proporción con la compensación solicitada; e
4.4.5 include prohibitions against using such procedures to protect domestic businesses from competition or applying such mechanisms unfairly against foreign businesses.	4.4.5 incluir prohibiciones contra el uso de dichos mecanismos a efectos de proteger a las empresas nacionales contra la competencia o la aplicación ilegítima de dichos mecanismos en contra de empresas extranjeras.
4.5 The following entities and persons should be authorized to commence a legal action described in this Section:	4.5 Las siguientes entidades e individuos deberían estar autorizados para iniciar un procedimiento judicial según se describe en esta sección:
4.5.1 An individual consumer in his or her own name and on behalf of other consumers seeking redress for similar harms arising out of transactions with the same entity or legally-related entities, and/or a representative party or parties, which may include a consumer association, on behalf of a group of consumers seeking redress for similar harms arising out of transactions with the same entity or legally-related entities;	4.5.1 Un consumidor en nombre propio y en representación de otros consumidores que busque obtener restitución por daños similares causados en virtud de operaciones con la misma entidad o con entidades vinculadas legalmente o una parte o partes representativas, pudiéndose incluir entre éstas una asociación de consumidores que actúe en representación de un grupo de consumidores que busque la restitución por daños similares causados por operaciones con la misma entidad o con entidades vinculadas legalmente;
4.5.2 A government enforcement authority, including a consumer protection enforcement authority or other competent authority as described in Section 6 of these Guidelines.	4.5.2 Una autoridad ejecutora gubernamental, incluida cualquier autoridad ejecutora de protección al consumidor o cualquier otra autoridad competente según se describe en la sección 6 de estas Directrices.
4.6 An individual or entity set forth in Section 4.5.1 of these Guidelines should be allowed to proceed with such a suit only when there is a judicial determination that:	4.6 Una entidad o individuo descrito en la sección 4.5.1 de estas Directrices debería estar facultado para promover dicho procedimiento sólo cuando exista una determinación judicial en el sentido que:
4.6.1 a number of consumers have alleged that they have suffered harm as a result of the practices of the same entity, and	4.6.1 una cantidad de consumidores ha alegado haber sufrido daños como resultado de las

that it is not practicable or efficient to resolve these common claims in an individual action or series of individual actions; and	prácticas de la misma entidad, y no resulta práctico o eficaz resolver estos reclamos comunes a través de un procedimiento individual o de una serie de procedimientos individuales; y
4.6.2 questions of law or fact common to the members of the group of consumers predominate over any questions affecting individual consumers; and	4.6.2 las cuestiones de hecho o de derecho que son comunes a los miembros del grupo de consumidores predominan sobre las cuestiones que afectan a los consumidores de manera individual; y
4.6.3 it appears that the representative party or parties will fairly and adequately protect the interests of the group of consumers during litigation and/or settlement of the collective action.	4.6.3 se presume que la parte o partes representativa(s) protegerá(n) justa y adecuadamente los intereses del grupo de consumidores durante el transcurso del litigio o en caso de acuerdo de transacción del procedimiento colectivo.
4.7 These mechanisms may be provided on an "opt-in" basis, whereby consumers must take specific steps to join themselves to the collective action, or on an "opt-out" basis, whereby consumers are joined to the collective action unless they take steps to exclude themselves.	4.7 Estos mecanismos podrán proporcionarse sobre una base de “inclusión”, en virtud de la cual los consumidores habrán de tomar las medidas apropiadas para formar parte del procedimiento colectivo, o sobre una base de “exclusión”, en virtud de la cual los consumidores quedan incorporados al procedimiento colectivo a menos que tomen medidas para ser excluidos.
4.7.1 When collective action is available on an "opt-in" basis, consumers should be adequately notified of the initiation of such cases so that they can take steps to include themselves within the group and benefit from the outcome.	4.7.1 Cuando los procedimientos colectivos se encuentren disponibles sobre una base de “inclusión”, los consumidores deberían ser debidamente notificados con respecto al inicio de dichos procedimientos a efectos de que puedan tomar las medidas apropiadas para ser incluidos dentro del grupo y beneficiarse de los resultados correspondientes.
4.7.2 When collective action is available on an "opt-out" basis, consumers should be adequately notified of the initiation of such cases so that they can take steps to exclude themselves if so desired.	4.7.2 Cuando los procedimientos colectivos se encuentren disponibles sobre una base de “exclusión”, los consumidores deberían ser debidamente notificados con respecto al inicio de dichos procedimientos a efectos de que puedan tomar las medidas apropiadas para ser excluidos del grupo, si así lo desean.
4.8 Such notices should be written in plain, easily understood language and should contain a clear and concise explanation of the factors relevant to the consumer's decision to be included or excluded from the collective action.	4.8 Las notificaciones o avisos deberían ser redactados en lenguaje sencillo y claramente comprensible y deberían contener una explicación clara y concisa de los factores relevantes a ser tomados en cuenta por el consumidor al decidir acerca de su inclusión o exclusión respecto a la acción colectiva.
4.9 Consumers should not be compelled to take part in or be bound by the outcome of a collective action proceeding of which they have not been adequately notified.	4.9 Los consumidores no deberían verse forzados a participar en un procedimiento colectivo con respecto al cual no hayan sido debidamente notificados, ni les serán aplicables bajo dichas circunstancias los resultados del mismo.
4.10 It should be possible to adjudicate issues of both liability and damages in a collective or representational action.	4.10 Debería existir la posibilidad de que el procedimiento colectivo o representativo determine tanto los temas de responsabilidad como los daños a ser compensados.

4.11 These mechanisms set forth in Section 4.5.1 and Section 4.5.2 should be designed to permit a consumer domiciled in one member state to participate in a collective action brought in the courts of another member state.	4.11 Los mecanismos descritos en las secciones 4.5.1 y 4.5.2 deberían estar diseñados a efectos de permitir que un consumidor domiciliado en un Estado Miembro pueda participar en una acción colectiva tramitada ante los juzgados de otro Estado Miembro.
5. Governmental Dispute Resolution and Redress for Economic Harm to Consumers	**5. Solución de controversias y restitución gubernamental en caso de daño económico a los consumidores**
5.1 Member States should adopt laws that enable one or more governmental entities, including a consumer protection enforcement authority or other competent authority at the national, state, provincial, municipal, or local level charged with protecting similar consumer interests, to take action and obtain remedies, including redress, for or on behalf of consumers who have suffered economic harm as a result of being deceived, or defrauded, or misled due to fraudulent or deceptive commercial practices in a business-to-consumer transaction.	5.1 Los Estados Miembros deberían adoptar leyes para autorizar a una o más entidades gubernamentales, incluida una autoridad ejecutora de protección al consumidor u otra entidad competente en el ámbito nacional, estatal, provincial, municipal o local que tenga a su cargo la protección de los intereses de los consumidores, a efectos de poder iniciar procedimientos y plantear reclamos, incluidas las restituciones para o en representación de los consumidores que hayan sufrido un daño económico como resultado de haber sido engañados o defraudados o inducidos a un error debido a prácticas comerciales fraudulentas o engañosas en el contexto de una operación de empresa a consumidor.
5.2 The authority for consumer protection enforcement authorities to obtain redress for consumers can be particularly helpful in addressing complex cross-border disputes involving fraudulent and deceptive commercial practices. Thus, actions taken by consumer protection enforcement authorities may serve an important and complementary goal to other avenues for consumer relief outlined in these Guidelines.	5.2 La facultad acordada a las autoridades ejecutoras de protección al consumidor para obtener una restitución a favor de los consumidores puede resultar de especial utilidad en el caso de controversias complejas transfronterizas que se vinculen con prácticas comerciales fraudulentas y engañosas. En consecuencia, las acciones iniciadas por las autoridades ejecutoras de protección al consumidor pueden cumplir un fin de gran importancia y complementario con respecto a los otros mecanismos de apoyo al consumidor que se mencionan en estas Directrices.
5.3 Such governmental entities should have authority to decide whether to take action and obtain remedies, including redress, on behalf of consumers. Such proceedings may be in addition to other remedies provided elsewhere.	5.3 Dichas entidades gubernamentales deberían contar con la facultad para determinar si deberán o no iniciar un procedimiento y plantear reclamos, incluso obtener restituciones en nombre de los consumidores. Estos procedimientos podrán ser adicionales a los establecidos por otras fuentes.
5.4 Annex C to these Guidelines, entitled Model Law on Government Redress For Consumers Including Across Borders, provides for the creation of one or more competent authorities, grants the authority obtain monetary redress and engage in cross-border cooperation; and facilitates recognition of foreign civil judgments for consumer redress of fraudulent or deceptive commercial practices.	5.4 En el Anexo C, titulado Ley Modelo de Restitución Gubernamental para Consumidores incluso en el ámbito transfronterizo, dispone la creación de una o más autoridades competentes, otorga la facultad de obtener restitución monetaria y realizar actividades de cooperación transfronteriza y facilita el reconocimiento de fallos civiles extranjeros para la restitución a consumidores por prácticas comerciales fraudulentas o engañosas.
6. Definitions	**6. Definiciones**
6.1 "Consumer" means a natural person engaging in a commercial transaction for personal,	6.1 "Consumidor" significa una persona física que

family, or household use, and not for resale or other commercial activity.	actúa en una operación comercial para uso personal, familiar o del hogar y no para fines de reventa u otra actividad comercial.
6.2 "Business-to-consumer transactions" means transactions for value between commercial entities and consumers. These can include, to the extent provided for in the law, cross-border transactions or services. Examples of business-to-consumer transactions covered by these Guidelines are breach of consumer protection laws against fraudulent, misleading, and unfair commercial conduct or breach of contract arising out of a business to consumer transaction (e.g., unauthorized billing and charging; misrepresentations or omissions of material facts in advertising and marketing; non-delivery of products; delivery of non-conforming products).	6.2 "Operaciones de empresa a consumidor " significa operaciones a título oneroso entre entidades comerciales y consumidores. Esta definición puede incluir, en la medida de lo permitido por la ley, operaciones o servicios transfronterizos. Entre los ejemplos de las operaciones de empresa a consumidor que se rigen por estas Directrices se incluyen el incumplimiento de leyes de protección al consumidor en virtud de conductas comerciales fraudulentas, engañosas o desleales o el incumplimiento de contrato resultante de una operación de empresa a consumidor (por ejemplo, cobranzas o deducciones no autorizadas; declaraciones falsas u omisión de información esencial en la publicidad o comercialización, la no entrega de productos, o la entrega de productos que no cumplen las condiciones pactadas).
6.3 "Dispute Resolution" means mechanisms designed to provide consumers with the opportunity to resolve their complaints against businesses and to obtain redress (which includes monetary and/or restorative relief as defined in section 6.4, below) when those consumers have suffered economic harm arising out of transactions involving goods or services, including cross-border transactions. This term includes informal and formal mechanisms, online and offline mechanisms, and private sector, public sector, administrative, and judicial mechanisms. (Examples of such mechanisms include traditional judicial proceedings, simplified court proceedings, arbitration proceedings, and alternative dispute resolution proceedings such as conciliation or mediation.) It may include mechanisms or systems for obtaining monetary compensation or injunctive relief that contains a restorative element.	6.3 "Solución de controversias" significa los mecanismos diseñados para proporcionar a los consumidores la oportunidad de resolver sus reclamos contra las empresas y obtener restitución (que incluye tanto la compensación monetaria como la restitución, según se define en la sección 6.4, más adelante) cuando dichos consumidores han sufrido un daño económico generado por las operaciones que involucren bienes o servicios, incluidas las operaciones transfronterizas. Esta expresión incluye mecanismos formales e informales, por computadora y sin ella, así como mecanismos ante el sector privado, el sector público y mecanismos administrativos y judiciales. (Entre los ejemplos de dichos mecanismos se incluyen los procedimientos judiciales tradicionales, los procedimientos judiciales simplificados, procedimientos de arbitraje y los procedimientos alternativos de solución de controversias como la conciliación y la mediación.). Puede incluir asimismo mecanismos o sistemas para obtener una compensación monetaria o medidas cautelares que contengan un elemento restitutivo.
6.4 "Redress" means (a) compensation for economic harm, whether in the form of a monetary remedy (*e.g.,* a voluntary payment, damages, restitution, or other monetary relief) or (b) a conduct remedy with a restorative element (*e.g.,* exchange of a good or service, specific performance, cancellation, or rescission of a contract), or both.	6.4 "Restitución" significa (a) la compensación de un daño económico, ya sea de naturaleza monetaria (por ejemplo, pago voluntario, daños, restitución u otra compensación monetaria), o (b) una conducta con elementos restitutivos (por ejemplo, el canje de bienes o servicios, el cumplimiento específico, la anulación o la rescisión de un contrato) o ambas opciones.
6.5 "Economic harm" means actual monetary loss sustained by a consumer in a business-to-consumer transaction as the direct and	6.5 "Daño económico" significa la pérdida monetaria real que haya sufrido el consumidor en una operación de empresa a consumidor, como

foreseeable result of that transaction.	resultado directo y previsible de esa operación.
6.6 "Consumer protection enforcement authority" means any governmental public body that has a principal mission of implementing laws against fraudulent, misleading, or unfair commercial practices affecting consumers and has powers (a) to conduct investigations, (b) to pursue enforcement proceedings, or (c) both.	6.6 "Autoridad ejecutora de protección al consumidor" significa cualquier organismo público gubernamental cuya misión principal consista en la implementación de leyes en contra de las prácticas comerciales fraudulentas, engañosas o desleales que afecten a los consumidores, y que tenga las facultades de (a) realizar investigaciones, (b) iniciar procedimientos de ejecución, o (c) ambas opciones.
6.7 "Member state" means a member state of the Organization of American States.	6.7 "Estado Miembro" significa un Estado Miembro de la Organización de Estados Americanos.
6.8 "Cross-border" means between or among consumers and businesses domiciled in different member states.	6.8 "Transfronterizo" significa entre consumidores y empresas domiciliados en Estados Miembros distintos.
6.9 "Consumer association" means a non-governmental organization that has, as its primary mission, the promotion of consumers' rights and interests in the marketplace.	6.9 "Asociación de consumidores " significa una organización no gubernamental que tenga, como misión principal, la de promover los derechos e intereses de los consumidores en el mercado.

ANNEX A / ANEXO A

Draft Model Law on Small Claims	**Proyecto de Ley Modelo para Reclamos de Menor Cuantía**
1. Purpose	**1. Objetivo**
The goal of this Law is to establish a procedure for resolving small claims in consumer contracts which is simple, expeditious, economical, and fair.[2]	El objetivo de esta Ley es crear un procedimiento para resolver reclamos de menor cuantía en los contratos de consumo de una manera simple, expedita, económica y justa.[1]
2.Definitions[3]	**2. Definiciones**[2]
2.1 "Consumer" means a natural person engaging in a commercial transaction for personal, family, or household use, and not for resale or other commercial activity.	2.1 "Consumidor" significa una persona física que actúa en una operación comercial para uso personal, familiar o del hogar, y no para fines de reventa u otra actividad comercial.
2.2 "Business-to-consumer transactions" means commercial transactions for value between commercial entities and consumers.	2.2 "Operaciones de empresa a consumidor " significa operaciones a título oneroso entre entidades comerciales y consumidores.
2.3 "Economic harm" means actual monetary loss sustained by a consumer in a business-to-consumer transaction, as the direct and foreseeable result of that transaction.	2.3 "Daño económico" significa la pérdida monetaria real que haya sufrido el consumidor en una operación de empresa a consumidor, como resultado directo y previsible de esa operación.
3. Scope of Claims	**3. Alcance de los reclamos**
3.1 The law shall apply in civil and commercial matters whatever the nature of the tribunal[4] where a. the stated amount of a claim excluding interest, expenses and outlays does not exceed [ ][5] at the time the procedure is commenced, and b. the claim pertains to: (1) damages for breach of contract; (2) damage to personal property; (3) personal injury to the claimant; or (4) economic harm suffered as a result of	3.1 La ley se aplicará tanto a asuntos comerciales como civiles, independientemente de la naturaleza de la corte,[3] en casos en los cuales a. el valor total declarado del reclamo, excluyendo intereses, gastos y desembolsos efectuados no exceda [ ][4] al momento de iniciarse los procedimientos, y b. el reclamo corresponda a: (1) daños por incumplimiento del contrato; (2) daños a bienes personales; (3) daños personales que afecten al demandante; o (4) daño económico sufrido como

[2] Many elements of this proposal are drawn from successful, functioning small claims procedures within OAS member states and from experiences elsewhere. This Model Law is proposed as a complement to the proposed Model Law on Government Redress for Consumers Including Across Borders. Both proposals are meant to work as alternatives for providing meaningful redress to consumers.
Muchos de los elementos de esta propuesta tomaron como modelo los procedimientos exitosos y efectivos que existen actualmente en Estados Miembros de la OEA, así como experiencias en otros ámbitos. Esta Ley Modelo se propone a modo de complemento de la propuesta de Ley Modelo de Restitución Gubernamental para Consumidores, incluyendo en el ámbito transfronterizo. La finalidad es que ambas propuestas funcionen como alternativas para proporcionar una restitución significativa a los consumidores.

[3] This Draft Model Law should also be interpreted in light of the terms and definitions provided in the Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers.
Este proyecto de Ley Modelo deberá interpretarse asimismo a la luz de los términos y definiciones detallados en la Guía Legislativa para una Ley Interamericana en torno a la Disponibilidad de Medios de Solución de Controversias y Restitución a favor de los Consumidores.

[4] This model law leaves it up to each state to determine the nature of the adjudicative body.
Esta ley modelo permite que cada estado determine la naturaleza del organismo adjudicador.

[5] Each State should set the appropriate maximum jurisdictional amount given its circumstances. For reference, the limits in U.S. courts average about US $5,000. States could also utilize a multiplier based on their minimum wage scale.
Cada Estado deberá determinar, en virtud de sus propias circunstancias, la cuantía máxima para determinar la jurisdicción. A modo de referencia, los límites en los tribunales estadounidenses alcanzan un promedio de US$5,000. A modo de base, los estados también podrían utilizar un factor multiplicador basado en la escala del salario mínimo.

a business-to-consumer transaction.	consecuencia de una operación de empresa a consumidor.
3.2 If a claim [or defendant's counterclaim][6] exceeds the jurisdictional limit stated in Article 3.1.a, or is beyond the subject matters outlined in Article 3.1.b, the claim shall not be considered. It shall be removed and handled in accordance with rules and procedures established by the State for the relevant higher court or tribunal.[7] The tribunal shall inform the claimant to that effect.	3.2 Si el reclamo [o la contrademanda de un demandado][5] excede el límite establecido en el Artículo 3.1.a, o si se refiere a otros temas más allá de los detallados en el Artículo 3.1.b., no se dará lugar al reclamo, el cual será tramitado de conformidad con las normas y procedimientos establecidos por el Estado para la corte o tribunal superior que corresponda.[6] Estas circunstancias serán informadas al demandante por el tribunal.
4. Commencement of the Procedure	**4. Inicio del procedimiento**
4.1 The claimant shall commence the procedure by completing a claim form described in Annex I and submitting it to the relevant tribunal. The claim form shall also be accompanied by any relevant supporting documents.	4.1 El demandante iniciará el proceso completando un formulario de reclamación, según se describe en el Anexo I, y lo presentará ante el tribunal competente. Al formulario de reclamación se podrán adjuntar asimismo los documentos probatorios relevantes.
4.2 If the tribunal considers that the information provided by the claimant is not sufficient it may give the claimant an opportunity to complete the form properly or supply such additional information as may be necessary.	4.2 Si el tribunal considera que la información proporcionada por el demandante es insuficiente, podrá proporcionar al demandante una oportunidad para completar el formulario de manera adecuada o presentar la información adicional que fuere necesaria.
5 .Parties and Representation	**5. Partes y representantes**
5.1 Representation by an attorney in a small claims tribunal shall not be mandatory.	5.1 En los casos ante un tribunal de menor cuantía no resultará obligatoria la representación por abogado.
5.2 Corporations and partnerships may be represented by an owner, officer, partner, employee, authorized agent or attorney, consistent with the procedural law of the State.	5.2 Las personas jurídicas podrán estar representadas por un propietario, director, socio, empleado, agente autorizado o abogado, de conformidad con las reglas procesales nacionales que fueren aplicables.
5.3 A party may be represented by a friend or relative if the representative is familiar with the facts of the case, consistent with the	5.3 La parte podrá estar representada por un familiar o amigo siempre que dicho representante tenga

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6 Not all States allow counterclaims in small claims courts.
Algunos estados no permiten la interposición de contrademandas ante las cortes de menor cuantía.

7 Many OAS State procedural laws provide that the court or tribunal shall remove the claim and all related counterclaims if permitted, to a general court or tribunal.
Las normas procesales de muchos Estados Miembros de la OEA establecen que la corte o tribunal eliminará la demanda y las contrademandas correspondientes, si fuere el caso.

8 As noted above, not all States allow counterclaims in small claims courts. For those States that do allow counterclaims, the claimant may have [30] days from service to lodge an answer form to any counterclaim. The court or tribunal normally serves a copy of any such answer to the defendant within [7] days of receipt.
Según se indicó anteriormente, no todos los Estados permiten la interposición de contrademandas ante los tribunales de menor cuantía. En el caso de aquellos Estados que permiten las contrademandas, el demandante contará con un plazo de [30] días a partir de la notificación para presentar un formulario de contestación a la contrademanda. La corte o tribunal generalmente notificará una copia de dicha contestación al demandado dentro de un plazo de [7] días luego de su recepción.

9 In most OAS member States, the parties may appeal the judgment to a general court or tribunal. An appeal from a judgment in a small claims action is typically taken by filing a notice of appeal with the small claims court or tribunal. A notice of appeal is normally filed not later than [30] days after the court or tribunal has served notice of entry of the judgment to the parties. The scope of the hearing normally includes the claims of all parties who were parties to the small claims action at the time the notice of appeal was filed. The judgment of a general court or tribunal after a hearing on appeal is final and not appealable.
En la mayor parte de los Estados Miembros de la OEA, las partes tienen la posibilidad de apelar la sentencia ante una corte o tribunal ordinario. Normalmente, la apelación a una sentencia dictada por una corte de menor cuantía se realiza mediante la presentación de un aviso o anuncio de apelación ante la corte o tribunal de menor cuantía. Dicho aviso de apelación generalmente se presenta no más allá de [30] días después de la notificación de la sentencia a las partes. La audiencia de apelación normalmente incluye los reclamos de todas las partes que eran parte de la acción de menor cuantía al momento de presentarse el aviso de apelación. La sentencia dictada por la corte o tribunal ordinario posteriormente a la audiencia de apelación será inapelable.

procedural law of the State.	conocimiento de los hechos del caso, y de conformidad con las reglas procesales nacionales que fueren aplicables.
6. Small Claims Procedure	**6. Procedimiento para reclamos de menor cuantía**
6.1 The small claims procedure shall be a written procedure unless an oral hearing is deemed to be necessary by the tribunal or if a party so requests on the claim or answer form. The tribunal may refuse such a request if it considers that, with regard to the circumstances of the case, an oral hearing is not necessary for the fair administration of the case. Such refusal shall be reasoned and in writing.	6.1 El procedimiento para reclamos de menor cuantía será un procedimiento escrito, a menos que el tribunal considere necesaria la celebración de una audiencia oral o si así lo solicita una de las partes en el formulario de reclamación o contestación. El tribunal podrá rechazar dicha solicitud si considera que, en virtud de las circunstancias del caso, la audiencia oral claramente no resulta necesaria para la justa adjudicación del caso. La denegatoria deberá expresarse por escrito y con fundamentos.
6.2 The tribunal shall respect the right to a fair trial and the principle of an adversarial process, particularly when deciding on the necessity of an oral hearing and on the means of proof and the extent to which evidence is taken.	6.2 El tribunal deberá respetar el derecho a un juicio justo y los principios del debido proceso, en particular al decidir respecto a la necesidad de una audiencia oral y respecto a los medios de prueba y al alcance de las diligencias probatorias a realizarse.
6.3 Within [7] days of receiving the properly completed claim form, a copy shall be served on the defendant, together with a copy of the relevant supporting documents. The defendant shall also be provided with a copy of the answer form set forth in Annex II [and a copy of a claim form described in Annex I in case the defendant wishes to file a counterclaim].	6.3 Dentro de los [7] días de recibido el formulario de reclamación, debidamente completado, el tribunal deberá notificar al demandado una copia de dicho formulario, conjuntamente con una copia de los documentos probatorios. Asimismo, se proporcionará al demandado una copia del formulario de contestación que se describe en el Anexo II [así como una copia del formulario de reclamo que se describe en el Anexo I en caso de que el demandado decida presentar una contrademanda].
6.4 The defendant shall lodge with the tribunal the completed answer form[, any counterclaim,] and any additional supporting documents within [30] days of the service of the claim form.	6.4 El demandado presentará ante el tribunal el formulario de contestación debidamente completado [la contrademanda] y cualquier otra documentación probatoria pertinente dentro de los [30] días luego de haber sido notificado del formulario de reclamación.
6.5 Within [7] days of receipt, a copy of the defendant's answer form [and any counterclaim] shall be served on the claimant, together with a copy of the supporting documents.	6.5 Dentro de los [7] días siguientes de su recepción, se notificará al demandante una copia del formulario de contestación del demandado [y de la contrademanda] conjuntamente con una copia de la documentación probatoria presentada.
6.6 [If the defendant alleges a counterclaim against the claimant, the claimant shall file an answer to that claim within [30] days of the service of the claim.[8]]	6.6 [Si el demandado plantea una contrademanda contra el demandante, éste deberá presentar una contestación a la contrademanda dentro de los [30] días luego de haber sido notificado de la misma.[114]]
6.7 Once all relevant pleadings have been filed and served, the tribunal shall within [30] days: (a) deliver a judgment; or (b) demand further details from the parties concerning the claim; or (c) summon the parties to a hearing (if it decides an oral hearing is warranted).	6.7 Una vez que se hayan presentado y notificado los documentos correspondientes, el tribunal deberá, en un plazo de [30] días: (a) dictar sentencia o (b) solicitar a las partes detalles adicionales con respecto al reclamo o (c) convocar a las partes a una audiencia (si se decide que existe justificación para una audiencia).
6.8 The tribunal may hold a hearing through an audio, video or email conference or other communications technology if the technical	6.8 El tribunal podrá celebrar la audiencia a través de conferencia vía audio y video o correo electrónico u otra tecnología de comunicación siempre que los

means are available and both parties agree. The tribunal shall issue and serve an order to the parties, which shall specify how to participate in such hearing, and how to submit relevant documents and witness testimony.	medios técnicos se encuentren disponibles y que ambas partes estén de acuerdo. El tribunal emitirá y notificará una resolución a las partes, en la cual se especificará la manera de participar en dicha audiencia y de presentar documentos relevantes y ofrecer prueba testimonial.
7. Judgment and Collection	**7. Sentencia y cobro**
7.1 The judgment shall be rendered within 6 months of the registration of the claim form.	7.1 La sentencia deberá dictarse dentro de los seis meses siguientes a la presentación del formulario de reclamación.
7.2 If the tribunal has not received an answer [from the relevant party] within the time limit[s] laid down in Article[s] 6.4 [and 6.6], it shall enter a default judgment on the unanswered claim [or counterclaim].	7.2 Si el tribunal no ha recibido una contestación [de la parte correspondiente] dentro del plazo [o los plazos] especificados en el [los] Artículo[s] 6.4 [y 6.6], dictará una sentencia en rebeldía con respecto a la demanda [o contrademanda] no contestada.
7.3 When the tribunal issues a judgment, the tribunal shall serve notice of entry of the judgment to the parties, unless it is delivered orally at the conclusion of a hearing at which both parties are present.	7.3 Cuando el tribunal dicte sentencia, la misma será notificada a las partes a menos que la misma haya sido emitida en forma oral al final de una audiencia en la cual ambas partes se encuentren presentes.
7.4 The small claims tribunal may grant relief in the form of monetary damages, rescission, restitution, reformation, and specific performance.	7.4 El tribunal de menor cuantía podrá fallar concediendo la reparación de daños monetarios, rescisión, restitución, reforma y la realización de conductas específicas.
7.5 The small claims tribunal shall follow the procedural law of the State with regard to collection and review of judgments.	7.5 El tribunal de menor cuantía cumplirá las leyes procesales nacionales con respecto a los procesos de cobro y revisión de sentencias.
8. Appeals[9]	**8. Apelaciones**[8]
8.1 The State shall make information publicly available about whether an appeal is available under its procedural law against a judgment rendered in its small claims tribunal.	8.1 El Estado pondrá a disposición del público información acerca de la posibilidad de apelación, en virtud de sus normas procesales, contra las sentencias dictadas por un tribunal de menor cuantía.
8.2 In an appeal procedure against a judgment rendered in a small claims tribunal, the parties shall not be required to be represented by a lawyer. The hearing shall be conducted informally.	8.2 En un procedimiento de apelación contra una sentencia dictada por un tribunal de menor cuantía no se exigirá que las partes se encuentren representadas por un abogado. La audiencia se celebrará de manera informal.
Annex I. The complaint form shall be simple and non-technical. It shall require that the plaintiff state: (1) the name and address of the defendant(s), if known; (2) the amount of the claim; (3) a brief description of facts and arguments that form the basis of the claim; and (4) whether the plaintiff requests an oral hearing.	**Anexo I**. El formulario de reclamación será simple y de naturaleza no técnica. Se requerirá que el demandante indique: (1) el nombre y dirección del (de los) demandado(s), si se conocen; (2) el monto del reclamo; (3) una breve descripción de los hechos y fundamentos del reclamo; y (4) si el demandante solicita una audiencia oral.
Annex II. The answer form shall be non-technical and shall require the defendant to state in simple terms: (1) the main facts and arguments against the claims stated in the claim form; and (2) whether the defendant requests an oral hearing.	**Anexo II**. El formulario de contestación será de naturaleza no técnica y exigirá que el demandado establezca, en términos simples, lo siguiente: (1) los principales hechos y argumentos en contra de los reclamos planteados en el formulario de reclamación y (2) si el demandado solicita una audiencia oral.

ANNEX B / ANEXO B

Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims	**Borrador de Normas Modelo para el Arbitraje Electrónico de Reclamos Transfronterizos de Consumidores**
1. Purpose	**1. Objetivo**
The goal of these model rules is to establish a procedure for the electronic arbitration of the most common cross-border consumer claims that is simple, economical, effective, fast, and fair. "Arbitration" is used here as a general term covering non-judicial dispute procedures, and does not necessarily entail the applicability to these procedures of laws governing formal arbitration.[10]	El objetivo de estas normas modelo es el de crear un procedimiento para el arbitraje electrónico de los reclamos transfronterizos más comunes a nivel de consumidores, procedimiento que deberá ser simple, económico, efectivo, rápido y justo. En este contexto, "arbitraje" se utiliza como un término general que se aplica a procedimientos no judiciales de solución de controversias, y no implica necesariamente la aplicación a estos procedimientos de las leyes que rijan al arbitraje formal.[10]
2. Definitions[11]	**2. Definiciones**[11]
2.1 "Consumer" means a natural person engaging in a commercial transaction for personal, family, or household use, and not for resale or other commercial activity.	2.1 "Consumidor" significa una persona natural que actúa en una operación comercial a efectos del uso personal, familiar o del hogar, y no para fines de reventa u otra actividad comercial.
2.2 "Business-to-consumer transaction" means a commercial transaction for value between commercial entities and consumers.	2.2 "Operaciones de empresa a consumidor" significa operaciones a título oneroso entre entidades comerciales y consumidores.
2.3 "Economic harm" means actual monetary loss sustained by a consumer in a business-to-consumer transaction, as the direct and foreseeable result of that transaction.	2.3 "Daño económico" significa la pérdida monetaria real que haya sufrido el consumidor en una operación de empresa a consumidor, como resultado directo y previsible de esa operación.
2.4 "Writing" includes data messages in both physical and electronic form, so long as the information contained therein is accessible so as to be usable for subsequent reference.	2.4 "Escrito" incluye mensajes de datos tanto en formato físico como electrónico, siempre que la información contenida en los mismos resulte accesible y pueda ser utilizada posteriormente como referencia.
3. Scope of Claims	**3. Ámbito de los Reclamos**
These procedures only apply: a. To claims where the amount claimed by the consumer is not more than US$1,000, or the equivalent in other currency, and to any setoff claims up to that amount raised by the vendor, and b. To cross-border disputes arising between a consumer domiciled or legally resident in one contracting state, and a business both doing	Estos procedimientos se aplicarán exclusivamente: a. A reclamos en los que el monto reclamado por el consumidor no exceda los US$1,000 o su equivalente en otra moneda, y a reclamos por compensación que por hasta ese monto plantee el vendedor, y b. A conflictos transfronterizos entre un consumidor domiciliado o legalmente residente en un estado contratante, y a una empresa con actividades

[10] These Model Rules are proposed as a complement to the proposed Model Law on Adjudication of Consumer Claims and Government Redress for Consumers Including Across Borders. These proposals are meant to work together as alternatives for providing meaningful redress to consumers. It is contemplated that a model implementation arrangement may be produced by the CIDIP process; the notes in this document suggest some of the issues such an arrangement could address. These Model Rules could also be used in conjunction with that model implementation agreement. Estas Normas Modelo se proponen a modo de complemento de la propuesta de Ley Modelo para Reclamos de Menor Cuantía y de la Ley Modelo de Restitución Gubernamental (incluyendo a nivel transfronterizo). La finalidad es que estas propuestas funcionen en forma conjunta y como alternativas para proporcionar una restitución significativa a los consumidores. Se prevé que se pueda redactar un convenio modelo de implementación dentro del proceso de la CIDIP; las notas incluidas en este documento plantean sugerencias respecto a algunos de los temas que pueden ser tratados en dicho convenio. Asimismo, estas Normas Modelo se podrían utilizar conjuntamente con dicho convenio modelo de implementación.

[11] These Draft Model Rules should also be interpreted in light of the terms and definitions provided in the Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers. Este borrador de Normas Modelo deberá interpretarse asimismo a la luz de los términos y definiciones detallados en la Guía Legislativa para una Ley Interamericana respecto a la Disponibilidad de Medios de Solución de Controversias y Restitución a favor de los Consumidores.

business and engaging in the transaction in another contracting state, at the time of the transaction;[12] and	comerciales y que realice la operación en otro estado contratante, al momento en que ocurra la operación; y[12]
c. To consumer claims against a vendor for economic harm arising from a business-to-consumer transaction in which:	c. A reclamos de consumidores contra un vendedor por el daño económico que resulte de una operación de empresa a consumidor en la cual:
i. the vendor delivered a product or service that was not fit for the purpose reasonably contemplated in the transaction; or	i. El vendedor entregó un producto o servicio no apto para la función u objetivo razonablemente contemplado en la operación correspondiente; o
ii. the product or service received by the consumer was damaged, or otherwise materially different from the product or service the parties agreed to;	ii. El producto o servicio recibido por el consumidor se encontraba dañado, o resultó ser sustancialmente distinto al producto o servicio acordado por las partes;
iii. the vendor failed to deliver to the consumer the product or service purchased, licensed, or leased after the consumer was charged;	iii. El vendedor no cumplió con la entrega al consumidor del producto o servicio comprado, obtenido bajo licencia o alquilado, luego de haberse efectuado el cobro al consumidor;
iv. the vendor made express or factually implied misrepresentations of material fact about the	iv. El vendedor, de manera expresa o implícita a través de sus hechos, comunicó información

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[12] These model rules are intended to apply to business-to-consumer transactions online, except in cases where a vendor has explicitly excluded transactions involving jurisdictions relevant to the consumer claim. El objetivo de estas normas modelo es el de ser aplicadas a operaciones de empresa a consumidor realizadas en línea, excepto en aquellos casos en los cuales el vendedor ha excluido expresamente operaciones vinculadas con jurisdicciones que resulten relevantes al reclamo del consumidor.

[13] States may wish to consider the possibility of permitting the consumer to be charged a very small fee for such arbitration proceedings. If the consumer prevails, the arbitrator might in turn order repayment of this fee by the vendor. Los Estados podrán analizar la posibilidad de permitir que se cobre al consumidor un honorario mínimo por estos procedimientos de arbitraje. En caso que el consumidor resulte exitoso, el árbitro podrá decretar que dicho honorario pase a ser abonado por el vendedor.

[14] States may wish to consider how their own authorities might support the effective use of this procedure, such as by maintaining a list of arbitrators to handle claims made pursuant to these model rules and by arranging to refer such claims to arbitrators for handling. Los Estados podrán analizar la manera en la cual las autoridades competentes habrán de promover el uso efectivo de este procedimiento, por ejemplo si se habrá de mantener una lista de árbitros para el manejo de los reclamos promovidos en virtud de estas normas modelo, así como los mecanismos para que dichos reclamos sean remitidos a los árbitros para su consideración.

[15] An enacting state may wish to provide appropriate communications technology for online dispute resolution of such consumer claims. Cada estado que adopte estas normas podrá considerar el proporcionar una tecnología adecuada de comunicación a efectos de la resolución en línea de los reclamos de los consumidores.

[16] Given the small value of these consumer claims, it would be desirable that, as a rule, awards be kept brief and not be required to provided reasoned grounds. En virtud de la baja cuantía de los reclamos planteados por los consumidores, sería deseable que, como regla general, los laudos fueran breves en su extensión y no exigieran la expresión de fundamentos.

[17] These model rules do not set forth rules concerning appeals of arbitral awards. However, generally parties cooperating with the arbitration under these rules should not be deemed to have waived their right to appeal the validity of the arbitration agreement if: (a) the arbitration was not conducted in the manner described in these model rules, including the selection of the arbitrator; or (b) the arbitration did not provide the party with adequate notice of the arbitral proceedings. Estas normas modelo no incluyen normas relativas a la apelación de los laudos arbitrales. Sin embargo, de modo general no se considerará que las partes que cooperen con el proceso de arbitraje en virtud de estas normas han renunciado al derecho de apelar la validez del acuerdo de arbitraje si: (a) el arbitraje no se realizó de la manera descrita en estas normas, incluyendo en materia de selección del árbitro; o (b) no se proporcionó a la parte una adecuada notificación de los procedimientos arbitrales.

[18] Consideration could be given under these model rules as to whether or not the award is enforceable under the OAS Panama Convention on Commercial Arbitration or the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Given the small size of these consumer claims, however, use of these treaties may not be cost-effective. States may wish to separately consider whether it is appropriate to establish alternate incentives for compliance with such arbitral awards. Possibilities to consider include promoting a voluntary seal program that vendors can join only on condition that they satisfy all resulting arbitral awards; arranging for vendors joining the program to post a bond or other guarantee for amounts in dispute; and/or developing an arrangement whereby vendors would consent to the reversal of charges on their merchant bank accounts to reflect arbitral awards involving a credit card transaction. Estas normas modelo deberán tomar en cuenta si, a efectos de la ejecutabilidad del laudo arbitral, se aplicarán las normas de la Convención Interamericana sobre Arbitraje Comercial Internacional de la OEA (Panamá) o la Convención de Nueva York sobre el Reconocimiento y Ejecución de las Sentencias Arbitrales Extranjeras. Cabe anotar, sin embargo, que en virtud de la baja cuantía de estos reclamos planteados por consumidores, el recurrir a estos tratados puede no resultar económicamente viable. Los estados podrán considerar, de manera independiente, si resulta apropiado crear incentivos alternativos para el cumplimiento de dichos laudos arbitrales. Dentro de las posibles opciones se incluye: la promoción de un programa voluntario de sellos de confianza al cual se podrían adherir los vendedores bajo la condición de que cumplan con los correspondientes laudos arbitrales; la coordinación de un sistema de fianzas u otras garantías otorgadas por los vendedores para cubrir los montos en disputa; y/o la coordinación de un sistema en virtud del cual los vendedores prestaren su consentimiento, en el caso de operaciones con tarjetas de crédito, a que el banco correspondiente realizare reintegros a las cuentas de los clientes a efectos de reflejar los respectivos laudos arbitrales. f:\shared\dept. of state\cp 7604\u.s. proposal\july2007\bilingual-cross_border_arbitration_07-26-2007-rev3.doc

product or service that was the subject of the transaction, which affected the consumer's conduct or decision with regard to that product or service;	falsa sobre un aspecto sustancial del producto o servicio objeto de la operación, que afectó la conducta del consumidor o su decisión con respecto a dicho producto o servicio;
v. the vendor failed to comply with express warranties made to the consumer; or	v. El vendedor no dio cumplimiento a las garantías expresamente dadas al consumidor;
vi. the vendor charged or debited the consumer's financial, telephone or other account without authorization, or charged an amount for the transaction different from that agreed to.	vi. El vendedor facturó o realizó un débito con respecto a la cuenta financiera, telefónica o de otra naturaleza del consumidor, sin su autorización, o cobró un monto distinto al que se había acordado para la operación.
4. Agreement to Arbitrate	**4. Acuerdo de Arbitraje**
4.1 An agreement or assent to arbitrate pursuant to these rules shall be in writing The arbitration agreement shall reference the procedure to be used, including the process and deadline for initiating an arbitration claim, the appointing authority that will select the arbitrator, and the expected costs of the procedure. The arbitration agreement may as appropriate include a reference to these model rules, and shall provide the email and physical address of the vendor, and of the arbitrator or other authority on which a consumer should deliver any arbitration claim.	4.1 El acuerdo o consentimiento para proceder al arbitraje en virtud de estas normas se otorgará por escrito. El acuerdo de arbitraje habrá de incluir información respecto al procedimiento a utilizarse, incluyendo el proceso y plazo para plantear un reclamo de arbitraje, la identificación de quién designará al árbitro (autoridad designante), y los costos anticipados del procedimiento. El acuerdo de arbitraje podrá, si resulta apropiado, incluir una referencia a estas normas modelo, y proporcionará asimismo la dirección de correo electrónico y dirección física del vendedor, del árbitro y de cualquier otra autoridad ante la cual el consumidor pueda presentar una solicitud de arbitraje.
4.2 Agreements optionally may take the form of an alternative that the vendor provides to the consumer to pursue arbitration covered by these rules in the event a dispute arises, and may provide the arbitrator with authority to award relief on certain claims without requiring proof of applicable law	4.2 De manera opcional, el acuerdo podrá tomar la forma de una alternativa proporcionada por el vendedor al consumidor a efectos de proceder al arbitraje bajo estas reglas en aquellos casos en que surja un conflicto, y podrá conceder al árbitro la facultad de resolver ciertos reclamos sin que se requiera prueba del derecho aplicable.
5. Initiation of Arbitration Claim	**5. Inicio de la Solicitud de Arbitraje**
5.1 An arbitration claim may be initiated by the consumer pursuant to these rules within one year after the occurrence of the facts giving rise to the claim. The consumer may initiate the claim by delivering it in writing to the vendor, and to the arbitrator or other authority, that he or she wants to arbitrate a dispute. An arbitration claim should : · briefly explain the dispute and reference the arbitration clause, · list the names, physical address, and email address of the consumer and of the business (if known); · specify the amount claimed, and · indicate the solution sought.	5.1 La solicitud para presentar un reclamo de arbitraje podrá ser planteada por el consumidor de conformidad con estas normas dentro del año siguiente al momento en que sucedieron los hechos que dieron origen al reclamo. El consumidor podrá iniciar el reclamo mediante su presentación por escrito al vendedor, al árbitro o a otra autoridad expresando su deseo de someter un conflicto al arbitraje. La solicitud de arbitraje debería: · explicar de manera sumaria la naturaleza del conflicto y hacer referencia a la cláusula de arbitraje, enumerar los nombres, dirección física y dirección de correo electrónico del consumidor y de la empresa (si se cuenta con la misma); · especificar el monto reclamado, y · hacer referencia a la solución que se busca.
The consumer must also deliver copies of the	Asimismo, el consumidor deberá entregar

arbitration claim to the arbitrator or appointing authority at the same time he or she delivers the claim to the vendor. Delivery of the arbitration claim, and of subsequent communications in the arbitration, shall be effected by post and email, or as otherwise provided in the arbitration agreement.[13]	copias de la solicitud de arbitraje al árbitro o autoridad designante, concomitantemente a la entrega del reclamo al vendedor. La entrega de la solicitud de arbitraje, y de las comunicaciones ulteriores en el proceso de arbitraje se realizarán por correo común y por correo electrónico, o por otra vía que se encuentre especificada en el acuerdo de arbitraje.[13]
5.2 The vendor may in writing answer the consumer's claim. The answer must be delivered to the consumer and the arbitrator or other authority within 20 calendar days after delivery of the consumer's claim.	5.2 El vendedor podrá contestar el reclamo del consumidor por escrito. La contestación deberá ser entregada al consumidor y al árbitro u otra autoridad dentro de los 20 días corridos luego de la entrega del reclamo del consumidor.
5.3 The arbitration will go forward, even if the vendor does not file an answer.	5.3 Se procederá al arbitraje incluso si el vendedor no presenta contestación.
6. The Arbitrator When an arbitrator is appointed, his or her full name, address, nationality, and email address shall be indicated, together with a brief description of the arbitrator's qualifications. The arbitrator appointed must also disclose to the parties any circumstance that is likely to affect his or her impartiality. This includes any bias, any financial or personal interest in the result of the arbitration, or any past or present relationship with the parties or their representatives. Challenges to arbitrators appointed, and the replacement of an arbitrator, shall be pursuant to the terms of the arbitration agreement or otherwise as provided by rules applicable to this arbitration proceeding.[14]	**6. Árbitro** Al designarse a un árbitro se indicará su nombre completo, dirección, nacionalidad y correo electrónico, así como una breve descripción de sus aptitudes o preparación como árbitro. El árbitro designado también deberá poner en conocimiento de las partes si existe alguna circunstancia que pudiere afectar su imparcialidad. Esto puede incluir cualquier prejuzgamiento, interés financiero o personal en el resultado del arbitraje, o cualquier relación presente o pasada con las partes o con sus representantes. La recusación del árbitro designado y el reemplazo del árbitro se realizará de conformidad con los términos del acuerdo de arbitraje, o por otras vías, de conformidad con las normas aplicables a este procedimiento de arbitraje.[14]
7. Parties and Representation 7.1 Parties may be represented by counsel, if they choose, but representation by an attorney shall not be mandatory.	**7. Partes y Representación** 7.1 Las partes podrán estar representadas por abogado, si así lo eligen, pero la representación por abogado no será obligatoria.
8. Proceedings 8.1 Disputes under these rules are resolved by reviewing documents and statements submitted by the parties. Documents may be provided either electronically or by post, concurrently with the sending of the claim and answer, or as otherwise provided by the arbitrator.	**8. Procedimientos** 8.1 Las controversias que se regulen por estas normas se resolverán mediante la revisión de los documentos y declaraciones presentados por las partes. Los documentos podrán proporcionarse ya sea de manera electrónica o por correo, conjuntamente con la presentación del reclamo o contestación, o según lo disponga el árbitro.
8.2 A party may request that the arbitrator hold one hearing by audio, video or email conference or other communications technology if the technical means are readily available. If the arbitrator decides to hold a hearing, taking into account the issues and amount in dispute, such hearing may occur even if the other party refuses to participate. If a party wants to have a hearing it must pay the communications costs for the arbitrator and both parties to	8.2 Una parte podrá solicitar que el árbitro celebre una audiencia a través de conferencia vía audio, video, correo electrónico u otra tecnología de comunicación siempre que los medios técnicos se encuentren fácilmente disponibles. Si el árbitro decide celebrar una audiencia, tomando en consideración los temas y monto en disputa, dicha audiencia se podrá realizar aunque la parte contraria se niegue a participar en la misma. Si una parte desea que se celebre una audiencia, deberá

participate using the technical means chosen.[15]	pagar los costos de comunicación del árbitro y de ambas partes a efectos de su participación a través de los mecanismos técnicos elegidos.[15]
8.3 The arbitrator has the authority to determine which evidence is relevant and material. Parties are expected to produce whatever evidence is requested by the arbitrator. The parties do not have to follow legal rules of evidence.	8.3 El árbitro tendrá la facultad de determinar qué medios probatorios resultan relevantes y conducentes. Se espera que las partes presenten todas las pruebas que sean solicitadas por el árbitro. Las partes no tendrán que seguir las normas legales respecto a medios probatorios.
8.4 An arbitrator, or other person authorized by law may request production of documents or other evidence upon the request of any party or independently that is relevant and reasonable taking into consideration the amount of the claim.	8.4 El árbitro u otra persona autorizada por la ley podrá solicitar la presentación de documentos u otras pruebas a solicitud de cualquiera de las partes o a su iniciativa propia, siempre que resulte relevante y razonable tomando en consideración el monto del reclamo.
9. The Award	**9. Laudo**
9.1 Unless the parties agree otherwise, the arbitrator must make a decision in the form of an award or otherwise within 45 calendar days after his or her appointment.	9.1 A menos que las partes acuerden algo distinto, el árbitro deberá emitir su decisión en la forma de un laudo, o de otra manera, dentro de un plazo de 45 días corridos luego de su designación.
9.2 Awards shall be in writing and shall be executed as required by law.[16]	9.2 Los laudos se emitirán por escrito y serán ejecutados según se determine por la ley.[16]
9.3 Arbitrators may grant appropriate relief to consumers who show economic harm resulting from claims within the scope of these model rules. Arbitrators shall, to the extent the parties have agreed, decide such claims and grant such relief on an equitable basis, based on an interpretation of these rules and without requiring proof of applicable law. In granting such relief, arbitrators may order, consistent with these rules, payment of money, return of a product or service, and/or replacement of a product or service. Arbitrators shall in calculating economic harm take into account any economic value the consumer retains as a result of the transaction. The arbitrator may use a vendor's claims to reduce or eliminate the amount owed by a vendor, but otherwise shall have no authority to enter an award for such relief against a consumer. The arbitrator may also make an award based on the parties' settlement of a claim.	9.3 Los árbitros proporcionarán una restitución adecuada a los consumidores que prueben un daño económico dentro del ámbito de aplicación de estas normas modelo. En la medida en que las partes así lo hubieren acordado, los árbitros podrán decidir los reclamos y proporcionar la restitución correspondiente en base a la equidad, de conformidad con la interpretación de estas normas y sin exigir prueba del derecho aplicable. A efectos de dicha restitución los árbitros podrán ordenar, de conformidad con estas normas, el pago de una suma de dinero, la devolución de un producto o servicio, y/o la sustitución de un producto o servicio. A efectos del cálculo del daño económico, los árbitros tomarán en consideración cualquier valor económico que el consumidor hubiere retenido como resultado de la operación. El árbitro podrá tomar en cuenta los reclamos del vendedor a efectos de reducir o eliminar el monto debido por el vendedor, pero no tendrá la facultad de emitir un laudo restitutorio en contra de un consumidor. El árbitro también podrá emitir un laudo en base a los términos de la transacción acordada por las partes.
9.4 The award shall be final and binding, with preclusive effect up to US$1,000, or the equivalent in other currency, but subject to review in accordance with applicable state statutes governing arbitration awards.[17]	9.4 El laudo será definitivo y obligatorio, y tendrá efecto preclusivo por hasta un monto de US$1,000, o su equivalente en otra moneda, sin perjuicio de la revisión que se pueda realizar de conformidad con las leyes estatales aplicables en materia de laudos arbitrales.[17]
9.5 Parties to an arbitration under these rules shall be deemed to have consented that	9.5 Se presumirá que las partes de un arbitraje realizado en virtud de estas normas han prestado

judgment upon the arbitration award may be entered in any court having jurisdiction thereof.[18]	su consentimiento para el dictamen de una sentencia sobre el laudo arbitral por cualquier corte que resulte competente en la materia.[18]
10. Extensions of Time	**10. Prórroga de Plazos**
10.1 The arbitrator may give each party one ten calendar day extension of any deadline in these rules, and otherwise for good cause shown.	10.1 El árbitro podrá conceder a cada parte una única prórroga de diez días corridos con respecto a cualesquiera de los plazos incluidos en estas normas, o en cualquier otra instancia si se demuestra justa causa.
10.2 When any action under these rules is due on an official holiday or a non-business day at the residence or place of business of the person whose action is due, the due date for the action is extended until the first business day which follows.	10.2 Cuando un plazo determinado en virtud de estas normas venza en un feriado oficial o en un día no laborable en el lugar de residencia o lugar de negocios de la parte a la cual se aplica dicho plazo, el mismo se extenderá hasta el primer día hábil siguiente.
11. Language	**11. Idioma**
11.1 The arbitration shall be conducted in the language used in connection with the transaction in dispute, unless another language is agreed upon by the parties. In the event of any dispute about the language used in connection with the transaction, the arbitrator or appointing authority may decide the language to be used.	11.1 El arbitraje se llevará a cabo en el idioma utilizado en la operación que hubiere generado la controversia, a menos que las partes acuerden el uso de otro idioma. Si no existe acuerdo en cuanto al idioma utilizado en la operación, el árbitro o autoridad designante podrá decidir qué idioma se habrá de utilizar.
12. Agreements between participating states	**12. Acuerdos entre estados participantes**
12.1 [States adopting these rules may facilitate them by entering agreed terms for implementation between two or more other states. It is contemplated that a model implementation agreement may be produced by the CIDIP process.]	12.1 [Los estados que adopten estas normas podrán facilitar su uso mediante la celebración de acuerdos de implementación entre dos o más estados. Se prevé que se pueda redactar un convenio modelo de implementación como parte del proceso de la CIDIP.]

ANNEX C/ ANEXO C

Draft Model Law on Government Redress For Consumers Including Across Borders	**Proyecto de Ley Modelo de Restitución a los Consumidores, incluso a nivel transfronterizo**
1. Purpose The goal of this Law is to establish competent consumer protection authorities in member States, and vest them with the authority to obtain redress for consumers and to enable them to cooperate with their foreign counterparts. The Law also aims to facilitate the enforcement of certain judgments for consumer redress across borders.[19]	**1. Objetivo** La finalidad de esta Ley es la creación de autoridades competentes de protección al consumidor en los Estados Miembros, que cuenten con las facultades necesarias para obtener la restitución a favor de los consumidores y para cooperar con sus contrapartes en el ámbito internacional. Asimismo, la Ley tiene como finalidad facilitar la ejecución de ciertas sentencias para restitución a los consumidores en operaciones transfronterizas.[19]
2. Definitions[20] 2.1 "Consumer" means a natural person engaging in a commercial transaction for personal, family, or household use, and not for resale or other commercial activity. 2.2 "Business-to-consumer transactions" means commercial transactions for value between commercial entities and consumers. 2.3 "Economic harm" means actual monetary loss sustained by a consumer in a business-to-consumer transaction, as the direct result and foreseeable of that transaction. 2.4 "Competent authority" means the government agency designated or created for the application of this Law.	**2. Definiciones**[20] 2.1 "Consumidor" significa una persona física que participa en una operación comercial para uso personal, familiar o del hogar, y no para fines de reventa u otra actividad comercial. 2.2 "Operaciones de empresa a consumidor" significa operaciones a título oneroso entre entidades comerciales y consumidores. 2.3 "Daño económico" significa la pérdida monetaria real que haya sufrido el consumidor en una operación de empresa a consumidor, como resultado directo y previsible de esa operación. 2.4 "Autoridad competente" significa la agencia gubernamental designada o creada a efectos de la aplicación de esta Ley.
3. Competent Consumer Protection Authority[21] 3.1 Each Member State shall designate or create one or more competent authorities responsible for the application of this Law. 3.2 The competent authorities shall have the investigation and enforcement powers necessary for the application of this Law and shall exercise them in conformity with national law. 3.3 The competent authorities may exercise the powers referred to in this Law in conformity with national law either:	**3. Autoridad competente de protección al consumidor**[21] 3.1 Cada Estado Miembro designará o creará una autoridad o más autoridades competentes, responsables de la aplicación de esta Ley. 3.2 Las autoridades competentes tendrán las facultades investigativas y ejecutoras necesarias para la aplicación de esta Ley y las ejercerán de conformidad con el derecho aplicable en el ámbito nacional. 3.3 Las autoridades competentes podrán ejercer las facultades que les concede esta Ley de conformidad con el derecho interno ya sea: a. en forma directa, en virtud de su propia

[19] This Model Law is proposed as a complement to the proposed Model Law on Small Claims. Both proposals are meant to work as alternatives for providing meaningful redress to consumers. Esta Ley Modelo se propone a modo de complemento de la propuesta de Ley Modelo para Reclamos de Menor Cuantía. La finalidad es que ambas propuestas funcionen como alternativas para proporcionar una restitución significativa a los consumidores.

[20] This Draft Model Law should also be interpreted in light of the terms and definitions provided in the Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers. Este borrador de Ley Modelo deberá interpretarse asimismo a la luz de los términos y definiciones detallados en las Directricespara una Ley Interamericana respecto a la Disponibilidad de Medios de Solución de Controversias y Restitución a favor de los Consumidores.

[21] According to Section II.A. of the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders (2003), ("Cross-Border Guidelines"): ". . . countries should introduce and maintain an effective framework of laws, consumer protection enforcement agencies, institutions, practices, and joint initiatives designed to limit the incidence of fraudulent and deceptive commercial practices against consumers." De conformidad con la Sección II.A. de los Lineamientos de la OCDE para la Protección de los Consumidores frente a Prácticas Comerciales Transfronterizas Engañosas o Fraudulentas (2003) ("Los Lineamientos Transfronterizos"), "… los países deberían generar y mantener un marco efectivo de leyes, autoridades ejecutoras en materia de protección al consumidor, así como instituciones, prácticas e iniciativas conjuntas diseñadas a efectos de limitar la incidencia de las prácticas comerciales engañosas o fraudulentas contra los consumidores."

a. directly under their own authority or under the supervision of the judicial authorities; or b. by application to courts competent to grant the necessary relief, including, where appropriate, by appeal, if the application to grant the necessary relief is not successful.	autoridad o bajo la supervisión de las autoridades judiciales, o b. mediante solicitud planteada a las cortes competentes a efectos de la emisión de la medida correspondiente incluso, de ser necesario, por vía de apelación, si la solicitud de la medida judicial necesaria no resulta exitosa.
3.4 Insofar as competent authorities exercise their powers by application to the courts in accordance with Article 3.3.b, those courts shall be competent to grant the necessary relief.[22]	3.4 En la medida en que las autoridades competentes ejerzan sus facultades mediante solicitud a los tribunales de conformidad con el Artículo 3.3b, dichas tribunales deberán contar con la competencia necesaria para dictar las medidas correspondientes.i[22]
4. Grant of Authority to Seek Monetary Redress	**4. Concesión de autorización para buscar la restitución monetaria**
4.1 The competent authorities are hereby authorized to take action and obtain remedies, including but not limited to monetary redress,	4.1 Por la presente, las autoridades competentes quedan autorizadas a iniciar acciones y plantear recursos, incluyendo de forma no limitativa con

[22] See Article 4 of the Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (Regulation on consumer protection cooperation) (EC 2006/2004)(2004). Véase el Artículo 4 del Reglamento del Parlamento Europeo y del Consejo en materia de cooperación entre autoridades nacionales responsables por la ejecución de las normas de protección a los consumidores (Reglamento sobre cooperación en materia de protección a consumidores) (EC 2006/2004) (2004).

[23] According to Sections V.B. and C. of the Cross-Border Guidelines: "Member countries should work toward enabling their consumer protection enforcement agencies to take action against domestic businesses engaged in fraudulent and deceptive commercial practices against foreign consumers [and] against foreign businesses engaged in fraudulent and deceptive commercial practices against their own consumers." De conformidad con las Secciones V.B y C de los Lineamientos Transfronterizos, "los países miembros deberán trabajar en pro de que sus agencias ejecutoras en materia de protección a los consumidores puedan entablar acciones contra las empresas nacionales que utilizan prácticas comerciales engañosas y fraudulentas contra los consumidores extranjeros [y] en contra de empresas extranjeras que utilizan prácticas comerciales engañosas y fraudulentas contra sus propios consumidores."

[24] At least one member State has adopted legislation geared specifically toward facilitating cross-border cooperation on consumer protection enforcement matters. See U.S. SAFEWEB Act, Pub. L. No. 109-455 (2006). Al menos un Estado Miembro ha adoptado una legislación dirigida específicamente a la facilitación de la cooperación transfronteriza en materia de procesos de ejecución para la protección de los consumidores. Véase Ley SAFEWEB de los Estados Unidos, Pub. L. No. 109-455 (2006).

[25] See Section IV of the Cross-Border Guidelines. Véase Sección IV de los Lineamientos Transfronterizos.

[26] Courts have held that the test for whether a judgment is a fine or penalty is determined by whether its purpose is remedial in nature, with its benefits accruing to private individuals, or it is penal in nature, punishing an offense against public justice. See, e.g., Chase Manhattan Bank, N.A. v. Hoffman, 665 F.Supp 73 (D. Mass. 1987) (finding that a Belgium judgment was not penal even though the proceeding forming the basis of the suit was primarily criminal where Belgium court considered damage petition a civil remedy, the judgment did not constitute punishment for an offense against public justice of Belgium, and benefit of the judgment accrued to private judgment creditor, not Belgium). Thus, a judgment that awards compensation or restitution for the benefit of private individuals should not automatically be considered penal in nature simply because the action is brought on behalf of the private individuals by a government entity. See U.S.-Australia Free Trade Agreement, art.14.7.2, U.S.-Austl., May 18, 2004 (providing that when government agency obtains a civil monetary judgment for purpose of providing restitution to consumers, investors, or customers who suffered economic harm due to fraud, judgment generally should not be denied recognition and enforcement on ground that it is penal or revenue in nature, or based on other foreign public law). Los tribunales en general han decidido que el criterio conforme al cual se determina si una sentencia es de naturaleza penal o punitiva se vincula a si su objetivo último es reparatorio, en virtud de lo cual sus beneficios corresponden a individuos cuya naturaleza es privada, o si por el contrario su naturaleza es penal, a los efectos de sancionar una ofensa contra la justicia pública. Por ejemplo, en el caso de Chase Manhattan Bank, N.A. contra Hoffman, 665 F.Supp 73 (D. Mass. 1987) (en el que se concluyó que la sentencia belga no era de naturaleza penal a pesar de que el procedimiento que dio base al juicio fue predominantemente penal, el juzgado belga consideró la reclamación de daños como un recurso civil, y la sentencia no constituyó un castigo por una ofensa contra la justicia pública belga, y los beneficios de la sentencia se asignaron directamente al acreedor privado, y no al gobierno belga). En consecuencia, una sentencia que determine una reparación o restitución en beneficio de individuos de naturaleza privada no debería ser automáticamente considerada como una sentencia penal simplemente porque la acción fue iniciada por una entidad gubernamental en representación de dichos individuos. Véase asimismo el Artículo 14.7.2 del Tratado de Libre Comercio entre Estados Unidos y Australia del 18 de mayo de 2004 (que dispone que cuando una agencia gubernamental obtiene una sentencia civil de naturaleza monetaria a efectos de conceder una restitución a los consumidores, inversionistas o clientes que hayan sufrido un daño económico debido a actividades fraudulentas, no se deberá negar de forma general el reconocimiento o ejecución de dicha sentencia sobre la base de que la misma tiene una naturaleza penal o impositiva, o que se basa en otras normas de derecho público extranjero).

[27] See Article 14.7.3 of the Competition Chapter of the U.S.-Australia Free Trade Agreement. Véase el Artículo 14.7.3 del Capítulo de Competencia del Tratado de Libre Comercio entre Estados Unidos y Australia.

for or on behalf of consumers who have suffered economic harm as a result of fraudulent or deceptive commercial practices.	respecto a restitución monetaria, para o en representación de los consumidores que hayan sufrido un daño económico como resultado de prácticas comerciales fraudulentas o engañosas.
4.2 The redress powers of the competent authorities shall include the authority to: a. seek relief in court for redress in civil or administrative proceedings; and/or b. seek relief in court for redress in criminal proceedings; and/or c. commence a collective or representational action. This authority is granted in addition to remedies provided elsewhere by law.	4.2 Las facultades de las autoridades competentes en materia de restitución incluirán las siguientes: a. solicitar una decisión o medida judicial para la restitución en procedimientos civiles o administrativos, o b. solicitar una decisión o medida judicial para la restitución en procedimientos penales, o c. iniciar una acción colectiva o representativa. Estas facultades se conceden de manera adicional a otros recursos o medidas reguladas por esta ley.
4.3 The competent authority shall be permitted to pursue actions for redress against: (a) domestic businesses who have caused consumers to suffer economic harm as result of being deceived, or defrauded, or misled in business-to- consumer transactions, and (b) foreign businesses who have caused consumers to suffer economic harm as result of being deceived, or defrauded, or misled in business-to-consumer transactions.[23]	4.3 La autoridad competente podrá iniciar acciones de restitución en contra de: (a) empresas nacionales que hayan causado daños económicos a los consumidores como resultado de haber sido engañados o defraudados o inducidos a error en operaciones de empresa a consumidor y (b) empresas extranjeras que hayan causado daños económicos a los consumidores como resultado de haber sido engañados o defraudados o inducidos a error en operaciones de empresa a consumidor.[23]
5. Cross-Border Cooperation[24]	**5. Cooperación transfronteriza**[24]
5.1 The competent authorities shall have the authority to notify foreign competent authorities of investigations that affect these foreign countries, so as to alert them of possible wrongdoing in their jurisdiction, simplify assistance and cooperation and avoid duplication of efforts and potential disputes.	5.1 Las autoridades competentes tendrán la facultad de notificar a las autoridades competentes en el extranjero acerca de investigaciones que afecten a dichos países extranjeros, a efectos de alertarlas acerca de posibles actos ilegítimos cometidos dentro de su jurisdicción, de simplificar la asistencia y cooperación, y de evitar la duplicación de esfuerzos y los posibles conflictos.
5.2 The competent authorities shall have the authority to share the following information with foreign competent authorities in appropriate instances: a. publicly available and other non-confidential information; b. consumer complaints; c. information about addresses, telephones, Internet domain registrations, basic corporate data, and other information permitting the quick location and identification of those engaged in fraudulent and deceptive commercial practices; d. expert opinions on issues related to commercial practices, and the underlying information on which those opinions are based; and e. documents, third-party information, and other evidence obtained pursuant to judicial or other compulsory process.	5.2 Las autoridades competentes podrán compartir la siguiente información con las autoridades competentes en el extranjero, dentro de las instancias apropiadas: a. información disponible al público y otra información no confidencial; b. reclamos planteados por los consumidores; c. información relativa a direcciones, teléfonos, registros de dominio en Internet, datos corporativos básicos y demás información que permita la rápida localización e identificación de sujetos involucrados en prácticas comerciales fraudulentas y engañosas; d. opiniones periciales sobre temas vinculados a prácticas comerciales y cualquier información subyacente en la que se basen dichas opiniones; y e. documentos, información proporcionada por terceros y otras pruebas obtenidas a través de procesos judiciales u otros

5.3 The competent authorities shall have the authority to obtain information, including documents and statements, and otherwise provide investigative assistance for investigations of foreign competent authorities.	procedimientos obligatorios. 5.3 Las autoridades competentes tendrán la facultad de obtener información, incluso documentos y declaraciones u otros mecanismos, para proporcionar apoyo investigativo y asistencia a las investigaciones iniciadas por las autoridades competentes extranjeras.
5.4 The competent authorities shall take appropriate steps to maintain the necessary confidentiality of information exchanged under this model law, in particular in sharing confidential business or personal information.[25]	5.4 Las autoridades competentes tomarán las medidas apropiadas para mantener la necesaria confidencialidad de la información intercambiada en virtud de esta ley modelo, en particular en lo que refiere al intercambio de información confidencial comercial o personal.[25]
6. Recognition of Foreign Civil Judgments for Consumer Redress	**6. Reconocimiento de sentencias civiles extranjeras para la restitución a consumidores**
6.1 When a foreign competent authority obtains a civil monetary judgment for redress to consumers who have suffered economic harm as a result of being deceived or defrauded as a result of fraudulent or deceptive commercial practices in a business-to-consumer transaction, and such authority seeks to have that judgment or order recognized and enforced in [member state], the judicial authorities may treat that judgment as equivalent to such a judgment in the name of a private party or parties, and shall not disqualify such a monetary judgment from recognition or enforcement as penal or revenue in nature, or based on the public nature of the law enforced, due solely to the governmental status of the plaintiff pursuing the redress claim.[26]	6.1 Cuando una autoridad competente extranjera haya obtenido una sentencia civil de naturaleza monetaria para la restitución a consumidores que hayan sufrido un daño económico como resultado de haber sido engañados o defraudados o inducidos a error en la realización de operaciones de empresa a consumidor y dicha autoridad busque lograr el reconocimiento y ejecución de dicha sentencia u orden en [Estado Miembro], las autoridades judiciales podrán dar a dicha sentencia un tratamiento equivalente al que se daría a una sentencia favorable a una parte o partes privadas, y no se negarán al reconocimiento y ejecución de dicha sentencia monetaria alegando su naturaleza penal o impositiva, o en base a la naturaleza de derecho público de la ley que se aplica, tan sólo con sujeción a la calidad gubernamental de la parte actora que ha planteado la demanda de restitución.[26]
The judicial authorities shall consider the recognition or enforcement of provisions for monetary judgments described in Article 6.1 separately from other provisions of the judgment, to the extent such other provisions are deemed to be penal or revenue in nature or based on other foreign public law for the purposes of recognition or enforcement.[27]	A efectos del reconocimiento y la ejecución, las autoridades judiciales tomarán en consideración la posibilidad de reconocimiento y ejecución de las partes dispositivas de las sentencias en materia monetaria, descritas en el Artículo 6.1, en forma independiente de otras partes dispositivas de la sentencia, en la medida en que estas otras partes se consideren de naturaleza penal, impositiva o con fundamento en otras normas de derecho público extranjero.[27]

CJI/RES. 144 (LXXII-O/08)

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING 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;

RECALLING 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;

CONSIDERING its resolution CJI/RES. 122 (LXX-O/07), "Seventh Inter-American Specialized Conference on Private International Law (CIDIP VII)" by means of which it referred to the negotiation process aimed at the creation of instruments to facilitate, make effective and guarantee protection for customers and reiterated 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;

HAVING CONSIDERED the subject on its 71st and 72nd regular sessions held in Rio de Janeiro, Brazil (August, 2007 and March, 2008);

HAVING SEEN the study "Status of the Consumer Protection Negotiations at the Seventh Inter-American Specialized Conference on Private International Law" (CJI/doc.288/08 rev.1) presented by Dr. Antonio F. Pérez, and the analysis of the three proposals of Brazil, Canada and the United States respectively as they currently stand and are still in a process of harmonization,

RESOLVES:

1. To thank Dr. Antonio F. Pérez for his study "Status of the Consumer Protection Negotiations at the Seventh Inter-American Specialized Conference on Private International Law".

2. To underline that consumer protection remains one of the key emerging issues in the development of cross-border trade, and consequently to express its hope that deliberations and negotiations will lead to a successful holding of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII).

3. To express the view that for the outcome of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) to be successful, it should be guided by the need to ensure consumers engaging in cross-border commercial transactions a protection that is effective and affordable in relation to the value of claims and that leads to quickly enforceable remedies.

4. To suggest that, given the broad range of substantive issues involved in cross-border commercial contracts between consumers and providers, ongoing negotiations and deliberations to address and resolve jurisdictional, choice of law, recognition and enforcement and alternative dispute resolution issues may require innovative forms of international cooperation among OAS Member States.

5. To reiterate their mandate to its two rapporteurs, Drs. Ana Elizabeth Villalta Vizcarra and Antonio F. Pérez, to assist with the preparatory process of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII).

This resolution was adopted at the session held on March 12th, 2008, by the following members: Drs. Antonio Fidel Pérez, Hyacinth Evadne Lindsay, Guillermo Fernández de Soto, Mauricio Herdocia Sacasa, Jean-Paul Hubert, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

CJI/doc.309/08

TOWARDS THE INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW - CIDIP- VII

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

1. BACKGROUND

With the ongoing trends in the world and with the phenomenon of globalization and developments in integration processes, the national law of States is not sufficient to face the challenges and the problems created by the application of laws of different States.

In these cases the application of the Private International Law becomes necessary to find a solution to the problems posed. In the Inter-American area, the organ in charge of finding a solution to them and of providing a harmonious coexistence between Systems (*Civil Law* and *Common Law*) is the "Inter-American Specialized Conference on Private International Law (CIDIP)", in the framework of the Organization of American States (OEA).

The CIDIP, as established by Professor Diego Fernández Arroyo, has contributed decidedly to achieve the modernization of the state systems of Private International Law in the Americas, as well as highly generalized benefits in codification.[1]

The work of the CIDIP as regards codification and the progressive development of Private International law in the Inter-American System is so important because most of the American States do not participate actively in universal Private International Law codification. Instead, in the CIDIP all the OAS Member States are also members of the CIDIP under an egalitarian system, with voice and voting rights and participation in the proposal of topics, in preparatory work and in the preparation of legal texts which are negotiated in the Diplomatic Conferences.[2]

Since CIDIP-V, the process has gained vitality with the active involvement of the United States and Canada, in addition to many ratifications by Member States of the Organization of a large number of the Inter-American conventions produced in this process, in fact Belize has incorporated all the conventions related to minors.

The Inter-American Juridical Committee has played a very active role in the CIDIP process, in its work to harmonize and standardize American legislations, pursuant to the provisions of Article 99 of the OAS Charter.

Pursuant to Article 100 of the OAS Charter, “The Inter-American Juridical Committee ... may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggests the holding of specialized juridical conferences”. In these circumstances, and when harmonization was not achieved in the 50s between the Bustamante Code, the Treaties of Montevideo and the *Restatement of the Law of Conflicts of Laws*,

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1 **FERNÁNDEZ ARROYO, Diego P**. Razones y condiciones para la continuidad de la CIDIP: reflexiones de cara a la CIDIP-VII**.**

2 *Op cit*.

prepared by the American Law Institute, the Inter-American Juridical Committee suggested convoking the Specialized Conferences on Private International Law to standardize law in the Americas, and thus was born the process of the CIDIPs as of 1975 (in Panama).

These conferences are convened every 4 or 6 years, for the drafting of international instruments such as conventions, protocols, uniform documents and model laws, thereby promoting the codification and progressive development of Private International Law in the region.

Up to CIDIP-V, managing harmonization of Private International Law in the Americas was done by means of international conventions; at CIDIP-VI, harmonization was achieved through model laws and standard documents, which, unlike international conventions, are not binding.

Since 1975, six Inter-American Specialized Conferences on Private International Law (CIDIP's) have been held, discussing projects prepared by the Inter-American Juridical Committee. To date, 23 Conventions have been adopted, one model law and two standard documents, for a total of 26 international instruments. At CIDIP-I, held in Panama in 1975, 8 conventions were adopted; at CIDIP-II held in Montevideo, Uruguay, in 1979, 5 conventions were adopted; at CIDIP-III held in La Paz, Bolivia, 4 conventions were adopted; at CIDIP-IV, held in Montevideo, Uruguay, 1989, 3 conventions were adopted; CIDIP-V held in Mexico in 1994 adopted 2 conventions, and at CIDIP-VI held in Washington, D.C. in 2002, one model law and two standard documents were adopted.

Between the 1994 CIDIP-V and the CIDIP-VI of 2002, there was a difference of eight years, which led the experts to speculate whether the CIDIP process had exhausted itself and terminated its useful life.

As of CIDIP-VI, mention has also been made of "commercialization" of the Inter-American standardizing process, together with "privatization", which provoked the Inter-American Juridical Committee to present its report denominated "CIDIP-VII and Beyond",[3] which a questionnaire on the future of the CIDIP is sent to the States and to experts.

Well now, as some private-law experts demonstrate, does the peak of free trade have anything to do with the CIDIP, its agenda and its future? And we can attest that yes, it does, as shown in the words of Professor Fernández Arroyo:

1. The principal harmonizing drive in the CIDIP over the last few years has been "Inter-American Free Trade", and its contribution has been essential to approval of the texts on contracts in the CIDIP-V and those on secured transactions and standard documents in the CIDIP-VI.
2. The radical contrast that occurred prior to and during the CIDIP-VI concerning treatment of trade topics, in relation to trans-border contamination.
3. If we take into account the real content of the CIDIP-VII, its agenda is overwhelmingly trade-minded.[4]

The above text demonstrates how the CIDIP remains interested in trade matters, which deserve their prominent position there, since the very first CIDIP held in Panama in 1975, when an Inter-American Convention was signed on International Trade Arbitrage, which is currently in effect in 18 Member States of the OAS.

The topics of the present CIDIP (CIDIP-VII) refer to international trade, and Brazil has proposed an Inter-American Convention of Private International Law on Law Applicable to certain Contracts and Consumer Protection, not limited to electronic trade. The United States in turn proposes that a model law be drawn up to facilitate monetary restitution to consumers in international transactions, while Canada has proposed a law on jurisdiction, all of which shows how this matter on consumers has contributed to the use of different legislative techniques, from a convention to a model law, or else a methodological combination of both techniques.

The CIDIP is an eminently inter-American forum, and its protagonist role in the early days was predominantly Latin American. Staring with the CIDIP-V, one observes a manifest North-American interest. Now the fundamental task is to interest the CARICOM countries in this

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[3] CJI/doc.74/01 rev.1.

[4] FERNÁNDEZ ARROYO, Diego P. *Op. cit*.

Forum, and to restore Latin American activism in the current preparation of the CIDIP-VII, as manifested by some specialists, assuming its role to contribute to a balanced agenda in the CIDIP topics, participating more actively in the preparations of the Conferences and above all presenting suggestions as to the most appropriate methodology for each topic on the agenda.

The processes of integration in the region are advancing more and more, which makes it necessary to prepare the juridical measures to use, so the search for international solutions to international problems is now a necessity.

If the CIDIP fails to interest all the actors, the specialists could seek other alternatives, such as implementing sub-regional instances, but this would be outside the scope of the OAS.

2. PREPARING THE CIDIP-VII

The delegations of the Member States of the OAS that proposed topics for the agenda of the CIDIP-VII were: Brazil, Canada, El Salvador, United States, Mexico, Peru and Uruguay, which concentrated on: electronic trade, consumer protection, migratory flows, extra-contractual civil responsibility, transportation, trans-border insolvency, international jurisdiction, protection of minors, and university degrees and professions. Later on, Brazil presented its proposal of an "Inter-American Convention of Private International Law on Consumer Protection"; the United States, a "Model Law on Monetary Redress for Consumer Transactions", and Canada, a "Model Law on Jurisdiction and Conflict of Laws Rules for Consumer Contracts".

It is important to emphasize that the Permanent Mission of the United States, on presenting this topic to the Permanent Council of the OAS, stated:

> "We have also included additional material on the topic of consumer protection. It should be pointed out that the purpose of the proposal of the United States on consumer-related topics is to complement the proposals already introduced by other States, in particular that presented by Brazil, rather than substitute other proposals in this field."[5]

Nevertheless, the Member States presented a total of eight topics, and it was agreed that only two of them would be treated in the CIDIP-VII, so the Committee on Juridical and Political Affairs and the attending States ended up defining two topics concerning consumer rights and electronic registers.

Accordingly, resolution AG/RES. 2065 (XXXV-O/05) of the General Assembly of the OAS adopted the agenda of the future CIDIP with the following themes:

a. Consumer Protection: Applicable Law, Jurisdiction, and Monetary Redress (Conventions and Model Laws)
b. Secured Transactions: Electronic Registries Implementation of the Model Inter-American Law on Secured Transactions.

If a balance is made of the topics proposed by the Member States, the topic of "Consumer Protection" is seen to be the one with the biggest number of adhesions, while the country that presented the most elaborated proposal in this respect was Brazil, with the draft Inter-American Convention of Private International Law on the Law Applicable to some Contracts and Consumer Relations, prepared by Professor Cláudia Lima Marques.

In her work "Insufficient Consumer Protection in the Norms of Private International Law", Professor Lima Marques states the need for an Inter-American Convention (CIDIP) on the law applicable to some contracts and consumer relations, as follows:

> If some time ago consumer protection was a matter of national law, since the activities of most people were limited to the territory of their own country, a typical national relationship with no international element, today's regional and national reality is quite different. With the opening of markets to foreign products and services, with increasing economic integration, regionalization of trade, transportation facilities, mass tourism, growing telecommunications, computer network connections, and electronic commerce, there is no way to deny that consumption already crosses

[5] CP/CAJP-2094/03 add.7-a. **Selección de temas para la agenda de la Séptima Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado (CIDIP-VII).** 17 diciembre 2004. Non-official translation. Document available in Spanish at: http:/scm.oas.org/doc_public/SPANISH/HIST_04/CP13720S07.DOC.

national borders. Foreign goods are on supermarket shelves, services are offered by providers with overseas telemarketing headquarters, using television, the radio, the Internet, and mass advertising in the day-to-day lives of most citizens in the cities of our regional metropolises. One need no longer travel to be an *active consumer*, a tourist consumer. One need no longer go anywhere to be a consumer who contracts internationally or deals with suppliers in other countries. The very methods of production and assembly are now international. International consumer contacts and tourism have become activities of the masses. The phenomenon of the *passive international consumer* and the *active international consumer* has already reached the countries of Latin America and Brazil. Consuming internationally is typical of our times. A foreign product or service means status, is symbolic of the current consumer culture. Tourism, trips, being an active consumer internationally are part of the postmodern search for pleasure, individual leisure, the realization of dreams and the imagination, and are becoming an increasingly more important social distinction.[6]

So one cannot deny the myriad of problems that can come from consumer relations and the need to create norms, in the American environment, which bind the States to a common objective in favor of harmonizing conflicting rules as regards consumer rights. That is to say, among our countries there ought to be a legislation that embraces norms of consumer protection as "a physical person who acts outside his/her professional activity, as the end addressee of services and products for personal or family ends".[7]

In this sense, each State of the American Continent has only internal rules to deal with the topic of consumer protection, which makes it urgent to set up an inter-American instrument to rule consumer protection, stressing how important it is for the CIDIP-VII to take place as soon as possible in order to regulate maintenance of consumer relations among the citizens of the American Continent.

In this same sense, Professor Lima Marques reported that the Organization of the American States (OAS) holds Courses on International Law in Rio de Janeiro, Brazil, every August, and that in 2001 she participated presenting the topic "Regional Consumer Protection in the Mercosur and International Consumer Protection", on which occasion she noticed that most of the treaties and international conventions did not concern consumer rights, and that it was therefore necessary to work on that theme.

3. METHODOLOGY OF THE CIDIP-VII

In the above-mentioned resolution AG/RES. 2065 (XXXV-O/05) emitted by the General Assembly of the OAS at its XXXV regular session held in Fort Lauderdale in June 2005, the Permanent Council of the Organization was assigned to establish the methodology for preparing the Inter-American instruments to be considered at the CIDIP-VII, to set the date and venue, and to consider, when studying themes for future CIDIP's, the topic of an Inter-American convention on international jurisdiction, among others.

In the same resolution, the Inter-American Juridical Committee is also requested to present its comments and observations with regard to the topics of the final agenda for the CIDIP-VII. Likewise, in resolution AG/RES. 2069 (XXXV-O/05), "Observations and recommendations for the Annual Report of the Inter-American Juridical Committee", the Juridical Committee is requested to collaborate with the preparation of the upcoming CIDIP-VII.

In view of the previous resolutions, during its 67th regular session held in Rio de Janeiro in August 2005, the Inter-American Juridical Committee adopted resolution CJI/RES. 100 (LXVII-O/05), "Seventh Inter-American Specialized Conference on Private International Law", by means of which the rapporteurs of the theme are requested to announce in coordinated fashion the consultation mechanisms that they set up with a view to developing the topics proposed for the CIDIP-VII, principally in the meeting of specialists summoned to that effect. The rapporteurs

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6 Marques, Claudia Lima. **Insufficient Consumer Protection in the Provisions of Private Internacional Law: the Need for an Inter.-American Convention (CIDIP) on the Law Aplicable to Certain Contracts and Consumer Relations**. 43 p.

7 VIEIRA, Luciane Klein. **La VII Conferencia Especializada interamericana de Direito Internacional Privado – CIDIP VII.** Centro Argentino de Estudios Internacionales. Programa de Derecho Internacional. p. 15. Non-official translation. Document available in Spanish at: http://www.caei.com.ar/es/programas/di/54.pdf

are also requested to keep the Inter-American Juridical Committee informed of the advances made in the discussion of the topics and to draft a report on the matter to be presented at the 68th regular session of the Juridical Committee or before, if the evolution of the topics so warrant.

In turn, to carry out these resolutions the Permanent Council of the Organization determined that specialists will be designated and that meetings will be organized for this purpose and to draw up an agenda for the preparatory works. In this sense, the Committee on Juridical and Political Affairs requested the Member States to present proposals and comments on the adopted topics.

In this sense, with regard to the topic Consumers, the Delegation of Brazil presented a "Draft Inter-American Convention of Private International Law (CIDIP) on the Law Applicable to Certain Contracts and Consumer Relations"; the Delegation of the United States presented a "Model Law on Monetary Redress for Consumer Transactions", and the Delegation of Canada presented a "Proposal on the Development of a Model Law on Jurisdiction and Conflict of Laws Rules for Consumer Contracts in the Context of CIDIP-VII".

The Brazilian Draft Convention on Law Applicable to transactions with consumers contains specific rules on the definition of "consumer" and establishes that contractual types will be governed by the law of the country where the consumer resides, or by the law most favorable for him/her. It also regulates special contracts such as for travel and tourism and shared-time contracts.

The proposal of the United States is to prepare a model law on mechanisms for monetary redress to the consumer when economically jeopardized. In this way, the proposal looks at different forms of economic restitution, including the use of legal mechanisms and collective actions for jeopardized consumers within the same jurisdiction, in addition to setting up principles for obtaining of compensation for damages of a smaller quantity.

The proposal made by Canada refers to the bases for a draft convention project or model law on jurisdiction for transactions carried out with consumers by the Internet. In their official document, the Canadian Delegation explained that its proposals could function harmoniously with the instruments proposed by Brazil and the United States, with special reference to the topic of jurisdiction concerning electronic transactions, which is not covered by the documents presented by the two countries mentioned.

The specialists appointed by the States worked in the forums that opened for discussion over the Internet on the part of the Department of International Legal Affairs of the OAS, now the Secretariat of Legal Affairs. These forums were divided between the two topics of the CIDIP-VII and proved to be a magnificent new alternative to drive the work forward and to save time and money.

Besides the government specialists on the matter, the General Assembly asked the Inter-American Juridical Committee to collaborate with the preparatory work, and requested the General Secretariat to explore forms of collaboration with international organizations, including the Conference of The Hague on Private International Law, the United Nations Commission on International Mercantile Law (UNCITRAL), the International Institute for the Standardization of Private Law (UNIDROIT), the Inter-American Development Bank (IDB), among others.

This cooperation becomes necessary because in the international market, the consumers' position is even more vulnerable, therefore demanding urgent and effective protection of their interests through positive intervention of the States and of the international organizations, as consumer vulnerability has been noticeable for many years. Here we recall a speech made in 1962 by then President John F. Kennedy before the Congress of the United States, in which he said: "we are all consumers, we are all vulnerable, and all of us stand before the market weak and bewildered".[8]

Consumers, according to the experts, have a great expectation as regards the urgent need for protection throughout the Americas, and this is precisely the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), within the framework of the

[8] **La protección del Consumidor Internacional en América: rumbo a la CIDIP-VII.** *Revista Ámbito Jurídico*.

Organization of American States (OAS)[9], whose preparatory work is under way. The OAS is the forum which in fact meets the needs of the region, both in terms of standardization and harmonization, and for that reason the conclusion of the work is eagerly expected in order to set the date and venue of the CIDIP-VII.

At its 68th regular session held in Washington, D.C., in March 2006, the Inter-American Juridical Committee adopted resolution CJI/RES. 104 (LXVIII-O/06) called "Seventh Inter-American Specialized Conference on Private International Law", requesting the rapporteurs to participate in a coordinated manner representing the Juridical Committee in the consultation mechanisms established with the aim of developing the themes proposed for the CIDIP-VII. Also, rapporteurs were requested to keep the Juridical Committee informed on the advances in the discussion of the topics and to submit a new report to the Committee with their remarks and comments on the Agenda for the CIDIP VII in the next regular session. That resolution also adopted document CJI/doc 209/06.

Through resolution AG/RES. 2218 (XXXVI-O/06), the OAS General Assembly, during its XXXVI regular session convened in Santo Domingo in June 2006, requested the Inter-American Juridical Committee to cooperate in the organization of the next CIDIP-VII, encouraging the rapporteurs to participate in the consultation mechanisms implemented for developing the themes proposed for that CIDIP.

During its 69th regular session convened in Rio de Janeiro in August 2006, the Inter-American Juridical Committee adopted Resolution CJI/RES. 115 (LXIX-O/06), "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", in which it reiterated its support of the CIDIP process as the forum *par excellence* for standardizing and harmonizing private international law in the Hemisphere and specifically, the need to draft inter-American instruments within the framework of the CIDIP-VII on consumer protection and electronic registries for secured transactions. It also reiterated its support of the involvement of rapporteurs in the preparatory work for the CIDIP-VII, asking them to continue their participation representing the Inter-American Juridical Committee in the mechanisms for the drafting of inter-American instruments on consumer protection and electronic registries for secured transactions and emphasizing the reports of the Juridical Committee on both topics. Finally, it decided to draft new texts, comments and questions for the CIDIP-VII Internet discussion forum in order to encourage dialogue on the drafting of instruments to be implemented in all the Member States of the Organization.

The First Experts Meeting of the CIDIP-VII took place in Porto Alegre, Brazil, at the Federal University of RIo Grande do Sul, on 2-4 December, 2006, addressing the theme of Consumer Protection. The proposals from Brazil, the United States and Canada on the topic were discussed. The coordinators of each theme then held a meeting on January 18, 2007 with the Committee of Juridical Political Affairs of the OAS, in which their proposals were presented.

During its 70th regular session held in San Salvador, in February-March 2007, the Juridical Committee adopted resolution CJI/RES. 122 (LXX-O/07), "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", in which it expressed satisfaction in view of the advances to date in the negotiation process focusing on the drafting of instruments with the aim of facilitating, enforcing and guaranteeing protection to consumers, particularly on the occasion of the First Experts Meeting. The Committee reiterated its willingness to cooperate with the objective of Member States of the OAS seeking successful implementation of the CIDIP-VII, focusing on the theme of Consumer protection and reiterating the mandate for co-rapporteurs to continue to participate in representing the Juridical Committee in the process of preparation for the CIDIP-VII and to report on same.

During the 72nd regular session of the Inter-American Juridical Committee held in Rio de Janeiro, Brazil, in March 2008, the Director of the Department of International Law of the Secretariat of Legal Affairs of the Organization reported that, since the Porto Alegre Meeting, no additional documents had been received, and that the informal meetings between Brazil, the United States and Canada continue to be convened.

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[9] KLEIN VIEIRA, Luciane. *Op. cit*.

During that session, the Inter-American Juridical Committee adopted resolution CJI/RES.144 (LXXII-O/08), "Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)", stressing that consumer protection continues to be one of the key emerging topics in the development of trans-border trade, and that hopefully deliberations and negotiations will be instrumental for a successful CIDIP–VII, reiterating to rapporteurs the mandate of providing assistance during the development of the preparatory works.

The OAS General Assembly, during its XXXVIII regular in Medellin, Colombia, in June 2008, adopted resolution AG/RES. 2401 (XXXVIII-O/08), called "Seventh Inter-American Specialized Conference on Private International Law", in which the following resolutions were recalled: AG/RES. 1923 (XXXIII-O/03), AG/RES. 2033 (XXXIV–O/04), AG/RES. 2065 (XXXV-O/05), AG/RES.2217 (XXXVI-O/06) and AG/RES. 2285 (XXXVII-O/07). These respectively convened for CIDIP-VII, analyzed States proposals for CIDIP-VII, included Registries on Consumer Protection and Secured Transactions as the two topics on the Agenda, and established its methodology and preparatory work. It was also recalled that the CIDIP process is the main component of the OAS for the development and harmonization of Private International Law in the Western Hemisphere, through which twenty-six inter-American instruments have been adopted.

In this regard it considered that in the area of Consumer Protection, Brazil, United States and Canada are working to conclude their draft convention, model laws and legislative guides on consumer protection, and that the current working groups on consumer protection and secured transactions have achieved poor progress.

For that reason, among other questions, it resolved:

1. To thank the CIDIP working groups on consumer protection and secured transactions registries for their efforts. In the future they will be comprised of government officials or representatives appointed by the states.
2. To urge the Consumer Protection Working Group to establish a work plan and agenda for further discussions with a view to completing the proposed instruments on the topic.
3. To urge member states with the support of the General Secretariat, to continue the preparatory work in the area of secured transaction registries with a view to completing the instruments on this topic.
4. To instruct the General Secretariat to continue lending its support, through the Department of International Law of the Secretariat for Legal Affairs, to the preparatory work of CIDIP-VII and, if necessary, to seek external funding for the preparatory and final work of this Conference.
5. To instruct the Permanent Council to set a date (or dates) for CIDIP-VII once the experts complete their preparatory work on consumer protection and secured transactions.
6. To instruct the Permanent Council to report to the General Assembly at its thirty-ninth regular session on the implementation of this resolution, the execution of which will be subject to the availability of financial resources in the program-budget of the Organization and other resources.[10]

In this regard, it is convenient to have a final document submitted by the Delegations from Brazil, United States and Canada on their proposals and expressing their remarks and recommendations.

4. CONCLUSION

Right from the beginning, the CIDIPs have served as codifying sources of the Private International Law in the American Continent and have contributed substantially to the codification process and to progressive development. The Inter-American Juridical Committee has played an outstanding role in the process of the CIDIPs, although it is true that in the beginning the Committee focused on preparing international instruments through Inter-American

[10] Resolution AG/RES. 2401 (XXXVIII-O/08). **Seventh Inter-American Specialized Conference on Private International Law - CIDIP-VII.**

conventions, all of them addressing the determination of applicable law, as well as harmonization of norms. The Inter-American Juridical Committee has contributed extensively in their drafting, with the support of both Public and Private Law Members, and not only with specialists in International Public Law but also in Private International Law, such as Drs. José Luis Siqueiros and Caicedo Castilla, among others.

Since the CIDIP-VI, other types of documents have been drafted, such as model laws, using another legislative technique which is not only characteristic of Private International Law, but also of Public International Law. For example, in the case of the application of the Inter-American Convention against Terrorism, this legislative technique involving the drafting of model laws in the OAS Member States was used, and many international forums used a combination of methodologies, i.e. applying to a single instrument both legislative techniques. In that sense, drafting model laws is a legislative technique used currently both in the framework of Public and Private International Law, whether in the global or regional fields, as a more flexible method for harmonizing the systems.

With regard to the topic of Consumer Protection, as shown above, proposals have been made in respect to applicable law (Brazil), monetary redress (United States) and the topic of jurisdiction (Canada). However, none of them refers to the execution of foreign sentences, a matter served by the “Inter-Ame***rican Convention*** on the Effectiveness of Extraterritorial Judgments and Arbitration Awards (CIDIP-II)” and the “***Inter-American Convention on Jurisdiction in the*** International ***Sphere*** for the ***Extraterritorial*** Validity of ***Foreign*** Judgments”.

As regards the topic of consumer protection, experts have been clear in expressing that in view of the vulnerable situation of consumers in America, due to the lack of regulations at the international level, this protection becomes necessary. As a start, instruments have been drafted on law applicable to consumer relations, monetary redress and jurisdiction, hence the compatible and complementary nature of the proposals.

Accordingly, the substantive and timely cooperation is expected of all those involved in the theme, in order to conclude the preparatory works both on the topic of Consumer Protection and Electronic Registers, so that the date and the venue of the prospective Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) can be set. This will bring more clarity and assurance to the topic of consumer protection as regards the conflicting norms governing the protection of the consumer market in the Americas, through international instruments which harmonize conflicts of law of OAS Member States.

7. Implementation of International Humanitarian Law in the OAS Member States

Resolution

CJI/RES. 141 (LXXII-O/08)	Implementation of Humanitarian International Law in OAS Member States

Documents

CJI/doc.304/08	Implementation of International Humanitarian law in the OAS member States: Preliminary Document (presented by Dr. Jorge Palacios Treviño)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reported that the Permanent Council's Committee on Juridical and Political Affairs had already held its annual meeting on this subject, but that the corresponding report had not yet been distributed. He also reported that further to the activity that began the year before, the Department of International Law and the International Committee of the Red Cross had organized a second course on the topic, targeting staff from the Permanent Missions and the OAS General Secretariat. He also said that the Department of International Law had put Dr. Jorge Palacios, the rapporteur for the topic, in contact with Dr. Antón Camen of the International Committee of the Red Cross, in order to identify areas in which the Juridical Committee could prepare model laws, as requested in the corresponding General Assembly resolution. He also presented the Juridical Committee with a publication produced by the Red Cross, titled "Participation of American States in International Humanitarian Law Treaties and their National Implementation – 2007 Report."

Dr. Jorge Palacios said that he regretted the absence of responses by the Member States to the questionnaire on international humanitarian law, which was important for meeting the General Assembly's mandate. He suggested that at the present, it would be better for the Juridical Committee to deal with crimes against humanity and other crimes that do not apply at times of war, rather than to focus on war crimes.

The Chairman of the Inter-American Juridical Committee, Dr. Jean-Paul Hubert, agreed that the General Assembly's mandate was most vague and that there was a need for greater precision in its scope. This was not the first time the Committee had received a broad, general mandate and the Committee should request a clarification in order to be able to produce something useful.

Dr. Dante Negro agreed that it would indeed be difficult for the Committee to fulfill the mandate, because it was based on prior consultation with the member States and on their answers. He suggested that following his return to Washington, D.C., the Department of International Law could again send a verbal note to the Missions reminding them of the importance of responding to the questionnaire. That note was sent on April 22, 2008.

At this regular session, the Inter-American Juridical Committee was visited by Dr. Antón Camen of the International Committee of the Red Cross. The Chairman of the Juridical Committee noted that the General Assembly mandate specifically instructs the Committee to prepare model legislation, in consultation with the Red Cross and with the OAS member States, on priority issues affecting the implementation of obligations arising from international humanitarian law treaties. He said again that the Juridical Committee had prepared a questionnaire for the member States, but that it lacked the answers needed for its study to progress.

In explaining the work carried out by the Red Cross, Dr. Camen said that his organization works alongside other international organizations on the drafting of model laws, among which he cited laws addressing antipersonnel mines, biological weapons, and the implementation of the Geneva Conventions on humanitarian law. He added that the publication "Participation of American States in International Humanitarian Law Treaties and their National Implementation – 2007 Report," which was distributed among the members, contained a summary of progress to date with the implementation of international humanitarian law treaties in individual countries' laws.

One of the challenges facing those States that have adopted the Rome Statute, he said, is the problem of punishing crime *vis-à-vis* the obligations of international humanitarian law. He said that the States parties to the Statute had assumed the obligation of cooperating with the International Criminal Court, of putting into effect implementation mechanisms for humanitarian rights, and of punishing war crimes. However, he noted, few States had implemented the provisions of 1949 Geneva Conventions and its protocols of 1977.

Dr. Camen underscored the difficulty of defining such crimes within national law because of inconsistencies in the definitions used by the various instruments that deal with the subject. The Geneva Conventions classify 12 actions as war crimes, whereas the Rome Statute defines 70; in addition, the two lists do not coincide, which causes great confusion among legislators. This is exacerbated by the fact that the Rome Statute fails to include certain crimes that are set out in the Geneva Conventions. He gave the example of Argentina, which had overcome this difficulty by amending its Criminal Code to include three crimes not contained in the Rome Statute but that are covered by the Geneva Conventions.

Another obstacle Dr. Camen described occurs when the Rome Statute defines a crime that is similar to one already defined in the Geneva Conventions, but with added conditions; for example, the language “clearly excessive” used in connection with attacks that inflict harm on civilian populations. This wording, Dr. Camen said, could potentially lead a national judge to adopt a specific interpretation and end up not punishing the perpetrator of the crime.

Another important element to be taken into consideration that Dr. Camen spoke of is the responsibility of superiors, be they civilian or military, for violations committed by subordinates, when no steps were taken to prevent or impede the crime or when the superior contributed to its commission. Such offences are covered by the Geneva Conventions, but the Rome Statute makes a distinction between military and civilian superiors, adopting a more lenient approach as regards civilians. That factor leads to lengthy discussions among lawmakers.

Another issue related to humanitarian law is the protection of cultural assets and the obligation of punishing certain violations under the 1999 Protocol to the 1954 Convention: for example, the use of cultural property to support military actions. The same comment applies to treaties governing the use of chemical weapons and antipersonnel mines, he added.

Dr. Antón Camen noted the work carried out by several States as regards sanctions, allowing punishments to be applied to violations of humanitarian law that are not necessarily war crimes.

Finally, he suggested that the study to be carried out by the Inter-American Juridical Committee could be geared toward identifying the shortcomings in existing treaties, with the challenge of punishing those crimes: the international treaties originally addressed relations between States, but in recent years there has been an increase in the number of individuals not belonging to the armed forces who perpetrate violations of humanitarian law, as well as in violations arising beyond the confines of armed conflict. Punishing such crimes is a matter that the treaties do not deal with extensively, he said. The Rome Statute addresses certain actions within international conflicts, such as the use of gas, tactics such as attacks on civilians, or certain specific weapons. When the legislators choose remission, it must be decided whether it is sufficiently clear for the rule to be truly effective. He spoke of the possibility of the Juridical Committee working in the thematic area, on, for example, violations of international humanitarian law. He said that in spite of the rules that exist in international treaties and international customary law, translating those provisions into domestic laws had always been a very difficult task.

Dr. Camen reported that 18 American countries, with the exception of the Caribbean States, Venezuela and Mexico, had set up interministerial humanitarian law committees, thereby promoting the implementation of humanitarian law treaties. Those committees are attached to the Ministry of Foreign Affairs or the Ministry of Defense, or in other instances belong to the Supreme Court or to the executive branch of government. They sometimes involve universities in their work, but they remain governmental agencies. He said that his office was willing to provide the Juridical

Committee with a list of those interministerial committees existing in the OAS member States. That list was sent to the members of the Juridical Committee through the Department of International Law on March 19, 2008.

Drs. Jorge Palacios and Elizabeth Villalta, the joint rapporteurs for the topic, said that the countries' answers to the questionnaire were needed to discover their preferences and to make progress with this subject.

Finally, the Inter-American Juridical Committee decided to adopt resolution CJI/RES. 141 (LXXII-O/08), "Implementation of Humanitarian Law in the OAS Member States", reiterating the note sent to the OAS member States asking them to indicate the priority issues for which model laws should be drafted and offered, pursuant to resolution AG/RES. 2293 (XXXVII-O/07); the CJI resolution also suggests that in those countries where they exist, the national interministerial humanitarian law committees be used as a possible source of information, and instructs the joint rapporteurs to submit a progress report when the responses from the member States are received.

At its 38th regular session (Medellín, June 2008), by means of resolutions AG/RES. 2414 (XXXVIII-O/08) and AG/RES. 2433 (XXXVIII-O/08), the OAS General Assembly asked the Inter-American Juridical Committee to continue drafting and proposing model laws in support of efforts to implement the obligations of international humanitarian law treaties, based on the priority issues identified in consultation with the member States and the International Committee of the Red Cross; to that end it urged the member States to convey to the Inter-American Juridical Committee, as promptly as possible, a list of their priority topics in order for the Committee to discharge its mandate.

On June 16, 2008, the Secretariat forwarded the Inter-American Juridical Committee's members a note sent by the Permanent Mission of Ecuador to the OAS identifying the classification of war crimes as a priority topic and enclosing a copy of the law governing the use and protection of the Red Cross / Red Crescent symbol.

Similarly, on July 1, 2008, the Department of International Law sent the members of the Inter-American Juridical Committee the final report of the special meeting organized by that department under the *aegis* of the Committee on Juridical and Political Affairs on January 25, 2008.

At the 73rd regular session of the Inter-American Juridical Committee, Dr. Jorge Palacios, the rapporteur for the topic, reported that he had prepared a preliminary document on this question – document CJI/doc.304/08, "Implementation of International Humanitarian Law in the OAS Member States: Preliminary Document" – in which he identified the points requiring the closest attention. Among these, one basic point requiring clarification is that international humanitarian law only applies at times of international armed conflict. It also applies during armed conflicts that are not international in scope as defined by the Geneva Conventions but that take place within the territory of a single country: in other words, an internal conflict that shares certain characteristics with international conflicts. This means that it does not apply to any or all situations of domestic violence or unrest.

Another significant problem, said the rapporteur, arises from the conceptual differences in the elements that make up the crimes set out in the various Geneva Conventions of 1949, in the First Protocol of 1977, and in the Statute of the International Criminal Court. Thus, for example, the Rome Statute defines 70 different war crimes and defines some of them with more elements than are set out in the Geneva Conventions and, most particularly, in the First Protocol. He noted that while some crimes are similar, their component elements vary from one instrument to the other. Other crimes are not covered by the Rome Statute.

The rapporteur said that the International Committee of the Red Cross recommends that States bring their laws into line with the Statute but, at the same time, it also recommends that they do not modify those implementing the Geneva Conventions and the Protocol – a complicated task if a concept is treated differently in the various instruments. The International Committee of the Red

Cross has produced many documents noting its interest for the Geneva Conventions and the Protocol to be enforced in the way in which they were agreed on.

In the rapporteur's view, it was impossible to fulfill the General Assembly's mandate, since the request sent to the member States on repeated occasions by the Juridical Committee had to date only been answered by Ecuador. He suggested that perhaps the States of the Americas had already adapted their laws to address the provisions of the international treaties, following the example of Argentina, Canada, Colombia, and other countries.

He added that Article 9 of the Rome Statute offered a solution for overcoming these contradictions by requesting the Statute's States parties to reach agreement on the language covering the defining elements of its 70 war crimes.

The rapporteur then spoke of Article 30 of the Vienna Convention on the Law of Treaties, which sets rules that apply when successive treaties relating to the same subject matter deal with the topic differently and thus give rise to conflicting provisions. This is the strictly juridical problem at play: the obligation of the States to comply, on the one hand, with the Conventions and the First Protocol and, on the other, with the Rome Statute. In light of the complexity of the situation, the rapporteur suggested holding a regional conference for the States to harmonize the way they deal with the provisions set out in the Geneva Conventions, the Protocol, and the Rome Statute.

He ended his presentation by showcasing the solution adopted by various States, among them Mexico, of simply referring back to the treaties: in other words, when a crime is covered by a binding treaty, it must be judged as provided for in that treaty. He said that the solution adopted by the Red Cross was also that of referring back to the treaties.

Another problem is that the International Criminal Court serves as a court of review for domestic judgments in cases of war crimes or crimes against humanity and therefore provides a hierarchically higher venue than the other conventions. If a State party tries a criminal under the Conventions but not the Statute, the Court is empowered to review the judgment.

Dr. Dante Negro, Director of the Department of International Law, pointed out that the mandate was issued to the Inter-American Juridical Committee by the General Assembly in 2007, without any discussion at the special meeting. He said that within the Committee on Juridical and Political Affairs, every possible effort was being made to enable the countries to indicate their preferences regarding the Juridical Committee mandate, but that to date there had been no answers.

The Chairman of the Juridical Committee, Dr. Jean-Paul Hubert, recalled the Red Cross proposal for a regional meeting of government experts to be held to study the national implementation of international humanitarian law in the Americas, and to deal with the problems identified and their possible solutions; this, he said, seemed essential if the rapporteur was to be able to continue with his study of the topic.

Dr. Guillermo Fernández de Soto said that although the Rome Statute did not identify with absolute clarity some aspects of its criminal definitions, it nevertheless represented a major step forward for the international human rights protection system by assigning responsibility not only to States, but also to individuals, including heads of State, so that such crimes do not remain unpunished. He said that he was not worried about the differences between the main international instruments, because the member States are sovereign and can as such make any distinctions they require. He thought it was unrealistic for the Juridical Committee to attempt to bring the instruments into line with each other and suggested that the Committee could call on the States to observe and uphold the Geneva Conventions and their Protocol and it could urge the non-party States to adhere to the Rome Statute.

Dr. Mauricio Herdocia said he thought it was exceedingly difficult to address the matter from the perspective the mandate set out in the General Assembly resolution, the idea of which was the preparation of a model law, since the rapporteur did not have the elements necessary for identifying

specific areas of interest to the States. However, he suggested a new approach focusing on a study of the criteria for interpreting and harmonizing international law in light of the Geneva Conventions, which would finally indicate whether there was a need to incorporate the criminal aspects of both the Statute and the Conventions into domestic laws. He said it would be useful to identify the interpretation and harmonization criteria to be used by the States when dealing with war crimes, since they involve imperative provisions, *jus cogens* in nature, which makes it impossible to exclude any crime they define.

Dr. Ana Elizabeth Villalta pointed out that several States have set up international humanitarian law committees to bring their laws into line with the terms of the Geneva Protocol. She stressed that the study should take care to provide guidance on the correct use of the interpretation criteria to avoid the error of placing one instrument above another; instead, the alignment should be complementary in nature.

Regarding the conflict of law that undeniably exists between the Conventions and the Statute, Dr. Jorge Palacios emphasized that the Rome Statute is of a higher hierarchy than the Geneva Conventions, because of the International Criminal Court's function of reviewing judgments handed down by States in cases involving crimes against humanity and war crimes. Firstly, because they are treaties that deal with the same subject matter and, constantly, the earlier ones are abrogated. In second place, because States must respond to war crimes with the criteria of the International Criminal Court, since that body has the authority to review judgments handed down by national judges.

If a hierarchy exists, Dr. Ana Elizabeth Villalta wondered, what happens with those States that are not parties to the Statute? Since they are not obliged to accept the elements contained in the Statute, they would have to use the Conventions. Therefore, she believed, efforts should be made to harmonize them and to avoid placing one instrument above another.

Dr. Guillermo Fernández de Soto disagreed with the claim that the Statute was of a higher order than the Conventions. He held them to be different international instruments and also disagreed about the question of abrogation. He cited the case of Colombia, which in amending its laws had taken into consideration all the definitions and elements set out in all the applicable treaties.

The Chairman of the Committee, referring back to the various interventions, concluded that the rapporteur could be asked to produce a general report, since no answers had been received, which should also answer the questions arising from these comments – such as the question of hierarchy, the harmonization criteria, the applicable provisions, etc. – and also propose principles for guiding the interpretation and harmonization of laws. If deemed appropriate, the report could also suggest organizing a meeting of government experts, to provide the process with further elements for consideration.

The following paragraphs set out the text of resolution CJI/RES. 141 (LXXII-O/08) and document CJI/doc.304/08:

CJI/RES. 141 (LXXII-O/08)

IMPLEMENTATION OF HUMANITARIAN INTERNATIONAL LAW IN OAS MEMBER STATES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND resolution AG/RES. 2293 (XXXVII-O/07) of the OAS General Assembly called "Promotion of and Respect for International Humanitarian Law", requesting 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 with 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;

THAT during the 71st regular session of the Inter-American Juridical Committee held in Rio de Janeiro in August 2007, the Inter-American Juridical Committee, in compliance with received mandates, appointed Drs. Ana Elizabeth Villalta Vizcarra, Ricardo Seitenfus and Jorge Palacios Treviño as rapporteurs for the topic;

THAT on the request of the Chairman of the Inter-American Juridical Committee, two letters were sent, one to the OAS Member States and the other to the International Committee of the Red Cross, requesting an indication of priority issues for Member States; and that no State has to date provided any information on the issue;

CONSIDERING that during the 72nd period of sessions of the Inter-American Juridical Committee held in March this year in Rio de Janeiro, Brazil, the Committee met Dr. Antón Camen, representative of the International Committee of the Red Cross, with the aim of fulfilling said mandate,

RESOLVES:

1. To thank Dr. Antón Camen of the International Committee of the Red Cross for the information offered on the current priorities of that organization with regard to the implementation of treaties of humanitarian international law, especially in the area of war crimes.

2. To reiterate the note forwarded to the OAS Member States with the aim of indicating the priority issues on which to prepare drafts and propose model laws pursuant to resolution AG/RES. 2293 (XXXVII-O/07), suggesting as a possible source of pertinent information, where they may exist, the national inter-ministerial committees of humanitarian law.

3. To request co-rapporteurs Drs. Ana Elizabeth Villalta Vizcarra, Ricardo Seitenfus and Jorge Palacios Treviño to submit a progress report on the issue when a reply is received from the Member States of the Organization.

This resolution was unanimously adopted at the session held on March 12th, 2008, by the following members: Drs. Antonio Fidel Pérez, Hyacinth Evadne Lindsay, Guillermo Fernández de Soto, Mauricio Herdocia Sacasa, Jean-Paul Hubert, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

CJI/doc.304/08

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW IN THE OAS MEMBER STATES: Preliminary Document

(presented by Dr. Jorge Palacios Treviño)

Resolution AG/RES. 2293 (XXXVII-O/07) of the General Assembly of the OAS contains a request for the Inter-American Juridical Committee to draw up 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 ICRC,...".

According to the information obtained, the afore-mentioned Resolution of the General Assembly of the OAS originated in the difficulty that the states of the region have in incorporating IHL treaties into their internal legislation because the elements that constitute this criminal offense are not always the same as in the treaties.

As is well known, the purpose of IHL is to protect civilians in times of armed conflict, that is, persons who take no part or who have ceased to participate in the hostilities, as well as assuring due treatment to injured combatants and prisoners of war; likewise, IHL proposes to limit the methods and means of waging war as well as to protect certain goods such as those of a cultural nature; accordingly, IHL is defined as

> … international treaty or customary rules which are specially intended to resolve matters of humanitarian concern arising directly from armed conflicts … and protect people and property affected or liable to be affected by the conflict.[11]

In the final analysis, given the difficulty of complying with the laws of war, IHL also has the primary objective of alleviating the most terrible manifestations of armed conflicts. Thus, in order to meet this objective, IHL determines that the States adopt measures to regulate and sanction abuses in the use of the emblems and denominations of the Red Cross, the Red Crescent and the Red Crystal.

IHL is principally comprised of the 4 Geneva Conventions dated 12 August 1949, and their 3 additional protocols, as well as the Statute of Rome (the Statute), dated 17 July 1998, which established the International Criminal Court (ICC) for the purpose of ensuring punishment, among other things, of the more serious offenses of international transcendence of IHL, for which end it is permitted to exercise jurisdiction complementary to national criminal jurisdictions.

IHL by itself applies to international or non-international armed conflicts in the sense given to these terms in article 2 common to the 4 Geneva Conventions and in article 1 of Additional Protocol I of these conventions, as follows: international armed conflict is one that opposes the armed forces of at least two States, or an armed conflict "… in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination". [12]

As for "non-international armed conflict", this takes place in the territory of a State when there exists prolonged armed conflict between the governmental authorities and organized armed groups or between such groups.

In view of the above, IHL does not apply in situations of internal disturbances or tension that do not reach the intensity of armed conflict, such as mutinies, isolated and sporadic acts of violence or other acts of similar nature such as fighting between factions or between these and the authorities in power (see items d) and f) of article 8 of the Statute and "International Humanitarian Law: answers to your questions", Geneva, CICR, 2002).

Provisional comments and proposals are made to certain themes mentioned in document ODI/doc.08/07, "Implementation of International Humanitarian Law in OAS Member States: Preparation and Presentation of Model Laws" (1 August 2007), of the Office of International Law of the OAS.

In the document "Repressing war crimes in the national criminal legislation of the American States", the CICR affirms that the differences between the elements that constitute crimes are especially noted when we compare article 85 of Additional Protocol I of the Geneva Conventions and article 8 of the Statute, in addition to which it says that "the Rome Statute of the International Criminal Court codifies a series of war crimes that do not always correspond to a serious infraction in the sense of the Geneva Conventions or the Additional Protocol I".[13] The CICR also refers to Protocol I of the Geneva Conventions, enumerating some crimes that do not appear in the Statute and advising that although there are crimes that resemble one another when we compare Protocol I and the Statute, the elements of the crimes are more restrictive in the Statute than in Protocol I, offering as an example "intentional attack", provided for in article 85.3.b of Protocol I, whose text reads as follows: "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii)" of the Protocol I itself; on the other hand – it adds – article 8.2.b. iv of the Statute demands that the damages be excessive and further that they be clearly excessive in relation to the concrete and direct overall military advantage. Concerning this point, the CICR comments

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[11] INTERNATIONAL COMMITTEE OF THE RED CROSS. **International humanitarian law: answers to your questions.** Geneva, October 2002. p. 4. Available at: http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p0703/$File/ICRC_002_0703.PDF!Open .

[12] **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)**, Article 1, paragraph 4. 8 June 1977. Available at: http://www.icrc.org/ihl.nsf/WebART/470-750004?OpenDocument

[13] COMITÉ INTERNACIONAL DE LA CRUZ ROJA. Servicio de Asesoramiento. Unidad América Latina. **Represión de los crímenes de guerra en la legislación penal nacional de los Estados americanos**. p. 6.

that the Statute is more restrictive than Protocol I, which "does not demand that the damages be 'manifestly' excessive, nor compared with the [concrete and direct] military advantage" and that "in this sense, crime of attacking or bombing, by any means, cities, villages, farms or buildings that are non-defended and not military objectives"[14], since the Statute does not provide for the possibility of proving prior to the attack that a city is a military objective.

The above are only a few examples of discrepancies between the Statute and Additional Protocol I, and apparently there may be many more, seeing that the Statute lists 71 war crimes and Protocol I in turn includes numerous provisions with regard to serious infractions relating to combatants and protection of civilians.

In this sense, the CICR mentions that some serious infractions that appear in Protocol I are not in the Statute, for example those contained in items c) and d) of clause 3 of article 85 and which read as follows:

> (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 (a) (iii);
>
> (d) making non-defended localities and demilitarized zones the object of attack.

The CICR recommends that in including war crimes in the national legislation of States, the definitions should have all the constituent elements provided by International Law but advises the States not to add conditions whose effect would be to exclude conduct qualified as war crimes in accordance with international treaties and to this effect offers in the document under analysis definitions of 22 war crimes, concluding that "The Geneva Conventions of 1949 established a system whose strict application would make it impossible for war criminals to avoid being tried before the courts of their own countries or in any other State", since "The Geneva Conventions establish a universal jurisdiction, strengthened by the fact that 194 States are parties to these Conventions and committed to apply their provisions"; in other words, the Geneva Conventions establish universal competence to punish such crimes, which is also called "ubiquity of punishment".

Concretely, the problem of incorporating IHL crimes into internal law comes from the fact that 35 States in the American region are parties to the Geneva Conventions of 1949, 34 of them are parties to Additional Protocol I, and 23 of these States are also parties to the Statute that established the International Criminal Court ("ICC") and, as noted above, there are discrepancies between what the Geneva Conventions of 1949 - and especially Additional Protocol I of 1977 - determine, and what the Statute of the ICC determines.

In the above-mentioned document, the CICR says that "the American States are committed by international law to punish war crimes according to the system established by the Geneva Conventions and Protocol I" and that accordingly these international instruments should be respected by the States in all circumstances, and recommends that the 23 American States Parties to the Statute adjust their criminal legislation to repress war crimes within the competence of the ICC, "without affecting the obligations contracted by virtue of the Geneva Conventions and their Additional Protocol I". The CICR document also advises that the States, on adjusting their criminal law to the Statute cannot neglect the obligations established in the Geneva Conventions and their Additional Protocol I, and that "it is rather a question of harmonizing the regime established in the latter two with that stipulated by the Statute", and that "The rules of the Statute can strengthen but not weaken the edifice thus erected, as regards defining war crimes, as well as concerning the rules on penal responsibility and the exercise of criminal action".

With regard to what the CICR determines, it should be pointed out that although the Statute does not explicitly oblige the States to legislate, investigate or judge crimes that are within the competence of the ICC, in its preamble the Statute declares that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," and consequently the States Parties should adjust their criminal law to the ICC Statute to

[14] *Op. cit.,* p. 7.

investigate and internally try those responsible for crimes under the jurisdiction of the ICC as established by the Statute, since the latter sets forth that the ICC take over the case as allowed by article 17 of the Statute that provides that, if "the State is unwilling or unable genuinely to carry out the investigation or prosecution", that is, if a State does not duly investigate or judge a presumed lawbreaker, the ICC shall do so. This means that States that are Parties to the Statute, in order not to expose themselves to the ICC's accusing them of not fulfilling the obligations that the Statute imposes on them and not exercising their jurisdiction, which is complementary to the jurisdictions of the States Parties, then these must add to their legislations both the provisions of the Statute and the elements of the crimes that the assembly of the States Parties approved in compliance with what article 9 of the same Statute sets forth, that is, that the elements of the crimes "shall assist the Court in the interpretation and application" of the provisions of the articles of the Statute that contain the crimes that the ICC should punish.

With regard to this last point, it should be remembered that the ICC is a body that reviews the actions of the national courts of States Parties, and accordingly the provisions of the Statute are hierarchically superior to those of other treaties on the subject – second only to the Charter of the United Nations – so the obligations of the Statute prevail over the others on the same matter. This means that if someone commits a crime not accounted for either in the Geneva Conventions or in Protocol I and the Statute and the characteristics of this crime are different between the Geneva Conventions or Protocol I and the Statute, the State Party in charge of judging the crime, if a State Party to the above-mentioned instruments and acting according to the provisions of the Geneva Conventions and Protocol I, the ICC can take over the case to file it as provided for in the Statute and in the elements of the crimes approved by the State Parties, even though the crime has already been judged correctly in accordance with the stipulations of the Geneva Conventions or Protocol I; conversely, if a person commits a crime and the corresponding State judges him as provided for in the Statute, it is considered that the State is not obliged to judge him in accordance with Protocol I.

As for the CICR recommendation to make the corresponding adjustments between the provisions of the Geneva Conventions and Protocol I with those of the Statute, the following comment is appropriate: in summary, Clause 3 of article 30 of the Vienna Convention on the Law on Treaties between States of 1969, rules that "in successive treaties concerning the same subject, the last treaty repeals the first" and if the Statute of the ICC contradicts the provisions set out in the conventions of 1949 or Protocol I, obviously the Statute of the ICC prevails, since it comes after the Conventions of 1949 and Protocol I, having been approved in 1998, and if when the States negotiate the Statute they failed to take into account all the elements of the crimes contained in the Conventions of 1949 and Protocol I, it is because they did not give it the proper attention. In any case, it is considered that a previous treaty on the same subject will only be applicable insofar as its provisions have not been changed by the later treaty and are compatible with it; in other words, the later treaty repeals all that contradicts it, but not what only complements the former without contradicting it; however, in the concrete case of Protocol I and the Statute, seeing that it is not only the same matter but also the same criminal offenses, it would be doubtful if the elements of Protocol I continued to prevail; on the other hand, in this case there would be other considerations to take into account, as follows: if the Statute did not gather broader elements of a crime, that is, if the elements of the Statute are more restrictive than those of Protocol I, this might be due to the fact that only the more serious cases were to be taken to the ICC, but in this case the accused could invoke in the State court that tries him the provisions of the Statute or even complain to the ICC if a crime is judged not according to the Statute but according to Protocol I.

This being so, the following situation would have to be considered: if the CICR recommends the States to adjust their legislation to the provisions of the treaties involved, that is because the differences between the Geneva and the Rome legislations are important, which means in the case in question that if elements of the Geneva Conventions or Protocol I are included in the elements of the Statute, the latter would be misrepresented, that is to say, the earlier treaty would be modifying the later one; consequently, the only proper adjustments are thought to be those that should be made to include in the Geneva legislation the provisions of the Rome Statute, since the latter, given the purposes for which it was drawn up, is hierarchically superior.

In the case of there being no adjustments to be made, it is thought that the provisions that prevail are those of the later treaty, that is, the ICC Statute in this case, especially if the subject and the crime are the same.

Bearing in mind all of the above, in order to incorporate the international treaties in question into the internal law of the States, it would be most appropriate to hold a conference of the States Parties, not just those of America but of other regions, since harmonizing the elements of the same crime that are different in the various applicable treaties is no easy task. So it is thought to be very important that all the States that are party to the treaties apply them in the same way, to which end the States should decide in conjunction which rules of one or another treaty should remain and which have been changed or repealed. The conclusion is that the CICR recommendation that the States harmonize the elements of all the treaties involved is a task that should be done in conjunction by the States of the international community.

Bearing in mind all of the above, the solution of this matter is not considered to be for the States of the region to adjust or try to adjust their internal legislation to two or three obligatory international instruments that have diverging provisions; besides being a difficult, specialized and very technical matter, the adjustment will always be liable to the States reaching different solutions, even in the case where the Inter-American Juridical Committee ("IAJC") elaborates a project with elements of the different crimes. Consequently, it is estimated that the States of the region, and better still all the States that are Parties to both the Geneva and the Rome instruments, as well as other interested countries, should gather to discuss and draw up the elements of the crimes in question, as was done with the elements of the ICC crimes.

In any case, the advisory collaboration of the CICR would be absolutely indispensable, as would be that of other experts, especially in international and criminal law.

Requesting the IAJC to draw up model laws or elements of IHL crimes is considered to be a task that will take up some time, given the large number of crimes, and in any case there would be the risk of the States not accepting the projects presented to them without first discussing them with the authors, which could lead to an international meeting. In any case, the task assigned to the IAJC would have to be undertaken.

The problem is no less, because already 23 American States are Parties to the Statute of Rome and other States of the region are known to be doing what is required to accept it as well.

If the idea of holding an international meeting to draw up the elements of IHL crimes is not accepted, or if they are elaborated in another way, perhaps the States that have not done so might consider it convenient to follow the simple and quick procedure – although for that very reason imperfect – that some States have followed to include in the internal law the crimes provided for in treaties, which consists in including in their Criminal Code an article with a text such as the following: "If a crime is committed that is not provided for in this Code but rather in an international treaty that has to be obeyed by the State, the treaty will be applied, taking into account the pertinent provisions of the internal criminal law". The CICR, in the document entitled "Repression of war crimes in the penal legislation of the American States", refers to this procedure in the following terms: "It could also be conceived to proceed to global accusation of war crimes in international law through remission of the treaties and customary international law". It should be warned that this procedure can only be followed if the treaties in the internal system of the State that intends to implant it have a normative hierarchy equal or superior to the internal penal laws. Albeit not perfect, this procedure is preferable to not having any legislation concerning incorporating the IHL treaties to the internal system.

8. Legal Situation of Migrant Workers and their Families under International Law

	Resolution
CJI/RES. 139 (LXXII-O/08)	The Legal Status of Migrant Workers and their Families in International Law
Annex: CJI/doc.292/07	Primer or Manual on the Rights of Migrant Workers and their Families
	Documents
CJI/doc.266/07 rev.1	The Legal Status of Migrant Workers and their Families in International Law (presented by Dr. Jorge Palacios Treviño)
CJI/doc.287/08	Manual of the Human Rights of all Migrant Workers and their Families (presented by Dr. Jorge Palacios Treviño)
CJI/doc.289/08 corr.1	Primer or Manual on the Rights of Migrant Workers and their Families (presented by Dr. Ana Elizabeth Villalta Vizcarra)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Dante Negro, Director of the Department of International Law, reported that during that same week, his department was organizing, in coordination with the International Organization for Migration and under the *aegis* of the Committee on Juridical and Political Affairs, a course on this topic aimed at members of the Permanent Missions and General Secretariat staff and intended to explore the issue more thoroughly. He also reported that the Department of International Law had prepared a dossier, including the Inter-American Program on the topic adopted by the General Assembly, the results from all special meetings held by the Commission, the Secretary General's work plan, and a database of national legislation in the member States, pending the inclusion of the corresponding laws from the Caribbean countries that have not yet been collected.

The Chairman of the Inter-American Juridical Committee described the evolution of this topic within the Committee on the basis of the annotated agenda. He also referred to the papers submitted to this regular session by Dr. Jorge Palacios: "The Legal Status of Migrant Workers and Their Families in International Law" (CJI/doc.266/07 rev.1) and "Manual of the Human Rights of All Migrant Workers and Their Families" (CJI/doc.287/08); and the one presented by Dr. Ana Elizabeth Villalta: "Primer of Manual Manual on the Rights of Migrant Workers and Their Families" (CJI/doc.289/08 corr.1).

The rapporteurs presented their work and, after an exchange with the other members, decided the documents could be combined into a single text and submitted to the Committee for consideration.

The Inter-American Juridical Committee adopted resolution CJI/RES.139 (LXXII-O/08), "The Legal Status of Migrant Workers and Their Families in International Law", in which they thanked the rapporteurs for presenting the consolidated text, CJI/doc.292/08, "Primer or Manual on the Rights of Migrant Workers and Their Families", accepted the document, and agreed to convey it to the Permanent Council for information purposes and, through the Permanent Council, to the OAS member States for them to disseminate it as they saw fit in their countries, as a way to foster respect for and promote the rights of migrant workers and their families.

On March 24, 2008, the Department of International Law forwarded that document and the corresponding resolution to the OAS Permanent Council.

Documents CJI/doc.266/07 rev.1, CJI/doc.287/08, CJI/doc.289/08 corr.1, as well as resolution CJI/RES.139 (LXXII-O/08) and its annex CJI/doc.292/08 (consolidated document)together with resolution, are transcribed in the following paragraphs:

CJI/doc.266/07 rev.1

THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL LAW

(presented by Dr. Jorge Palacios Treviño)

INTRODUCTION

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, in other cases, 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, supported by the right policies, can be highly beneficial for the development of both the countries they come from and of those where they arrive. But it also stresses that these benefits are contingent on the rights of the migrants themselves being respected and upheld." To support the first affirmation, the Secretary General added:

> It is no coincidence, and should be no surprise, that many countries, which not so long ago were primarily sources of migrants – for instance Ireland, several countries in southern Europe, the Republic of Korea and Chile – have developed spectacularly, and now boast thriving economies, which make them an attractive destination for migrants.
>
> Benefits both to countries of origin and to countries of destination are highly relevant to development, since both categories include many developing countries. Indeed, some developing countries, such as Malaysia and Thailand, are at this moment making the transition from one category to the other.
>
> …
>
> It surveys existing intergovernmental cooperation in this field -- including the normative framework, the various global and regional initiatives that have been taken, and the bilateral approaches that are being tried, such as agreements on the portability of pensions and health benefits. … international cooperation is also crucial in the struggle to protect people against the odious crime of human trafficking.

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. Such acts can occur at any stage of the migratory process, that is, since leaving their country of origin, during the journey in the countries of transit, and in the country of destination.

On 10 July 2007, at the Global Forum on Migration and Development convoked by the Belgian government, Kofi Annan´s successor as Secretary General, Ban Ki-Moon made the same appeal and stated that if governments have the right to monitor their borders, they should show full respect for the human rights and security of migrants.

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. These circumstances often lead to depression, anxiety and even mental disorders, or to excessive consumption of alcohol and drugs. Add to this the scant, if any, access to health services. 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 given 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. 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. As for the population of the destination country, they feel affected if the migrant workers gain space in the various sectors of their society – economic, cultural and even political. 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 the developed countries need migrant workers to boost their economy and the countries of origin need the money sent back home by the migrants.

Anyhow, the migration phenomenon is a responsibility both of the country of origin and the receiving country: 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 in the understanding that this cannot occur while unfair systems of international exchange prevail; in turn, the receiving country must respect the human rights and basic freedoms of the migrants while they are in its territory under its jurisdiction, either legally or illegally, and treat them and their families with humanity and consideration since they only seek through work better living conditions for themselves and their families. For this reason, whatever the condition, migration should be seen as an activity worthy of respect, rather than an affront, or worse still a crime.

At the same time, it must be borne in mind that the vast majority of migration in America is for economic reasons, and so the countries of origin cannot prevent migration before eliminating the causes, which obviously takes some time. Migration is an escape valve for unemployment in poor countries, but this entails many inconveniencies, because the country of origin has to make great efforts to retain potential migrant workers in conditions of justice and well being.

On March 7, 2007, during the 70th regular session of the Inter-American Juridical Committee, in San Salvador, El Salvador, resolution CJI/RES. 127 (LXX-07), entitled “The Legal Status of Migrant Workers and Their Families in the International Law”, was adopted, its purpose being to detect the legal aspects of human mobility, especially the human rights of migrant workers and the members of their families, within International Law, that is, the human rights that all migrant workers, documented or not, have, as well as their families. The idea is that these rights, as well as the regulations protecting them, are first of all known by the migrant workers so they can demand that they be respected, since it has been known for migrant workers, especially those without documents, to consider as normal the abuses committed against them and their families precisely for not possessing documents; they even think they deserve such violations of their rights as undue use of force, intimidation or extortion. It is also the intention that these rights be known by all sectors in contact with them, such as governmental, especially police, employers and the general public, of the countries of origin and those of transit and destination.

It should be pointed out there are no special human rights for migrant workers and the members of their families but the situation of mobility, which involves many countries and entails multiple needs such as security, food, transportation, work, and so on, can make it hard to identify the human rights that protect the different stages of international migration. It is therefore felt appropriate and even necessary to prepare the catalogue of human rights of migrant workers, always bearing in mind that, documented or not, they and their families have an intrinsic human dignity that must be respected and a right to be treated humanely.

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: "… preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of habitual 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: human rights are the rights and basic liberties that every human being has by the mere fact of their being, that is to 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. The insistence is 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. States have begun to include in their internal legislations provisions to protect human rights. The International Community of States have done the same in treaties, declarations and other international instruments in order to make such rights explicit and ensure compliance, that is, a guarantee. In conclusion, all States are obliged to respect all human rights and if necessary see that any violations are duly punished.

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. Among other manifestations already mentioned, the International Community of States proclaimed this in the Declaration on Human Rights of Individuals Who are not Nationals of the Country in which they Live In, adopted by the General Assembly of the National Unions in Resolution 40/144 dated 13 December 1985. All the States are entrusted with observing this minimum of human rights for all migrant workers and their families.

This leads to another conclusion, namely that in order to avoid irregular migration, the States concerned should negotiate agreements to regulate migration.

Accordingly, reference is now made to the key multilateral international instruments adopted to protect human rights and applicable to the phenomenon of international migration; these instruments are:

The Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948. Its provisions have the quality of *jus cogens* norms, that is, "imperative norms of general international law, accepted and recognized by the international community of States as a whole and that admit of no agreement to the contrary" and are therefore obligatory for all States (hereinafter quoted as UD).

The International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966 is a treaty that develops the human rights indicated in the name and contained in the UD; moreover, it is obligatory for the member States (hereinafter quoted as Pact I);

The International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16 December 1966 is a treaty that develops the human rights indicated in the name and contained in the UD; moreover, it is obligatory for the member States (hereinafter quoted as Pact II);

The Convention on the Rights of the Child adopted at the General Assembly of the United Nations on 20 November 1989 is obligatory for the States that are parties to the Convention (hereinafter quoted as CRC);

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families adopted by the General Assembly of the United Nations on 18 December 1990 is obligatory for the member States (hereinafter quoted as CMW);

The American Declaration of the Rights and Duties of Man adopted at the 9th American International Conference in Bogotá, Columbia in 1948. Its provisions are jus cogens norms and so obligatory for all the States (hereinafter quoted as AD);

The American Convention on Human Rights adopted at the Specialized Inter-American Conference on Human Rights held in San José, Costa Rica in 1969, with obligatory norms for all the member States (hereinafter quoted as AC);

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, called “Protocol of San Salvador”, is obligatory for the Member States (hereinafter quoted as PACA).

Human rights of migrant workers and their families

The Universal Declaration of Human Rights adopted by the International Community of States at the General Assembly of the United Nations on 10 December 1948 in a general sense protects the human rights of all migrant workers and their families in articles 1, 2, paragraph 1, and 7, as follows:

> 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. 2.1 – Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> 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 of 1948.

The third chapter of CMW states the human rights of workers with or without identity papers and their families; in chapter four, it states the other rights that workers with identity papers and their families have. On this matter, the CMW advises that it does not encourage migration without identity papers but 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.”

The human rights especially applicable to international migration of workers and their families, whether documented or not, are as follows:

1. 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 Covenant on Civil and Political Rights (Pact I), article 12, paragraph 2; in AD, article 8 and in article 8 of CMW.

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 of the UD were reality:

> Everyone has the right to work, to free choice of employment, to just and favourable 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);
>
> 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 (Article 25, paragraph 2).

If the conditions mentioned in the above articles held true, migration would only be a right to be freely decided and this would be ideal, with migration as a choice rather than 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".

Pope John 23rd´s encyclical "*Pacem in terris*" states that a person's right to live in his country is infringed if he or she has to emigrate for economic reasons. However, it is obvious that the main reason for a State failing to develop economically is that it does not depend solely on its will but rather on the wealth and conditions of international exchange. For example, the first free-trade agreement signed in the American continent between a developed and a developing country included in its proposals to impede workers from migrating from the rural regions of developing countries. The result, however, has been the opposite, because the proper measures were not taken to prevent the agricultural produce of the developed country that enter the developing country in accordance with the agreement compete advantageously with the produce of the latter.

It should also be remembered that although development is the prime responsibility of each State, it consists of an entire process tending to create "a more just economic and social order that will make possible and contribute to the fulfillment of the individual", pursuant to article 33 of the OAS Charter. Also article 2 of the International Covenant on Economic, Social and Cultural Rights (Pact II) provides that the States agree to take economic and technical measures "to the maximum of their available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant"; in other words, they do not agree to immediately give their populations the rights mentioned in the Pact.

With regard to the right to leave one's country, it can also be concluded from the above that it would be enough for someone not to find adequate 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 human 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.

So, this right is infringed if the State of origin prevents people who wish to immigrate from doing so, unless there is a legal reason for such prohibition. However, according to the above

provisions, when someone is getting ready to emigrate, with or without his or her family, 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 a 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.

Similarly, one must consider the right that all countries have to control their borders and because of this migrants and their families must obtain permits required to travel through countries of transit and work in the country of destination. This right of all States to control their borders is not under question, but they are requested to do so in accordance with the obligation they have to observe the human rights of all persons and grant migrant and their families, whatever their migrant status, humane treatment.

Those who wish to emigrate without documents, with or without their families, must realize before making a decision that there have been frequent experiences of abuses and crimes at every stage of the journey: physical injuries, violations, theft or extortions, and others, practiced both by those enforcing the law, especially border guards, and by private persons who offer or provide some service to the migrants. It should also be borne in mind that migrant women without identity papers, traveling alone or with their children, are even more vulnerable to such offences. If after due consideration they decide to emigrate, they should take all possible precautions.

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, as well as to inform them of the dangers involved if they fail to present the necessary permits, but also of the human rights both they and their families have, in any situation and in any country. For example, if they are expelled from the country where they find themselves, whether it be the country of transit or destination, they have the right, whatever may be their migratory status, for such expulsion not to be carried out using undue force or mistreatment, nor arbitrarily but rather in accordance with the laws of the country and always in a humane manner.

The policy in some countries to refuse work permits forces the workers to emigrate without identity papers and this forces them to accept any work whatsoever, even in unfair conditions, because unscrupulous employers take advantage of the situation, which leads to a countersense: on the one hand they are given work, which means they are recognized and accepted, but their rights are not recognized. For instance, in some cases they are not even paid a minimum wage, they are made to work overtime without the corresponding payment, or else restrictions are placed on their sending remittances of money. "Labor rights" refers to the rights that all migrant workers have, no matter what their migratory status is.

Of course, the migrant's preparation to leave his/her country should include the necessary economic means for food, transportation and contingencies such as sickness, and since these are mostly lacking, the migrant worker has to travel unprotected, and on some occasions even has to stop for a while somewhere to work and earn some money to enable him to continue the journey. In some countries, in order to cover their costs, workers borrow from usurers to meet these needs. It would be recommendable for the responsible authorities in the migrant workers' country of origin to set up aid systems for such needs. It is also very important for the authorities of the countries of origin to inform migrants and their families about the hazards of contracting certain contagious serious diseases, as well as the steps to take to avoid them.

It is likewise important that authorities in the country of origin inform migrant workers about persons who can help them during their journey and in the country of destination, such as consuls in the countries of transit and destination and private organizations that help migrants.

There are two offences, "trafficking in persons" and "smuggling of migrants" to which people about to emigrate are especially exposed and that they should be aware of. These two offences are a threat to many human rights, among others the right to life and freedom - persons may be exposed to conditions of slavery – personal integrity, fair and equal work, rights that will be dealt with later on. These offences are:

a) Smuggling of Migrants

The United Nations Protocol to Prevent, Suppress and Punish Smuggling of Migrants, especially Women and Children, adopted in 2000, defines this crime as follows:

> ... the recruitment, transportation, transfer, harbouring 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs (art. 3, a).

Smuggling 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. In many cases the traffickers take their victims´ ID documents and thus oblige them to remain with them and accept unfair working conditions.

b) Smuggling of Migrants

The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air defines smuggling of migrants as “facilitating illegal entry of a person (workers or not) to 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 financial or other material benefit”. Even if smuggling occurs with the person’s consent, 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.

2. The right to life, liberty and security

These rights are provided in: UD, article 3; AD, article 1; CMW, article 9; Pact I, article 6, 9, 10, 11, 12 and 13; and AC, article 4.

The UD and AD provide that: “Everyone has the right to life, liberty and security of person”.

The primordial right to life is a right that cannot be fully applied if it is not complemented with human rights for liberty and security of person, so they have to be considered together. The American Convention protects the right to life, “in general, from the moment of conception” and both this Convention and 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 heeds due legal process in accordance with applicable laws and all strict guarantees, and thereby provide the two aforementioned instruments. Both the UD and the AD 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, as well as providing that the death penalty cannot be applied to persons under 18 or over 70 years old, nor to pregnant women. Also, this penalty cannot be applied to political offences.

Due to the conditions of workers’ international migration, to a great extent 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 danger of losing their life from accidents can be explained by the fact that migrant workers and their families travel under very precarious conditions, unsafe means of transportation, no or insufficient public security, no or insufficient food, 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. With regard to these measures, the OAS Secretary General has declared that “it is not a proper answer to emigration”, “bilateral and regional dialogue is the only feasible instrument in the quest for realistic options to solve the problem of illegal migration”. In fact, the migrants, especially those without identity papers are persecuted and obliged to take hazardous routes in the countries of transit or arrival in the country of work.

From 1995 to 2005 the number of migrant deaths increased by 500 percent, which indicates that control measures have not deterred migration, but rather brought about changes in the flux of persons through more inhospitable zones and even an 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 migratory process.

The crimes most often committed against life, liberty and security of migrant workers, especially those without papers, and their families, are armed robbery on the journey to rob or extort money from them, violence and all sorts of physical aggression in the means of transportation to threaten them with not being able to travel, and violent actions of border guards when 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. The States not only have the duty to respect the life of people who are in their territory, but also to prevent other people from endangering it when violating rights that also protect the life of migrants and members of their families, such as excessive force, submitting them to inhuman working conditions, either because of the unhealthy conditions of the working places or excessive hours of work without rest. The life of migrants and their families is likewise endangered in cases of detention in improper conditions together with common criminals and without appropriate health conditions and necessary care and medical attention when they fall ill.

3. The right to personal integrity

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 human right to personal integrity includes physical, mental and moral integrity, so this concept embraces the following rights of migrant workers and their families: not to be subjected to slavery, servitude, torture, cruel, inhuman or degrading treatment or punishment; not to be obliged to do forced or obligatory labor, except when permitted in certain circumstances, for example, when the decision is taken by a competent court.

These human rights are especially infringed in sectors such as domestic service, agriculture, industrial workshops and restaurants and hotels. Other particularly vulnerable activities are prostitution and sexual services.

The rights mentioned above protect migrant workers and their families in any place and in any circumstances from:

- being subjected to punishment or treatment that causes serious physical, psychological or humiliating pain;
- being subjected to slavery or servitude, for example, being forced to work excessively long hours;
- inhuman working conditions such as long working hours without rest or sufficient food;
- performing work that they do not want to do;
- taking experimental medicine or undergoing medical treatment without their consent.

There is evidence that in order to commit the above infringements, the passports and other documents of migrant workers and their families are confiscated so that they cannot travel, thus forcing them to perform the activities to which they are subjected.

4. Right to recognition of everyone as a person before the law

This right is protected by UD, article 6; Pact I, article 16; AC, article 3; AD, article 17; and CMW, article 24.

These provisions recognize the right of all human beings to rights and obligations and to enjoy the basic civil rights. Such recognition is necessary because the human being is the natural legal subject but it is the right that converts a human being into a person before the law, that is, it gives an individual aptitude or capacity to possess rights and obligations. The law also recognizes the juridical personality of certain entities, such as the family.

In the case of international migration, this means that not only a migratory worker or his wife or children are persons before the law, but also 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 the right to recognition as persons before the law. This is expressed below in item 8: "The right to private life and the right to protection of the family".

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; an unborn but already conceived being is capable of having rights, such as acquiring by donations, but also has other legal effects, such as in paternity suits. Even before an individual is born, he or she is protected by law, as provided in article 4 of the AC.

Being a person before the law means that a migrant worker or his family does not need representatives to sign or terminate a work contract, rent or buy or sell a house, accept or leave an inheritance, make or accept a donation, file a claim due to default of a contract or theft or fraud, and so on. This also involves the right to have a nationality, of which nobody can arbitrarily deprive them.

To have the right to be recognized as a legal personality also means that a person is be responsible for any free and rational act or contract.

5. Right of equality before the law

This right is provided in UD, article 7; Pact I, article 26; AD article 2; AC article 24; and CMW article 18.

Equality before the law implies another human right, the right not to be discriminated, expressed as "all human beings have the right to equal protection of the law".

The right of equality before the law and not to be discriminated is applicable to all stages of the migration process. It is especially important that it be applied in the period spent in remunerated activity, since the consequences of this right reflect not only on the working conditions but also the living conditions of the migrant worker and his family. At this point it is also appropriate to quote a paragraph of Advisory Opinion OC-18, "Juridical Condition and Rights of Migrant Workers without Documents", of the Inter-American Court of Human Rights, which is quoted at greater length in the item "Labor rights and the right to social security": "On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment". The Court's opinion could not be more explicit: Work cannot be given to any person, whatever his or her migrant status, without recognizing his or her rights springing from this working relation. Failure to recognize these rights would imply infringement of the human right to equality before the law and to non-discrimination.

This Advisory Opinion of the Inter-American Court OC-18 is obligatory for all countries because it is based on valid *erga omnes* human rights such as the right to equality and non-discrimination and the right to due process of law; these rights are protected in all the countries of the American continent.

Racism, that is, differentiation for reasons of race or ethnic background, and xenophobia, that is, "hatred or repugnance of the foreigner", are two forms of violating the human right to equality and non–discrimination, and governments are obliged to adopt effective measures to protect everyone, especially migrants and their families, from violation of such rights.

The right to equality and non-discrimination protects someone from preference being given to another with some characteristic such as race, skin color, age, sex, married status, language, religion, ideology, sexual preference, nationality, social or economic position, physical

appearance or incapacity. This law also protects a person from one such characteristic being the cause of violence, insult, exclusion from some group, moral or material harm, or restriction of labor rights, for example, not receiving a work contract, being paid less for the same job, having to work longer hours, not being rented a house, not being sold or allowed to buy something, or being discriminated in the offer of some service.

On the other hand, migrants and their families arriving in a country have the responsibility and obligation to understand the laws and values of the society that has welcomed them. The welcoming society must in turn respect the rights and cultural diversity of migrants and their families. Tolerance, comprehension and mutual respect are the ingredients of the solution.

Integration of the migrants and their families is the best solution to the migration process, but this depends fundamentally on the receiving country accepting them, recognizing the contribution that migrants make to economic development, offering them equal conditions without any discrimination, and when necessary allowing their families to rejoin them.

The right to equality must not be violated even if questions of security or terrorism are alleged just because he is a migrant worker, with or without documents. Such allegations, sometimes, are tinged with racism or xenophobia, and governments must be careful to avoid abuses and infringement of the human rights of migrant workers and their families for these reasons. 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 to due legal process are adopted.

6. Labor and social security rights

The right to work is provided in UD, article 22, 23, 24 and 25; Pact II, articles 6, 7, 8, 9, 10, 11, 16, 17, 18 and 19; AD, articles 14, 15 and 16; AC, article 16; PACA, articles 6, 7, 8 and 9; and CMW, articles 25, 26, 27, 28, 32, 83 and 84.

Article 23, paragraph 1, of the Universal Declaration of Human Rights states: “Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment”. If migrant workers, whatever their status, establish a working relation, they should be treated in labor matters in the same way as other workers, including nationals of the country where they work, in accordance with the human right to equality and non-discrimination before the law. Consequently, migrant workers must enjoy working conditions that allow them and their families living conditions in keeping with the dignity deserved by human beings, such as equal wages for equal work, prohibition of forced labor, the right to social security, access to education for their children, fair payment for overtime, reasonable limitation of the number of working hours, weekly rest, leisure time, periodical paid vacations, the right to set up trade unions and associations to defend their interests, and for working women to enjoy specific rights such as maternity leave and so on.

These labor rights, being human rights, are obligatory for all States.

On the human right to equality and non-discrimination, the Advisory Opinion OC-18 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:

> 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. …* 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. … The general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person. …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. … 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. … 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. … 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. … 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 is 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, the right to equality before the law, including the sphere of labor rights of irregular migrant workers, is confirmed by this Advisory Opinion.

The right to freedom that all human beings enjoy 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 integrating with the community, on equal and non-discriminatory terms, this being the most convenient for migrant workers and their families

Unfortunately, it often happens that problems arise between groups of migrant workers and the communities that they join because of racial, social, cultural or religious questions, especially when there are substantial differences in these matters. Isolating migrants and their families not only hampers their personal development but also prevents them from forming associations with other workers or trade unions that can defend their rights and protect them from abuses with regard to work, which is even more frequent among domestic servants, mostly women. Women face more restraints than 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 to support” in family migration, with less access to the labor market when they are admitted as accompanying spouses, plus their marginalization into traditional female and poorly paid occupations when they migrate as workers and their greater vulnerability to sexual exploitation, are legitimate reasons for concern. Avoiding these situations depends basically on respect for the rights established in the principal instruments of human rights.

Also, it is indispensable to facilitate the transfer of cash remittances, pensions and allowances of retired migrant workers, male and female, to their countries of origin.

7. Right to due process of law, right to non-retroactivity and right to obtain indemnization

UD, articles 7, 8, 9,10, 11 and 17; AC, article 8; Pact I, article 3, 9, 10, 11, 13, 14, 15 and 26; AD, article 2, 18 and 26; AC, articles 9 and 10; and CMW, articles 15, 16, 17, 18, 19, 20, 21, 22 and 23.

If a migrant worker or a member of his family is arrested by a civil servant or a police or public security officer, in order either to check their migrant status or because of some criminal accusation or to determine their civil rights and obligations, migrant-aid organizations recommend keeping calm, not running and not insulting the person who arrests him in the understanding that they have the right to be immediately informed of the reason for their arrest in a language that they understand. The arrest of an immigrant or his family for the above reasons can only be done if the legislation of the country so permits; if so, migrants and their families have the following rights: firstly, respect for their human rights, even in the case of being undocumented; for a translator and lawyer; to be put in touch with the nearest consulate of his nationality, which 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, these same authorities 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, and 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 sometimes children and adolescents are wrongfully arrested and depositions are made without the presence of a legal representative or adult responsible for them. Arrested migrant workers also have these rights: to remain silent, but they should give their real name; not to sign, against their will any voluntary release or similar paper; to leave after paying bail; to have hygiene in the place of arrest - which must not be a jail - and to be given food and water. They also have the right against excessive force in custody, and not to be insulted or attacked, harmed by handcuffs; and to be given medical care, and not to have their money or other valuables taken away from them. It is also advisable for the arrested not to lie, carry false documents, for instance false social security card – since this is an offense -, not to say he is a citizen of the country when he is not, and 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 the arrested migrant worker or member of his family is not released, an order is required by the competent authority to keep him in custody and start a lawsuit, that is, a decision before a court. The human right to due legal process**,** the right to justice, the guarantee to migrant workers and their families, no matter what their migrant status, that any ensuing legal process based on the accusation of having committed a crime such as homicide, robbery or fraude will be carried out according to the prevailing laws, by an independent and impartial court or tribunal established by law, in other words, with justice. During the process, the minimum guarantees granted to all must be given, including the right to adequate defense, to communicate with the defender of his choice or one appointed free of charge if he cannot afford to pay, to be tried without undue delays; to be present at the trial in order to have fair judgment according to the laws in effect and not arbitrarily, that is, not in accordance with the free criterion of those executing them but rather in compliance with the essential formalities that the law indicates to be able to deprive someone of some right or impose punishment. To this same end, the accused has the right to a public hearing in order that all the pertinent elements be included and the court accordingly prepared to pass sentence, as well as interrogating or having interrogated the accusation and defense witnesses and obtaining the appearance of the latter to be questioned in the same conditions as those for the accusation; to be assisted by an interpreter if he does not understand the language used in the court. And not to be obliged to make a statement against himself or declare himself guilty.

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. If a person is deported, he must be informed of the reasons for this and also the recourses he has available not to be deported. Persons accused of a crime have the right to be presumed innocent until proven guilty.

Migrant workers and their families have the same right to be heard when the trial takes place to determine rights and obligations of a civil nature, for example, non-compliance with a work or rental contract. 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.

If a person is arrested because of his physical characteristics to check his migrant status, the human right to equality is infringed before the law that prohibits all discrimination for reasons of race, color, language, religion, sexual preference, and so on. This right is also infringed if based on these criteria distinctions are made, restrictions imposed or preferences given among the persons arrested. Police roundups, whether in the working place, public places or homes,

lead to a situation of generalized terror, and collective expulsions are illegal because each case must be judged individually, with due respect for human rights.

If these human rights are violated, the authorities or persons that committed the infringement must be denounced.

In short, the right to due legal process ensures migrant workers and their families full equality with the nationals of the country involved in a trial taken to court or tribunal.

The right to no-retroactivity complements the right to due legal process since if a lawsuit is carried out based on a law that did not exist when the crime was committed, the right to due legal process would be infringed, since commission or omission would be judged without a law to punish it, plus the fact that this would infringe the principles of “no crime without law” and “no punishment without law”.

The UD (article 11.2) refers to this right in the following terms:

> 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.

Article 15 of Pact I provides that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law…”

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.

Paragraph 5 of article 9 of Pact I says: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”, and article 10 of the AC provides that: “Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”

The above provisions are based on the general principle of international law that says: “Violation of a right allows for indemnization”.

8. Right to private and family life

UD, articles 12 and 16; Pact I, articles 17 and 23; AD, articles 5 and 6; CA, articles 11 and 17, and CMW, articles 14 and 44.

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 honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

The right not to be subjected to arbitrary interference at home authorizes the inhabitants to not permit entry, even of an official, to a home unless there is a written order from a competent authority in this respect that specifies what may be done in that home. This right applies to all persons who have this home, that is whether nationals of the State or aliens.

The right to inviolability of private communications applies to letters, telegrams, telephone calls, electronic messages, 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.

Item 1 of article 17 of the AC states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. Article 44 of the CMW contains a similar article, adding that the States that are signatories to the Convention should take the “appropriate measures to ensure the protection of the unity of the families of migrant workers”.

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”. If children are separated from their parents because the latter have no documents, and then deported, this is a violation of the human right of persons who integrate the family, enshrined in article 16 of the UD. This is likewise recognized by the CMW.

It is important to address this section on the human rights of the family in order top preserve its unit as such. It is also important to recall the special protection required by migrant women since, if they travel alone or are 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 where they are employed, even if their own country, and if they work 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 besides being separated from her husband, she must look after the children and are more vulnerable to maltreatment, accusations or abuse by family members under her charge. If it is the mother who emigrates, the daughters are exposed to incest; if she accompanies her husband and they have children, very often she must not only look after them but also have an outside job. 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 is it not beneficial but also measures are taken against national 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 emigrates. 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.

9. Right to freedom of thought, conscience and religion and the right to freedom of opinion and expression

UD, article 18 and 19; Pact I, article 18 and 19; AD, article 4; AC, article 12 and 13; CMW, article 12.

Articles 18 and 19 of the UD describe these rights amply and precisely:

> Article 18 - Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
>
> Article 19 – Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

10. Freedom of peaceful meeting and association

UD , article 20, paragraphs 1 and article 23, paragraph 4; Pact I, article 21 and 22; Pact II, art. 8; AC, articles 15 and 16; and CMW, article 26.

In the articles quoted, the UD establishes respectively that “Everyone has the right to freedom of peaceful assembly and association” and that “Everyone has the right to form and join trade unions for the protection of his interests”.

These rights are included in the other international instruments quoted in this item. Pact I provides that “no restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others”, to which is added that migrant workers and their families, being aliens, should not refer to political affairs of the welcoming country.

Evidence shows that foreign workers who work seasonally have joined trade unions.

11. Right to individual and collective private property

This right is dealt with in article 17 of the UD; article 3 of Pact II; and article 15 of CMW.

Migrant workers and their families have the right to individual and collective property, that is, to possess a good individually or in partnership with other persons and also to have the right not to be arbitrarily deprived of their property; nonetheless, the authorities have the right to impose on individual or collective property whatever is in the interest of society and to regulate such property in the benefit of society, but if a good that is private or collective is expropriated, fair compensation is only fair.

12. Rights of the child

These rights are provided in UD, articles 25 and 26; Pact I, article 24; Pact II; article 13; CMW, article 29; and CRC, article 8.

The international instruments quoted in this item refer to the specific human rights of children, whatever may be their migrant status, as follows: special cares and assistance – similar to maternity; equal social protection – whether born in or out of wedlock - both on the part of the family and the society and State; protection measures required by their condition as minors, without any discrimination as regards race, color, gender, language, religion, national or social origin, economic position or birth; immediate registration upon birth, and bearing a name in order to have an identity; having a nationality like everyone else, and changing it; education, which should be free, except with regard to elementary instruction, which should be aimed at full development of the human personality and strengthening of respect for human rights and fundamental liberties. On their part, parents have the preferential right to choose the type of education to be given to their children.

Also in accordance with what the UD establishes, and other international instruments quoted in this item, the human rights of children in the migration process are infringed:

a) if they are not registered immediately upon birth and given a name which gives then the right to have an identity that complements two others: the right to a nationality and the right to legal personality;
b) if they are born in a country that concedes nationality to anyone born in its territory and does it grant it;
c) if they suffer at school racial or any other kind of discrimination;
d) if a child is forced to perform activities or work that could prove dangerous or impair their education or are hazardous to his health or physical, mental, spiritual, moral or social development;
e) if children are recruited or enlisted in the armed forces or used to participate actively in hostilities;
f) if they are arrested and imprisoned together with their parents – and not in adequate places - and are treated as criminals;
g) if their parents are arrested and separated from the children; if unaccompanied minors are expelled from the country, especially if they are deported without from their family parents or at risk periods.

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MANUAL OF THE HUMAN RIGHTS OF ALL MIGRANT WORKERS AND THEIR FAMILIES

(presented by Dr. Jorge Palacios Treviño)

If you are contemplating migrating to work in another country in order to ensure a better life for you and your family, you must comply with the requirements imposed by the laws of the country of your nationality; in the first place, obtaining a passport issued by the Secretariat or the Ministry of Foreign Affairs. You also must remember that to enter and work in the country to where you wish to emigrate, you have to have the necessary permits, and if you have to cross other countries to reach your destination, you also need to have permits to pass through them. To find out what requirements you have to meet in order go and work in your country of destination and travel through other countries, you need to go to the embassy or consulate of those countries.

You also have to bear in mind that if you do not have the necessary permits to enter and work in the country of destination, you are exposing yourself to many crimes, and if you are taking your family with you, you are exposing them as well, because there are always delinquents to take advantage of this situation in order to obtain some profit or gain. Remember that there are organizations or gangs that use threats or force or other forms of violence to recruit people that want to emigrate in order to exploit them. These gangs offer people their services to arrange transportation, help them enter the country of destination or find them work, and instead of doing so, they exploit the immigrant; for example, women are offered jobs as maid and are then obliged to work as prostitutes under threat of punishment; in other cases, people are made to work in conditions of slavery and in unhealthy places and have their wages stolen under the pretext of paying for transportation and other costs.

Besides failing to comply with what is offered, the traffickers often rob the people who accept their services and even, if necessary, murder them so as not to have to fulfill their part of the arrangement; sometimes they take the ID documents of migrant workers and their families to force them to stay with them and carry out work that they do not want to do. Some employers also do this in order to retain the workers and oblige them to work in unfair conditions.

For all the above reasons, it is advisable not to leave without the necessary permits and resources, especially if you are taking your family, but if nevertheless you decide to go ahead, you must take all possible precautions and at the same time remember that whatever the circumstances, you have certain rights, in other words human rights, even though you and your family have no permit nor any other document, which is why you are getting to know these rights so that you can demand them, because nobody - the authorities least of all - has the right to subject you and your family to abuse and you must never think that because you have no documents, such abuse is normal and that you deserve (although this is no justification) to be treated in this way or be intimidated or threatened or made a victim of extortion. This means that

everyone, whether they have documents or not, in any circumstances and in any country, has at least the rights that are listed herein.

Always remember the words of the Universal Declaration of Human Rights, approved by all the countries in the world at the Organization of the United Nations on 10 December 1948: “All human beings are born free and equal in dignity and rights. … without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”, and therefore all persons have the obligation to respect the human rights of others and treat them with benevolence. So, you must remember that if you have any trouble, you can go to your country’s embassy or consulate and the organizations that offer aid to migrants.

It is important that you, migrant worker, and your families demand both of the authorities and private parties that they respect the fundamental human rights, and if you are expelled from the country where you find yourselves because you do not have the necessary documents, or any other valid reason, remember that even in this case, human rights must be respected; in turn, the migrant worker must consider that humiliating work in unfair conditions is not worth having.

You and your family have the following human rights:

1. The right to leave your country

If you wish to emigrate to another country and work there, you have the right to do so and you also have the right to leave alone or with your family, unless there is a law that prohibits this or some other valid reason, such as an epidemic. You should therefore know that nobody can oblige you to leave your own country and that you have the right to return to it whenever you wish.

This right to leave is based on the right that all persons have, namely, to provide your family with food, clothes, a home and medical services, and if you cannot obtain this in your own country, you have the right to look elsewhere.

2. The right to live in freedom and safety

This right is often exposed to infringement during the journey to the country of employment, either because of accidents due to the poor condition of the means of transportation, or because of the inadequate conditions of accommodation and food, or else on account of stricter measures to prevent migrant workers without working papers, such as fences or walls, and the excessive actions of border guards. Also, in the country of destination, life can be dangerous if work is done in inhumane conditions such as long hours without rest or in unhealthy work places or living areas, or if there are no medical services, or the necessary care and medicine are unavailable if someone falls sick.

For all these reasons, you must demand safe means of transportation and proper conditions of other services, humane treatment from the border guards in accordance with the law, and working conditions similar to those of the nationals of the country of employment.

On the other hand, you and your family should be very aware that some countries still have not abolished the death penalty for certain serious crimes, so you have to be very attentive, and if this situation unfortunately arises, the only attitude is to make sure that the penalty is not imposed arbitrarily and that the pertinent laws are applied based on due legal process, that is to say, according to the law, as explained further ahead. Likewise, you should know that no country can impose the death penalty on people over 70 or on those under 18, nor on pregnant women.

3. The human right to personal integrity

This right preserves all people from suffering lesions, torments or corporal, psychological, degrading or humiliating punishment. They are also preserved from being subjected to slavery or servitude, torture, being forced to work, inhuman working conditions such as long hours without rest or sufficient food, doing work that they do not want to, and taking experimental medicine or undergoing medical treatment without their consent. Nor can they be subjected to forced or obligatory labor, unless this is imposed as punishment “in compliance with a sentence passed by a competent court”.

If any of these situations befalls you or your family, you must denounce it, and in some cases you may even have the right to reparation for the offence and harm suffered.

Experience shows that this human right is infringed above all in sectors such as domestic service, farm work, industrial workshops, restaurants and hotels.

4. The right of every individual to recognition as a legal person

This right means that people, always in accordance with the law, have the aptitude or capacity to possess rights and contract obligations, that is to say, you and your family do not need representatives to enter into a contract to work or terminate work, rent, buy or sell a house or accept or leave an inheritance, make or accept a donation, or claim before an authority for an unfulfilled work contract, or a robbery or fraud or any other matter.

Possessing a legal personality also implies that you are responsible for any act or contract that you enter into freely and in full awareness.

The family, as a collective natural person, also has a legal personality, that is, it has rights and duties as such, for example, not to separate from minor children, as explained further ahead in the item “protecting the family”. Accordingly, an unborn but already conceived human being is capable of having rights such as the right to acquire through donation, as well as having other legal effects such as when the paternity of this unborn human being is in question. This right also involves having a nationality that nobody can be deprived of arbitrarily.

5. The right of equality before the law

To be equal before the law implies the right that you and your family have not to be discriminated against, since “all human beings have the right to equal protection of the law”. This right should be respected at each and every moment of the migration process: from leaving the country of origin, in the countries of transit and during the entire stay in the country of employment. As a consequence of the right not to be discriminated against, preference cannot be given to another person applying for work instead of you, based on race, color, age, gender, married status, language, religion, ideology, sexual preference, nationality, social or economic position, or because of physical appearance or handicap. This right also protects you from violence or insults for these reasons, or being excluded from any group, or not being sold something or being able to buy something, not being rented a house or being kept waiting for a job.

The right to equality should not be infringed either, even if reasons of security are alleged, for experience shows that some accusations are only the result of racism or simply because the people concerned are aliens; consequently, this right should not be infringed on account of your being a migrant worker or the family of one, whether in possession of work permits or not.

On the other hand, it is of paramount importance that this right to equality is respected in the working place because this reflects not only on the migrant worker’s life but also on his family and so the same working conditions should be enjoyed as the nationals of the country, that is, your labor rights should not be denied or restricted, for example you should not be given a working contract as a migrant worker or paid less for the same job, or made to work more hours or granted inferior working conditions. On this point the Inter-American Court of Human Rights based in San José, Costa Rica, has determined – as explained in the following point – that when a work relationship is established, there is no difference between the rights of a worker with or without documents.

This law also protects migrant workers from being isolated from the society they have joined, for this prevents them from coming into contact with other people and integrating with the community – on equal terms and without any discrimination – which is obviously more convenient for migrant workers and their families.

The authorities have the duty to adopt effective measures to protect the right to equality of migrant workers and their families. In the case of an accusation of infringement of this right, it is essential that the human right be treated by due legal process, that is, that the process is carried out according to the laws of the country rather than in a discriminatory or arbitrary fashion.

On the other hand, migrant workers and their families who arrive in the country of employment have the responsibility and obligation to understand and respect its laws and

values as well as its rights and customs. In turn, the nationals of the welcoming country also must respect the rights of migrant workers and their families and their cultural diversity. Mutual tolerance, comprehension and respect are the ingredients of the solution.

6. Labor rights and the right to social security

If you, migrant worker, establish a working relationship, even if you do not possess the appropriate documents, you have the same labor rights as the nationals of the country where you work, this being established by the human right of equality and non-discrimination before the law; consequently, you should have working conditions that afford you and your family an existence in keeping with the dignity befitting human persons, such as the following: to earn an equal wage for equal work; not to have to perform forced labor; to have social security; to have reasonably limited working hours; to have fair remuneration for overtime; to have a weekly rest; to have leisure time; to enjoy paid periodical holidays; to set up trade unions and join them to defend your interests and your minor children's right to education. At the same time, women migrant workers, in addition to the above-mentioned rights, have the specific rights that correspond to their status as women, such as maternity leave.

The right to have the above-mentioned working conditions is confirmed by Advisory Opinion OC-18 - quoted in the preceding item – issued by the Inter-American Court of Human Rights on 17 September 2003 in respect to the Juridical Condition and Rights of Migrant Workers without Documents, which provides the following:

> 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. … 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. … 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). … workers, being possessors of labor rights, must have all the appropriate means to exercise them..... 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 Court, which is comprised of a group of eminent lawyer experts on the matter, could not be any clearer in the Advisory Opinion and the following conclusion can be reached from its reading: Employment cannot be given to a person, whatever their migrant status, without recognizing their rights born of this working relation, rights that on the other hand are protected by the internal laws of all countries in the American continent.

According to this Opinion, migrant workers also have the right to form associations with other workers or form trade unions with a view to defending their rights and preventing abuse in labor relations, which is most frequent among domestic servants, mostly women, who face more limitations than men because they are more liable to find themselves in situations that restrict their personal development; most are admitted as "family members to support" in family migration, and consequently have less opportunities to access the work market. When women migrate as workers they are usually marginalized into traditional, poorly paid female occupations and they are more vulnerable to sexual exploitation. Avoiding these results depends fundamentally on respecting and urging respect for human rights.

Furthermore, workers have the right to be able to transfer remittances of money, as well as to have retirement pensions and payments in their country of origin.

7. The right to due legal process, right to non-retroactivity and the right to obtain reparation

If you are a migrant worker and a police or public-security officer detains you or a member of your family, either to check your migrant status or because of an accusation of a criminal nature, or to determine rights or obligations of a civil nature, or for some other reason, you must know that you have the right to be informed immediately of the cause of detention in a language that you understand. In any case, you are advised to remain calm, to not run, to not hold an arm or anything that might look like one, and to not insult the person who detains you. Detention for

the above reasons can only be made if the legislation of the country allows this and if the following rights are ensured: human rights must be respected even in the case of the person being without documents; provision of the help of a translator and a lawyer; being put in contact with the nearest consulate of your nationality, which has the obligation to provide adequate consular services in any circumstances that call for them, and to provide assistance in any ensuing lawsuit, as determined by the Convention of Vienna on Consular Relations in 1963, which provides that when the authorities of a country detain an alien, in this case a migrant worker or his family, the same authorities are obliged to inform them without delay of their right to consular assistance and to communicate with the consulate of their country. Likewise, detainees have the right to communicate with an organization that provides aid to migrants, and with their family or someone who can help them; if they are accompanied by minor-age children they have the right not to be separated from them.

Other rights of detainees are: to remain silent, but to give their true name; not to sign voluntary release or any other document, if they do not wish to; to leave after paying bail in some cases; to have hygiene in the place of arrest – which must not be a jail - and to be given food and water. They also have the right against excessive force in custody, and not to be insulted or attacked, harmed by handcuffs or expelled handcuffed; and to be given medical care if necessary, and not to have their money or other valuables taken away from them. It is also advisable for the arrested not to lie, carry false documents (for example a social security document, since this is an offense in any country), not to say he is a citizen of the country when he is not, and 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 there is an accusation that you or a member of your family have committed an offense, you must know that you can only be detained in order to start a lawsuit before a court or tribunal if there is an order from a competent authority. Otherwise, you and your family should be let free. In any case, the human right to due legal process – the right to justice, as it is also called – guarantees you and your family, whatever your migrant status, that the ensuing lawsuit will be carried out in accordance with the applicable laws, and by an independent and impartial court or tribunal established by law. During the process, the minimum guarantees granted to all must be given, including the right to adequate defense, to communicate with the defender of his choice or one appointed free of charge if he cannot afford to pay, to be tried without undue delays; to be present at the trial in order to have fair judgment according to the laws in effect and not arbitrarily, that is, not in accordance with the free criterion of those executing them but rather in compliance with the essential formalities that the law indicates in order to be able to deprive someone of some right or impose punishment. To this same end, the accused has the right to a public hearing in order that all the pertinent elements be included; as well as interrogating or having interrogated the accusation and defense witnesses and obtain the appearance of the latter to be questioned in the same conditions as those for the accusation; to be assisted by an interpreter if he does not understand the language used in the court. And not to be obliged to make a statement against himself or declare himself guilty.

If a person is deported, he must be informed of the reasons for this and also the recourses he has available not to be deported. If this is not done, an infringement is also made of the right to due legal process. Persons accused of a crime have the right to be presumed innocent until proven guilty.

Migrant workers and their families have the same right to be heard when the trial takes place to determine rights and obligations of a civil nature, for example, non-compliance with a work or rental contract. 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.

If a person is arrested because of his physical characteristics to check his migrant status, the human right to equality is infringed before the law that prohibits all discrimination. This right is also infringed if based on these criteria distinctions are made, restrictions imposed or preferences given among the persons arrested. Police roundups, whether in the working place, public places or homes, lead to a situation of generalized terror, and collective expulsions are illegal because each case must be judged individually, with due respect for human rights. If

these rights are violated, the authorities should be denounced, or the persons responsible for such violation.

In short, the right to due legal process ensures migrant workers and their families full equality with the nationals of the country involved in a trial taken to court or tribunal.

The right to non-retroactivity means that a legal process cannot be carried out based on a law that did not exist when the crime was committed, so a trial would be held without a law to punish the offense, plus the fact that this would infringe the principles of “no crime without law” and “no punishment without law”. This right is based on the general principle that laws are made for the future and not for the past, but it should be borne in mind that if the new law benefits the accused, it should be applied.

Anyone who has been illegally detained or arrested will have the effective right to obtain reparation. Also, people have the right to indemnity according to the law in the case of having been condemned in a sentence by judicial error.

8. The right to private life and the right to protection of the family

All migrant workers and their families have the right not to be subjected to arbitrary interference at home and to authorize the inhabitants to not permit entry, even of an official, to a home unless there is a written order from a competent authority in this respect that specifies what may be done in that home. This right applies to all persons who have this home, that is, whether nationals of the State or aliens.

The right to inviolability of private communications applies to letters, telegrams, telephone calls, electronic messages, 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.

All persons have the right to marry and start a family, the family being the natural fundamental element of society and entitled to protection on the part of society and the State. If children are separated from their parents because the latter have no documents, and then deported, this is a violation of the human right of persons who integrate the family.

It is important to address this section on the human rights of the family in order to preserve its unity as such. It is also important to recall the special protection required by migrant women, if they travel alone or are 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 where they are employed, even if their own country, and if they work 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 besides being separated from her husband, she must look after the children and is therefore more vulnerable to maltreatment, accusations or abuse by family members under her charge. If it is the mother who emigrates, the daughters are exposed to incest; if she accompanies her husband and they have children, very often she must not only look after them but also have an outside job. The husband does not always help take care of and educate the children.

Based on human rights, 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 is it not beneficial but also measures are taken against national 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 when one of them emigrates. 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.”

9. Right to freedom of thought, conscience and religion and the right to freedom of opinion and expression

These rights are also included in the Universal Declaration of Human Rights adopted by all nations:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

and

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

10. Freedom of peaceful meeting and association

Likewise, the Universal Declaration sets forth that “All persons have the right to freedom of peaceful meeting and association” and that “All persons have the right to found and join trade unions to defend their interests”.

These rights are only subject to the restrictions provided in law that are necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and liberties of others, to which is added that migrant workers and their families, being aliens, should not refer to political affairs of the welcoming country.

Evidence shows that foreign workers who work seasonally have joined trade unions.

11. Right to individual and collective private property

Migrant workers and their families have the right to individual and collective property, that is, to possess a good individually or in partnership with other persons and also to have the right not to be arbitrarily deprived of their property; nonetheless, the authorities have the right to impose on individual or collective property whatever is in the interest of society and to regulate such property in the benefit of society, but if a good that is private or collective is expropriated, fair compensation is only fair.

12. Rights of the child

The specific human rights of children, whatever may be their migrant status, are as follows: special cares and assistance – similar to maternity; equal social protection – whether born in or out of wedlock - both on the part of the family and the society and State; protection measures required by their condition as minors, without any discrimination as regards race, color, gender, language, religion, national or social origin, economic position or birth; immediate registration upon birth, and bearing a name in order to have an identity; having a nationality like everyone else, and changing it; education, which should be free, except with regard to elementary instruction, which should be aimed at full development of the human personality and strengthening respect for human rights and fundamental liberties. On their part, parents have the preferential right to choose the type of education to be given to their children.

The human rights of children are violated:

a) if they are not registered immediately upon birth and given a name which gives then the right to have an identity that complements two others: the right to a nationality and the right to legal personality;
b) if they are born in a country that concedes nationality to anyone born in its territory and does it grant it;
c) if they suffer at school racial or any other kind of discrimination;
d) if a child is forced to perform activities or work that could prove dangerous or impair their education or are hazardous to his health or physical, mental, spiritual, moral or social development;
e) if children are recruited or enlisted in the armed forces or used to participate actively in hostilities;

f) if they are arrested and imprisoned together with their parents – and not in adequate places - and are treated as criminals;

g) if their parents are arrested and separated from the children; if unaccompanied minors are expelled from the country, especially if they are deported without from their family parents or at risk periods.

CJI/doc.289/08 corr.1

PRIMER OR MANUAL ON THE RIGHTS OF MIGRANT WORKERS AND THEIR FAMILIES

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. RESOLUTIONS OF THE INTERAMERICAN JURIDICAL COMMITTEE

The Inter-American Juridical Committee, at its 70th regular session held from February 26th to March 9th 2007 in the city of San Salvador, El Salvador, adopted resolution CJI/RES. 127 (LXX-O/07) called "The Legal Status of Migrant Workers and their Families in International Law", which claims that migrant workers and their families, whether documented or not, is a subject that concerns all the States of the American continent; that it is necessary to study the legal aspects of human migration, especially with regard to human rights, so that the fate of migrant workers can be considered; that the work carried out in the Inter-American System on this issue should be borne in mind; that the Inter-American Juridical Committee, on considering this topic at its 71st regular session held in Rio de Janeiro, Brazil, from July 30th to August 10th 2007, adopted resolution CJI/RES. 131 (LXXI-O/07), which referred to reports CJI/doc.266/07 and CJI/doc.269/07 called "The Legal Status of Migrant Workers and their Families in International Law" presented respectively by Drs. Jorge Palacios Treviño and Ana Elizabeth Villalta Vizcarra; that in item 3 of this resolution the Inter-American Juridical Committee resolved to "To request 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".

Pursuant to resolution CJI/RES. 131 (LXXI-O/07), as one of the rapporteurs of the topic, the author presents at this 72nd regular session of the Inter-American Juridical Committee this draft "Primer or Manual on the Rights of Migrant Workers and their Families", taking into account the work carried out in the Inter-American System on the matter, based on the following international instruments:

II. AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MEN

This Declaration was adopted at the Ninth International American Conference held in Bogota, Columbia in 1948, its main purpose being to protect the essential rights of men, rights not inherent to the fact that they are born citizens of a determined State but based on the attributes of the human person.

III. CHARTER OF THE ORGANIZATION OF THE AMERICAN STATES (OAS)

This Charter was adopted at the Ninth International American Conference held in Bogota, Columbia in 1948, which establishes that the true sense of American solidarity and the spirit of good neighbors can be no other than to consolidate a system of individual freedom and social justice in this continent, within the framework of democratic institutions, based on respect for the essential rights of mankind.

Among the principles mentioned in this Charter is the one that determines that "The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex".[1]

This same Charter created the Inter-American Commission on Human Rights, whose main function is to promote compliance with and defense of human rights.

[1] Article 3, literal l) of the Charter of the OAS.

IV. AMERICAN CONVENTION ON HUMAN RIGHTS: THE "SAN JOSE PACT"

This Convention was signed at the Inter-American Specialized Conference on Human Rights held in San Jose, Costa Rica on 22 November 1969.

The Convention recognizes that the essential rights of men are not born of the fact that they are citizens of any particular State but based on the attributes of the human person, which justifies international protection of a conventional nature to complement the protection offered by the internal law of each State.

Article 1 of this Convention establishes the obligation to respect human rights:

> 1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[2]

It also rules on the means of protecting human rights in the Inter-American System through the competent bodies: the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.

V. ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN RESPECT TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS: "THE SAN SALVADOR PROTOCOL"

This protocol was signed at the Eighteenth Regular Session of the General Assembly of the OAS held in San Salvador, El Salvador on 17 November 1988.

The protocol deals with:

> ... the close relationship that exists between economic, social and cultural rights, and of civil and political rights in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.[3]

VI. ADVISORY OPINION OC-16 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: "THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE IN THE FRAMEWORK OF THE GUARANTEES OF DUE LEGAL PROCESS"

This Opinion of the Convention of Vienna on Consular Relations, the principal objective of which is to "establish an equilibrium between States", also concerns protection of the fundamental rights of the person in the American continent, seeing that the paramount function of consular staff is to lend assistance to nationals of the State in defending their rights before the authorities of the receiving State. In this sense, article 36 of the Convention of Vienna on Consular Relations deals with consular assistance in a particular situation: deprival of freedom, ruling expressly on "the right to information and Consular Notification".

Accordingly, the right of an alien to be duly informed that he can count on consular assistance is part of the set of minimum guarantees comprising due legal process. Since the right to information on consular assistance constitutes a way to defend detainees, non-fulfillment or obstruction of this right affects the guarantees of due legal process, so the State must fulfill its duty to inform detainees on the rights recognized in this precept at the moment they are deprived of their freedom, and in any case before making their first deposition before the authorities.

This Opinion was emitted by the Inter-American Court of Human Rights in San Jose, Costa Rica on October 1st,1999.

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[2] Article 1 of the American Convention on Human Rights.

[3] Preamble to the Protocol of San Salvador".

VII. ADVISORY OPINION OC-18 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: "LEGAL STATUS AND RIGHTS OF MIGRANT WORKERS WITHOUT DOCUMENTS"

This Opinion was emitted by the Inter-American Court of Human Rights in San Jose, Costa Rica on 17 September 2003. According to this opinion, the Inter-American Court of Human Rights understands "migrant worker" to be any person who carries out, is going to carry out or has carried out any remunerated activity in a State of which he is not a national, and "migrant worker without documents or in an irregular situation" any person not authorized to enter or remain and exercise remunerated activity in the State of employment, in accordance with the laws of that State and the international agreements to which it is a signatory State, and who nevertheless performs such activity.

In this Advisory Opinion, notwithstanding the previous one, States are obliged to respect and guarantee human rights in accordance with international instruments on the matter, as manifested by the Inter-American Court of Human Rights in this Advisory Opinion, when it sets forth that:

> 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.

According to these international instruments and pertinent international jurisprudence, since States also have the general obligation to respect and guarantee fundamental rights, they must avoid taking initiatives that limit or restrict the exercise of such rights.

In this sense, States are obliged to respect and guarantee full and free exercise of rights and liberties without any discrimination; any non-compliance with this obligation on the part of the State through any discriminatory treatment implies international responsibility, since there is a universal duty for States to respect and guarantee the human rights, as set forth in the Principle of Equality and Non-Discrimination.

In this sense, States have the obligation not to introduce discriminatory regulations into their juridical system, and to rid their systems of such regulations, as well as to combat discriminatory practices.

Advisory Opinion OC-18 of the Inter-American Court of Human Rights considers that the Principle of Equality and Non-Discrimination before the law are part of *jus cogens* norms as well as general international law.

For this reason, States have the general obligation to respect and guarantee human rights without any discrimination and based on equality, abstaining from carrying out actions that in any way whatsoever are designed directly or indirectly to produce situations of discrimination, whether *de jure* or *de facto*. In this sense, the Inter-American Court of Human Rights considers that the right to due legal process should be recognized in the framework of the minimum guarantees that should be offered to all migrant workers, regardless of their migrant status.

Following this line of thinking, the Inter-American Court of Human Rights considers that those who enter a State and establish working relations acquire their human working rights in that State of employment, whatever their migrant status, since respect for and guarantee of enjoying and exercising these rights should preclude all and any discrimination. On assuming a working relation, migrant workers acquire rights as workers that must be recognized and guaranteed regardless of their regular or irregular status in the State of employment. Such rights are the consequence of the working relation. States should not allow their private employees to violate workers´ rights, nor let their contractual relations jeopardize minimum international standards.

Taking into account these international instruments of human rights within the framework of the Inter-American System, this report presents the following "Draft Primer or Manual on the Rights of Migrant Workers and their Families". "Migrant worker" is understood to be anyone who has a working relation in the State of employment, regardless of his or her migrant status.

Primer or Manual on the Rights of Migrant Workers and their Families

1. All migrant workers have the right to life, freedom and security of their person.
2. All migrant workers are equal before the law and enjoy the rights and duties enshrined in the American Declaration of the Rights and Duties of Men, without distinction of race, gender, language, religion or of any other nature.
3. All migrant workers are entitled to protection of the law against abusive attacks on their honor, reputation and private and family life.
4. All migrant workers have the right to constitute a family, the fundamental element of society, and to obtain protection for their family.
5. All women migrant workers, while pregnant or breastfeeding, have the right to special protection, care and assistance.
6. All migrant workers have the right to inviolability of their homes.
7. All migrant workers have the right to preservation of their health by sanitary and social means, as regards food, clothes, housing and medical assistance compatible with the level allowed by public and community resources.
8. All migrant workers have the right to work in proper conditions and to pursue their vocation freely to the extent that the existing opportunities of employment permit.
9. All migrant workers who work have the right to receive remuneration in keeping with their capacity and skill in order to ensure them a standard of living fitting for them and their families.
10. All migrant workers have the right to rest, honest recreation and the opportunity to use their free time in a useful manner for the benefit of their spiritual, cultural and physical betterment.
11. All migrant workers have the right to social security to protect them against the consequences of unemployment, old age and incapacity caused by any other condition against their will that make it impossible for them physically or mentally to obtain proper means of subsistence.
12. All migrant workers have the right to recognition anywhere as subjects of rights and obligations, and to enjoy fundamental civil rights.
13. All migrant workers can resort to the Courts to have their rights honored. To do so, they should have a simple, short procedure available for Justice to protect them against acts of authorities that jeopardize them by infringing a constitutionally enshrined fundamental right.
14. All migrant workers have the right to associate with others in order to promote, exercise and protect their legitimate interests of a political, economic, religious, social, cultural, professional, trade-union or any other nature.
15. No migrant worker can be subjected to slavery or servitude, nor can he be forced to do forced or obligatory labor.
16. Migrant workers deprived of their freedom have the right to appeal before a judge or competent tribunal for them to make an immediate decision regarding the legality of their arrest or detention and to order their release if the arrest or detention was illegal.
17. All migrant workers have the right to a hearing, with the due guarantees and within a reasonable timeframe, with a judge or competent, independent and impartial tribunal previously established by the law, for the purpose of substantiating any penal accusation made against them, or to determine their rights and obligations of a civil, labor, fiscal or any other nature.
18. All migrant workers accused of any crime have the right to be presumed innocent until legally proved guilty. During the process they have the right to full equality and the minimum guarantees of due legal process.

19. All migrant workers have the right to information concerning consular assistance in the framework of the guarantees of due legal process established in article 36.1.b) of the Convention of Vienna on Consular Relations, this being one of the duties related to the function of the receiving State.

20. All detained migrant workers who are not allowed access to the information mentioned in article 36.1.b) of the Convention of Vienna on Consular Relations are protected by the guarantees of due legal process. Accordingly, the imposition of the death penalty constitutes a violation of the right not to be deprived of life arbitrarily, in the terms of the relevant provisions of the Treaties of Human Rights, with the juridical consequences inherent to a violation of this nature, that is to say, concerning the international responsibility of States and the duty of reparation.

21. All migrant workers have the right to enjoy and exercise their human rights, including those concerned with work.

22. All migrant workers, upon assuming a working relation, acquire rights as workers that must be recognized and guaranteed, regardless of whether their status in the State of employment is regular or irregular. These rights are a consequence of the working relationship.

23. All migrant workers, as holders of labor rights, should have available all the appropriate means to exercise them. Migrant workers without documents possess the same labor rights as the other workers in the State of employment, and the latter must take all the necessary steps for this to be recognized and for this practice to be observed.

24. All migrant workers have the right to enjoy all the labor rights to which all the workers are entitled within the framework of the corresponding international instruments in the State of employment, whatever their migrant status may be.

This "Primer or Manual on the Rights of Migrant Workers and their Families" is based on the Inter-American System of Human Rights, this being one of the best structured on the matter, and also because the problem of migrant workers and their families particularly affects the American sphere, although it can be complemented with the Universal System.

CJI/RES. 139 (LXXII-O/08)

THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR FAMILIES IN INTERNATIONAL LAW

THE INTER-AMERICAL JURIDICAL COMMITTEE,

RECALLING resolutions CJI/RES. 127 (LXX-O/07) and CJI/RES. 131 (LXXI-O/07), both called "The Legal Status of Migrant Workers and their Families in international law" and particularly the latter, requesting co-rapporteurs on this issue, Drs. Jorge Palacios, Ana Elizabeth Villalta and Ricardo Seitenfus, to present a unified report on the issue prior to the next regular session of the Inter-American Juridical Committee, and accepting the offer from the co-rapporteurs to prepare a draft for a primer or manual on the rights of migrant workers and their families, on the basis of international law;

TAKING INTO CONSIDERATION that, pursuant to that mandate, Dr. Jorge Palacios presented documents CJI/doc.266/07 rev.1, "The legal status of migrant workers and their families in international law", and CJI/doc.287/08, "Manual of the human rights of all migrant workers and their families", and that Dr. Ana Elizabeth Villalta presented document CJI/doc.289/08 corr.1, "Primer or manual on the rights of migrant workers and their families", which were considered by the Inter-American Juridical Committee during the current ordinary session;

BEARING IN MIND that the International Juridical Committee requested Drs. Jorge Palacios and Ana Elizabeth Villalta to work on a unified document during the current ordinary session and on the basis of the documents presented by both, referring to a manual on the rights of migrant workers and their families and that, pursuant to that request, both rapporteurs

presented document CJI/doc.292/08, “Primer or manual on the rights of migrant workers and their families”,

RESOLVES:

1. To thank Dr. Jorge Palacios for the presentation of documents CJI/doc.266/07 rev.1, “The legal status of migrant workers and their families in international law”, and CJI/doc.287/08, “Manual of the human rights of all migrant workers and their families”; and also thank Dr. Ana Elizabeth Villalta for the presentation of document CJI/doc.289/08 corr.1, “Primer or manual on the rights of migrant workers and their families”, containing world and hemispheric background on the development and implementation of the human rights of migrant workers.

2. To thank both rapporteurs for their presentation and delivery of unified document CJI/doc.292/08, “Primer or manual on the rights of migrant workers and their families”.

3. To convey said document to the Permanent Council of the Organization for the purpose of information, and through it to the OAS Member States for the purpose of diffusion as deemed convenient in their respective countries, so as to contribute to the respect for and promotion of the rights of migrant workers and their families.

This resolution was unanimously adopted at the session held on March 7th, 2008, by the following members: Drs. Hyacinth Evadne Lindsay, Ana Elizabeth Villalta Vizcarra, Mauricio Herdocia Sacasa, Jean-Paul Hubert, Ricardo Seitenfus, Jorge Palacios Treviño, Freddy Castillo Castellanos and Jaime Aparicio.

CJI/doc.292/08

PRIMER OR MANUAL ON THE RIGHTS OF MIGRANT WORKERS AND THEIR FAMILIES

If you are contemplating migrating to work in another country in order to ensure a better life for you and your family, you must comply with the requirements imposed by the laws of the country of your nationality; in the first place, obtaining a passport regularly issued by the Secretariat or the Ministry of Foreign Affairs. You also must remember that to enter and work in the country to where you wish to emigrate, you have to have the necessary permits, and if you have to cross other countries to reach your destination, you also need to have permits to pass through them. To find out what requirements you have to meet in order go and work in your country of destination and travel through other countries, you need to go to the embassy or consulate of those countries.

You also have to bear in mind that if you do not have the necessary permits to enter and work in the country of destination, you are exposing yourself to be a victim of many crimes, and if you are taking your family you are exposing them as well, because there are always delinquents to take advantage of this situation in order to obtain some profit or gain. Remember that there are organizations or gangs that use threats or force or other forms of violence to recruit people that want to emigrate in order to exploit them. These gangs offer people their services to arrange transportation, help them enter the country of destination or find them work, and instead of doing so, they exploit the immigrant; for example, women are offered jobs as maid and are then obliged to work as prostitutes under threat of punishment; in other cases, people are made to work in conditions of slavery and in unhealthy places and have their wages stolen under the pretext of paying for transportation and other costs.

Besides failing to comply with what is offered, the traffickers often rob the people who accept their services and even, if necessary, murder them so as not to have to fulfill their part of the arrangement; sometimes they take the ID documents of migrant workers and their families to force them to stay with them and carry out work that they do not want to do. Some employers also do this in order to retain the workers and oblige them to work in unfair conditions.

For all the above reasons, it is advisable not to leave without the necessary permits and resources, especially if you are taking your family, but if nevertheless you decide to go ahead, you must take all possible precautions and at the same time remember that whatever the circumstances, you have certain rights, in other words human rights, even though you and your family have no permit nor any other document, which is why you are getting to know these rights so that you can demand them, because nobody - the authorities least of all - has the right to subject you and your family to abuse and you must never think that because you have no

documents, such abuse is normal and that you deserve (although this is no justification) to be treated in this way or be intimidated or threatened or made a victim of extortion. This means that everyone, whether they have documents or not, in any circumstances and in any country, has at least the rights that are listed herein.

It is important that you migrant workers, documented or not, and your families demand both the authorities and private parties that they respect the fundamental human rights, and if you are expelled from the country where you find yourselves because you do not have the necessary documents, or any other valid reason, remember that even in this case, human rights must be respected; taking the above into account, this report presents the following “Primer or manual of migrant workers and their families”.

You and your family have the following human rights:

1. All migrant workers and their families have the right to leave their country

If you wish to emigrate to another country and work there, you have the right to do so and you also have the right to leave alone or with your family, unless there is a law that prohibits this or some other valid reason, such as an epidemic. You should therefore know that nobody can oblige you to leave your own country and that you have the right to return to it whenever you wish.

This right to leave is based on the right that all persons have, namely, to provide your family with food, clothes, a home and medical services, and if you cannot obtain this in your own country, you have the right to look elsewhere.

2. All migrant workers and their families have the right to live in freedom and safety

This right is often exposed to infringement during the journey to the country of employment, either because of accidents due to the poor condition of the means of transportation, or because of the inadequate conditions of accommodation and food, or else on account of stricter measures to prevent migrant workers without working papers, such as fences or walls, and the excessive actions of border guards. Also, in the country of destination, life can be dangerous if work is done in inhumane conditions such as long hours without rest or in unhealthy work places or living areas, or if there are no medical services, or the necessary care and medicine are unavailable if someone falls sick.

For all these reasons, you must demand safe means of transportation and proper conditions of other services, humane treatment from the border guards in accordance with the law, and working conditions similar to those of the nationals of the country of employment.

On the other hand, you and your family should be very aware that some countries still have not abolished the death penalty for certain serious crimes, so you have to be very attentive, and if this situation unfortunately arises, the only attitude is to make sure that the penalty is not imposed arbitrarily and that the pertinent laws are applied based on due legal process, that is to say, according to the law, as explained further ahead. Likewise, you should know that no country can impose the death penalty on people over 70 or on those under 18, nor on pregnant women.

3. All migrant workers and their families have the human right to personal integrity

This right preserves all people from suffering lesions, torments or corporal, psychological, degrading or humiliating punishment. They are also preserved from being subjected to slavery or servitude, torture, being forced to work, inhuman working conditions such as long hours without rest or sufficient food, doing work that they do not want to, and taking experimental medicine or undergoing medical treatment without their consent. Nor can they be subjected to forced or obligatory labor, unless this is imposed as punishment “in compliance with a sentence passed by a competent court”.

If any of these situations befalls you or your family, you must denounce it, and in some cases you may even have the right to reparation for the offence and harm suffered.

Experience shows that this human right is infringed above all in sectors such as domestic service, farm work, industrial workshops, restaurants and hotels.

4. All migrant workers and their families have the right of every individual to recognition as a legal person

This right means that people, always in accordance with the law, have the aptitude or capacity to possess rights and contract obligations, that is to say, you and your family do not need representatives to enter into a contract to work or terminate work, rent, buy or sell a house or accept or leave an inheritance, make or accept a donation, or claim before an authority for an unfulfilled work contract, or a robbery or fraud or any other matter.

Possessing a legal personality also implies that you are responsible for any act or contract that you enter into freely and in full awareness.

The family, as a collective natural person, also has a legal personality, that is, it has rights and duties as such, for example, not to separate from minor children, as explained further ahead in the item “protecting the family”. Accordingly, an unborn but already conceived human being is capable of having rights such as the right to acquire through donation, as well as having other legal effects such as when the paternity of this unborn human being is in question. This right also involves having a nationality that nobody can be deprived of arbitrarily.

5. All migrant workers and their families have the right of equality before the law

To be equal before the law implies the right that you and your family have not to be discriminated against, since “all human beings have the right to equal protection of the law”. This right should be respected at each and every moment of the migration process: from leaving the country of origin, in the countries of transit and during the entire stay in the country of employment. As a consequence of the right not to be discriminated against, preference cannot be given to another person applying for work instead of you, based on race, color, age, gender, married status, language, religion, ideology, sexual preference, nationality, social or economic position, or because of physical appearance or handicap. This right also protects you from violence or insults for these reasons, or being excluded from any group, or not being sold something or being able to buy something, not being rented a house or being kept waiting for a job.

The right to equality should not be infringed either, even if reasons of security are alleged, for experience shows that some accusations are only the result of racism or simply because the people concerned are aliens; consequently, this right should not be infringed on account of your being a migrant worker or the family of one, whether in possession of work permits or not.

6. All migrant workers and their families have labor rights and the right to social security

a) All migrant workers and their families have the right to preservation of their health by sanitary and social means, as regards food, clothes, housing and medical assistance compatible with the level allowed by public and community resources.

b) All migrant workers have the right to work in proper conditions and to pursue their vocation freely to the extent that the existing opportunities of employment permit.

c) All migrant workers who work have the right to receive remuneration in keeping with their capacity and skill in order to ensure them a standard of living fitting for them and their families.

d) All migrant workers have the right to rest, honest recreation and the opportunity to use their free time in a useful manner for the benefit of their spiritual, cultural and physical betterment.

e) All migrant workers have the right to social security to protect them against the consequences of unemployment, old age and incapacity caused by any other condition against their will that make it impossible for them physically or mentally to obtain proper means of subsistence.

If you, migrant worker, establish a working relationship, even if you do not possess the appropriate documents, you have the same labor rights as the nationals of the country where you work, this being established by the human right of equality and non-discrimination before the law; consequently, you should have working conditions that afford you and your family an existence in keeping with the dignity befitting human persons, such as the following: to earn an equal wage for equal work; not to have to perform forced labor; to have social security; to have reasonably limited working hours; to have fair remuneration for overtime; to have a weekly rest;

to have leisure time; to enjoy paid periodical holidays; to set up trade unions and join them to defend your interests and your minor children's right to education.

7. The right to due legal process, right to non-retroactivity and the right to obtain reparation

a) All migrant workers can resort to the Courts to have their rights honored. To do so, they should have a simple, short procedure available for Justice to protect them against acts of authorities that jeopardize them by infringing a constitutionally enshrined fundamental right.

b) Migrant workers deprived of their freedom have the right to appeal before a judge or competent tribunal for them to make an immediate decision regarding the legality of their arrest or detention and to order their release if the arrest or detention was illegal.

c) All migrant workers have the right to a hearing, with the due guarantees and within a reasonable timeframe, with a judge or competent, independent and impartial tribunal previously established by the law, for the purpose of substantiating any penal accusation made against them, or to determine their rights and obligations of a civil, labor, fiscal or any other nature.

d) All migrant workers accused of any crime have the right to be presumed innocent until legally proved guilty. During the process they have the right to full equality and the minimum guarantees of due legal process.

If you are a migrant worker and a police or public-security officer detains you or a member of your family, either to check your migrant status or because of an accusation of a criminal nature, or to determine rights or obligations of a civil nature, or for some other reason, you must know that you have the right to be informed immediately of the cause of detention in a language that you understand. In any case, you are advised to remain calm, to not run, to not hold an arm or anything that might look like one, and to not insult the person who detains you. Detention for the above reasons can only be made if the legislation of the country allows this and if the following rights are ensured: human rights must be respected even in the case of the person being without documents; provision of the help of a translator and a lawyer; being put in contact with the nearest consulate of your nationality, which has the obligation to provide adequate consular services in any circumstances that call for them, and to provide assistance in any ensuing lawsuit, as determined by the Convention of Vienna on Consular Relations in 1963, which provides that when the authorities of a country detain an alien, in this case a migrant worker or his family, the same authorities are obliged to inform them without delay of their right to consular assistance and to communicate with the consulate of their country. Likewise, detainees have the right to communicate with an organization that provides aid to migrants, and with their family or someone who can help them; if they are accompanied by minor-age children they have the right not to be separated from them.

Other rights of detainees are: to remain silent, but to give their true name; not to sign voluntary release or any other document, if they do not wish to; to leave after paying bail in some cases; to have hygiene in the place of arrest - which must not be a jail - and to be given food and water. They also have the right against excessive force in custody, and not to be insulted or attacked, harmed by handcuffs or expelled handcuffed; and to be given medical care if necessary, and not to have their money or other valuables taken away from them. It is also advisable for the arrested not to lie carry false documents (for example a social security document, since this is an offense in any country), not to say he is a citizen of the country when he is not, and 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 there is an accusation that you or a member of your family have committed an offense, you must know that you can only be detained in order to start a lawsuit before a court or tribunal if there is an order from a competent authority. Otherwise, you and your family should be let free. In any case, the human right to due legal process - the right to justice, as it is also called - guarantees you and your family, whatever your migrant status, that the ensuing lawsuit will be carried out in accordance with the applicable laws, and by an independent and impartial court or tribunal established by law. During the process, the minimum guarantees granted to all must be given, including the right to adequate defense, to communicate with the defender of his choice or one appointed free of charge if he cannot afford to pay, to be tried without undue delays; to

be present at the trial in order to have fair judgment according to the laws in effect and not arbitrarily, that is, not in accordance with the free criterion of those executing them but rather in compliance with the essential formalities that the law indicates in order to be able to deprive someone of some right or impose punishment. To this same end, the accused has the right to a public hearing in order that all the pertinent elements be included; as well as interrogating or having interrogated the accusation and defense witnesses and obtain the appearance of the latter to be questioned in the same conditions as those for the accusation; to be assisted by an interpreter if he does not understand the language used in the court. And not to be obliged to make a statement against himself or declare himself guilty.

If a person is deported, he must be informed of the reasons for this and also the recourses he has available not to be deported. If this is not done, an infringement is also made of the right to due legal process. Persons accused of a crime have the right to be presumed innocent until proven guilty.

Migrant workers and their families have the same right to be heard when the trial takes place to determine rights and obligations of a civil nature, for example, non-compliance with a work or rental contract. 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.

If a person is arrested because of his physical characteristics to check his migrant status, the human right to equality is infringed before the law that prohibits all discrimination. This right is also infringed if based on these criteria distinctions are made, restrictions imposed or preferences given among the persons arrested. Police roundups, whether in the working place, public places or homes, lead to a situation of generalized terror, and collective expulsions are illegal because each case must be judged individually, with due respect for human rights. If these rights are violated, the authorities should be denounced, or the persons responsible for such violation.

In short, the right to due legal process ensures migrant workers and their families full equality with the nationals of the country involved in a trial taken to court or tribunal.

The right to non-retroactivity means that a legal process cannot be carried out based on a law that did not exist when the crime was committed, so a trial would be held without a law to punish the offense, plus the fact that this would infringe the principles of “no crime without law” and “no punishment without law”. This right is based on the general principle that laws are made for the future and not for the past, but it should be borne in mind that if the new law benefits the accused, it should be applied.

Anyone who has been illegally detained or arrested will have the effective right to obtain reparation. Also, people have the right to indemnity according to the law in the case of having been condemned in a sentence by judicial error.

8. <u>All migrant workers have the right to information concerning Consular Assistance in the framework of the guarantees of due legal process established in article 36.1.b) of the Convention of Vienna on Consular Relations, this being one of the duties related to the function of the receiving State</u>

All detained migrant workers who are not allowed access to the information mentioned in article 36.1.b) of the Convention of Vienna on Consular Relations are protected by the guarantees of due legal process. Accordingly, the imposition of the death penalty constitutes a violation of the right not to be deprived of life arbitrarily, in the terms of the relevant provisions of the treaties of human rights, with the juridical consequences inherent to a violation of this nature, that is to say, concerning the international responsibility of States and the duty of reparation.

9. <u>All migrant workers, upon assuming a working relation, acquire rights as workers that must be recognized and guaranteed, regardless of whether their status in the State of employment is regular or irregular. These rights are a consequence of the working relationship</u>

All migrant workers, as holders of labor rights, should have available all the appropriate means to exercise them. Migrant workers without documents possess the same labor rights as

the other workers in the State of employment, and the latter must take all the necessary steps for this to be recognized and for this practice to be observed.

All migrant workers have the right to enjoy all the labor rights to which all the workers are entitled within the framework of the corresponding international instruments in the State of employment, whatever their migrant status may be.

10. The right to private life and the right to protection of the family

All migrant workers and their families have the right not to be subjected to arbitrary interference at home and to authorize the inhabitants to not permit entry, even of an official, to a home unless there is a written order from a competent authority in this respect that specifies what may be done in that home. This right applies to all persons who have this home, that is, whether nationals of the State or aliens.

The right to inviolability of private communications applies to letters, telegrams, telephone calls, electronic messages, 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.

All persons have the right to marry and start a family, the family being the natural fundamental element of society and entitled to protection on the part of society and the State. If children are separated from their parents because the latter have no documents, and then deported, this is a violation of the human right of persons who integrate the family.

It is important to address this section on the human rights of the family in order to preserve its unity as such. It is also important to recall the special protection required by migrant women, if they travel alone or are 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 where they are employed, even if their own country, and if they work 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 besides being separated from her husband, she must look after the children and is therefore more vulnerable to maltreatment, accusations or abuse by family members under her charge. If it is the mother who emigrates, the daughters are exposed to incest; if she accompanies her husband and they have children, very often she must not only look after them but also have an outside job. The husband does not always help take care of and educate the children.

Based on human rights, 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 is it not beneficial but also measures are taken against national 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 when one of them emigrates or the reunion of parents and children. 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.

11. All women migrant workers, while pregnant or breastfeeding, have the right to special protection, care and assistance

At the same time, women migrant workers, in addition to the above-mentioned rights, have the specific rights that correspond to their status as women, such as maternity leave.

12. Right to freedom of thought, conscience and religion and the right to freedom of opinion and expression

These rights are also included in the Universal Declaration of Human Rights adopted by all nations:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

and,

> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

These rights are also ruled on in the American Declaration of Human Rights.

13. Freedom of peaceful meeting and association

Likewise, the Universal Declaration sets forth that “All persons have the right to freedom of peaceful meeting and association” and that “All persons have the right to found and join trade unions to defend their interests”.

These rights are only subject to the restrictions provided in law that are necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and liberties of others, to which is added that migrant workers and their families, being aliens, should not refer to political affairs of the welcoming country.

Pursuant to the above, migrant workers also have the right to form associations with other workers or form trade unions with a view to defending their rights and preventing abuse in labor relations, which is most frequent among domestic servants, mostly women, who face more limitations than men because they are more liable to find themselves in situations that restrict their personal development; most are admitted as “family members to support” in family migration, and consequently have less opportunities to access the work market. When women migrate as workers they are usually marginalized into traditional, poorly paid female occupations and they are more vulnerable to sexual exploitation. Avoiding these results depends fundamentally on respecting and urging respect for human rights.

Furthermore, workers have the right to be able to transfer remittances of money, as well as to have retirement pensions and payments in their country of origin.

Evidence shows that foreign workers who work seasonally have joined trade unions.

These rights have also been established in the American Declaration.

14. Right to individual and collective private property

Migrant workers and their families have the right to individual and collective property, that is, to possess a good individually or in partnership with other persons and also to have the right not to be arbitrarily deprived of their property; nonetheless, the authorities have the right to impose on individual or collective property whatever is in the interest of society and to regulate such property in the benefit of society, but if a good that is private or collective is expropriated, fair compensation is only fair.

15. Rights of the child

The specific human rights of children, whatever may be their migrant status, are as follows: special cares and assistance – similar to maternity; equal social protection – whether born in or out of wedlock - both on the part of the family and the society and State; protection measures required by their condition as minors, without any discrimination as regards race, color, gender, language, religion, national or social origin, economic position or birth; immediate registration upon birth, and bearing a name in order to have an identity; having a nationality like everyone else, and changing it; education, which should be free, except with regard to elementary instruction, which should be aimed at full development of the human personality and strengthening respect for human rights and fundamental liberties. On their part, parents have the preferential right to choose the type of education to be given to their children.

The human rights of migrant children are violated:

a) if they are not registered immediately upon birth and given a name which gives then the right to have an identity that complements two others: the right to a nationality and the right to legal personality;
b) if they are born in a country that concedes nationality to anyone born in its territory and does it grant it;
c) if they suffer at school racial or any other kind of discrimination;
d) if a child is forced to perform activities or work that could prove dangerous or impair their education or are hazardous to his health or physical, mental, spiritual, moral or social development;
e) if children are recruited or enlisted in the armed forces or used to participate actively in hostilities;
f) if they are arrested and imprisoned together with their parents – and not in adequate places - and are treated as criminals;
g) if their parents are arrested and separated from the children; if unaccompanied minors are expelled from the country, especially if they are deported without from their family parents or at risk periods.

9. Innovating Forms of Access to Justice in the Americas

	Document
CJI/doc.315/08	Access to justice: preliminary considerations (presented by Dr. Freddy Castillo Castellanos)

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), the Chairman of the Inter-American Juridical Committee noted that there was no General Assembly mandate covering this topic.

Dr. Freddy Castillo spoke of the discussions that had taken place within the Juridical Committee, about the work carried out by other international agencies, the existence of various Codes of Ethics at both the international and regional levels, and about those national projects that had had an international impact. Consequently, he thought the idea of drafting a Code of Ethics should be analyzed and suggested the topic be restated, eliminating the reference to "judicial ethics." He said that the focus should be on mechanisms for access to justice which, in light of their broad scope, could be pursued within the framework of other topics or even in terms of the Inter-American Democratic Charter.

Dr. Ricardo Seitenfus said he thought two separate topics were involved: judicial ethics and access to justice. He suggested that if the question of judicial ethics was kept on the agenda, it should be dealt with as a follow-up topic. He also proposed more precisely defining the topic of access to justice. He recalled the great weakness of the State in fighting cross-border crime, such as trafficking in weapons, women, and children, all of which are current issues that require urgent efforts to strengthen judicial cooperation between the region's states. For that reason, he believed, the topic of judicial cooperation was a more sensitive and important issue than attempting to draft a code of ethics.

Dr. Hyacinth Lindsay spoke about the experiences of Jamaica and other common-law Caribbean countries, which enforced judicial measures following breaches of ethics by judges. She said that drafting a judicial code of ethics should be a job for judges, and that any such code should be in line with domestic law. Her view was that access to justice was a more important topic, because of the permanent construction of law and, consequently, because of the emergence of new, alternative conflict-solving methods for easier access to the courts.

Following an exchange of ideas, the Chairman summarized the members' view that the title of the topic be "innovative forms of access to justice in the Americas".

At the request of Dr. Guillermo Fernández de Soto, the Department of International Law was asked to furnish the members of the Inter-American Juridical Committee with information on the compilation about access to justice produced by the IDB.

On June 25, 2008, the Department of International Law sent the members of the Inter-American Juridical Committee a summary of the work on this topic carried out in recent years by the Inter-American Development Bank and the World Bank, with references to web pages where additional information on those efforts may be found, together with the final report on the project "Guidelines and Good Practices for Adequate Access to Justice in the Americas" carried out within the OAS General Secretariat.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), Dr. Freddy Castillo Castellanos, rapporteur for the topic, presented the members of the Juridical Committee with document CJI/doc.315/08, "Access to Justice: Preliminary Considerations", in order to explore their ideas on the approach to the topic and, later, to submit a more detailed report.

He spoke of the extensive legal literature on access to justice, which was generally understood as access to the State's judicial system. Although access to justice is not restricted to

judicial activity, the powerlessness felt by defendants or even lawyers from the oppression of the judicial system could be compared to something out of Kafka, he said. From the language that is incomprehensible to laymen, to social and cultural differences that mean that each player at trial has a different perception of what justice entails, many factors combine to hinder access to justice. The term “access to justice” covers the basic principle that is the right to justice *per se*, as a concept that transcends procedural formalities and institutions to allow laymen to fully assume their citizenship, said the rapporteur.

As an effort to identify alternatives that would help overcome arbitrariness and eliminate the inappropriate mechanisms that hinder individuals seeking to enforce their rights and that delay decisions, the rapporteur prepared a list of principles to guide the Juridical Committee’s debates and, going forward, to channel its approach to the topic .

Once the discussions opened, the members of the Juridical Committee offered comments on matters that could be addressed in the next report, namely:

- delayed justice and preventive custody.
- the rulings of the Inter-American Court of Human Rights dealing with a guarantee of access to simple and effective remedies for resolving disputes within the judicial system.
- the guarantee of a judicial remedy for all decisions that affect freedom and basic rights.
- the problem of access to laws that are amended on a daily basis, since even legal practitioners are unaware of every single update that is produced.
- the principle of judicial independence and impartiality does not imply the total financial autonomy of the judiciary, which creates a privileged elite, removed from the budgetary constraints of the government as a whole.
- problems in securing answers from privately-owned public utilities (e.g., electricity, telephone) through administrative channels.
- reducing procedural formalities, additional promotion of alternative dispute resolution mechanisms, the introduction of courts for minor lawsuits, and the implementation of witness protection measures.
- access to information, since access to justice must involve the dissemination of information about rights, the mechanisms that exist for protecting those rights, and the costs (judicial costs, attorneys’ fees) involved.
- encouragement for increased use of collective lawsuits (class actions), particularly in connection with consumers’ rights, allowing consumers’ organizations to initiate actions to defend large numbers of individuals, which assures lower costs compared to individual actions.

Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, then described the ways in which this topic is addressed within the OAS, to assist the Inter-American Juridical Committee in working in coordination with other bodies:

a) REMJA – He reported that the Meeting of Ministers of Justice or Attorneys General had been held every second year since 1998. The most recent was held in April 2008 and was attended by an observer from the Inter-American Juridical Committee. The next such meeting was to take place in Brasilia. He also reported that a working group on access to justice had been set up, and had to date focused its efforts on cooperation in criminal matters and extradition. In addition, he said that the REMJA process had established a permanent network for dealing with cybercrime, a permanent network for reporting trafficking in human lives, and a third network, currently being set up, for central authorities responsible for children and families, with competence over matters of alimony, adoption, and the return of minors.

b) CEJA – Another agency that provides advice on legislation and access to justice, particularly in criminal matters.

c) Implementation of the judicial facilitators program, which was launched with great success in Nicaragua and was later extended to Paraguay and Panama, with adoption by Honduras and the Brazilian State of Mato Grosso do Sul currently underway.

d) The Secretariat for Legal Affairs is supporting a pilot project in Ecuador to provide mediation in civil and contractual matters dealt with by small-claims courts.

e) Regarding consumer protection, he said that the Secretariat for Legal Affairs was working with a network of government consumer-protection agencies; a database of complaints filed against public utilities was being created; and work was underway with the main consumer protection agencies, such as Consumers International, and others in São Paulo, Brazil.

f) Work is underway on follow-up mechanisms for processes covering corruption and money laundering, and a witness protection program is being devised.

g) In October, Mexico City will host the first meeting of ministerial-level authorities responsible for public security, which will deal with such topics as access to justice, prison policy, crime, etc.

h) Under the *aegis* of the United Nations, the OAS Secretary General met with Dr. Madeleine Allbright and Justice Kennedy of the U.S. Supreme Court, in order to develop cooperation mechanisms.

Dr. Castillo thanked the members for their contributions which, he said, would assist progress in this area and were essential for avoiding the duplication of actions.

Document CJI/doc.315/08 is transcribed in the following paragraphs:

CJI/doc.315/08

ACCESS TO JUSTICE:
PRELIMINARY CONSIDERATIONS

(presented by Dr. Freddy Castillo Castellanos)

A LITERARY APPROACH

Strictly speaking, the theme referred to by the expression “access to justice” usually means access to the legal system established by the State. That is also our theme, yet we must remember that the underlying, fundamental principle is access to justice proper, justice as a principle and as a value, which is something that is not circumscribed by the act institutionally considered as “legal activity”, above all when we know that there are deep - and apparently insoluble – economic, social and cultural inequalities that change the reductive view of an expression such as “access to justice” into an involuntary act of verbal cruelty, or at least one of infelicitous irony.

To make such a complex terrain smoother, it is always useful to look for perspectives different from the legal sphere. Accordingly, one of the first approaches to the theme could serve to entertain us for a while in our search for the subject of law in literary works. Of course, we shall not do this here, yet we could invoke as tutelary images the memorable examples taken from the pages of one of the most important writers of the 20th century, Franz Kafka, whose work, as you will recall, has much to do with access to justice.

Before referring to the examples, let us say a few brief words about the author:

Franz Kafka, as you know, was a strange and estranged man in permanent struggle with the world around him: his house, his father, Law, insurance companies, the city. He was born in Prague on 3 July 1883, in the famous Jewish ghetto, which was to mark him all through his lifetime. He could not be a non-Jew, but neither could he be one in the terms that the obscure laws of blood and religion imposed on him. The permanent debate with the world – in particular the debate of being Jewish or not – ended up enthroning him, with eternal honor, in the history

of literature, for which he lived so intimately almost all his life and whose glory he wanted to renounce.

When Franz Kafka managed to escape from his vital, secret cloisters, Law surrounded him completely. He studied law with a grudge and was far from being an outstanding student. And so he became a lawyer, without really wanting to. He exercised law as an employee of two insurance companies for which he wrote legal texts that today feature as curiosities of literary archeology. He had to attend many courtrooms, with more apprehension that pleasure, gathering from the atmosphere the necessary impressions to describe it in his masterpiece "The Trial". Let's take a look at the first images in the book.

On his thirtieth birthday, Joseph K., a bank employee, is arrested at home for no apparent reason. He is notified of his arrest, but is allowed to fulfill his obligations. On the following Sunday he is summoned to court for a first questioning which starts an inexplicable legal process constructed by means of impersonal mechanisms in the center of the law of K's life. He sees the lawyers as "mere shysters" and describes the room where he exercises his profession as "the same narrow enclosure with a very low ceiling … the finest demonstration of disdain for justice … all that treatment inflicted upon the lawyers was not gratuitous. This was how justice tried to suppress the defense so that the accused would have to face it all on his own …".

Isn't this Kafkian perspective the same perception that many of us have had at some time when we enter the somber premises of certain chambers of "justice"? Isn't the sensation of being defenseless and without shelter the same as many people feel who think they have "accessed justice"?

Probably the most emblematic text of Kafka's philosophy concerning the law is the one entitled precisely "Before the law". Here we find an indelible image of "access to justice". Let us recall the circumstances:

A peasant presents himself to the doors of the law and asks to come in. The door opens, but a fearsome, ominous doorman guarding the threshold tells him that he can't come in "for the moment". The peasant decides to wait for a while until they let him in. He thinks that this moment has to arrive some time, some day. And so his life is spent in fruitless waiting. He gets neither hope nor the least consolation from the unmovable doorman. After some years, when he is about to die, the peasant realizes that the door was there to prevent others from entering, but not him. It would have sufficed for him to ignore the doorman's fallacious warnings to have access to the only path reserved for him. He was the only one meant to enter freely, and he did not do so. He did not know that he could avoid the false taboo, the confused imposition of a norm, arbitrariness disguised as law. To his disgrace, he failed to follow the example of Antigone, who imposed natural law on written law.

Up to here, the force of symbolic irradiation behind Kafka's images goes beyond the literal and allows for clear associations with the legal world familiar to us. Let's allow these images to do their work in silence before we proceed to the necessary investigation of the theme, which, as a member of a Juridical Committee, I must do by virtue of formality and good academic practices.

ENUNCIATING SOME PRINCIPLES

1. Access to justice, albeit an inalienable human right, should also be seen as a social right.
2. Equal access to justice is a necessity of the Rule of Law. Legal exclusion of important segments of the population means, on the contrary, de-legitimizing democratic institutions.
3. The State has the duty to guarantee access to justice for everyone and to endeavor to achieve maximum equality in what it provides, how it functions and the results it produces.
4. The policies addressed to balancing social access to justice should not be circumscribed to a sort of "legal charity" (free defense, tax exemption, and so on). They should respond to an authentic system of effective (rather than simulated) protection of the weakest.

5. Democratization of the legal system is not limited to equal access, but rather implies greater social participation in how it is managed. The monopoly of legitimate justice on the part of the State is not incompatible with forms of social or community self-organization.
6. Administration can also be an alternative to prevent judicializing all matters that require the decision of a third party. Many fair decisions must be made in the administrative sphere.
7. A legal culture should be promoted to enable harmonization of forms of conciliation in cases where there is no reason for courts. And even when they do reach the courts, this culture should seek in limine litis to resolve them by using reparatory arrangements or agreements.
8. Effective independence of the administration of justice should be guaranteed. Not only independence from the other public powers but also from the factual powers that use all sorts of pressure to jeopardize the freedom of decisions. Better training of our judges, as well as due social control, can help to strengthen judicial autonomy.
9. The juridical and ethical training of judges should be a permanent concern of society and the State. We are aware that law schools are basically geared to training litigation lawyers and that the programs of law studies are limited to sporadic courses administered by the Judiciary. A system of integral legal training should be created from the undergraduate level.
10. Reform of the legal system meant to guarantee full access to justice calls for political decisions that should be given priority status in all spheres of international law, since this is a fundamental right that permeates all the vicissitudes of human life.

10. Considerations on an Inter-American Jurisdiction of Justice

At the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008), Dr. Mauricio Herdocia suggested restating the initial premise of this topic, which involved the Committee assuming jurisdictional functions. In his view, this was complex, since within the inter-American system, Article 31 of the Pact of Bogotá refers the solution of disputes to the International Court of Justice. He reminded members that the proposal for establishing an international court had been revived by the Secretary General and for that reason he believed it would be worthwhile to study the creation of a court, without necessarily associating it with the Juridical Committee.

Following an exchange of opinions, the members decided to keep the topic on the agenda and to change its title to "Considerations on an Inter-American jurisdiction of justice", and to present it in the form of a new proposal unrelated to the initial one made by Dr. Vio Grossi. Drs. Freddy Castillo and Guillermo Fernández de Soto were appointed to serve as rapporteurs.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the rapporteur for this topic, Dr. Guillermo Fernández de Soto, gave a preliminary oral presentation. His speech covered the direct and indirect antecedents of the proposal, such as the report by Dr. Eduardo Vio, the 1923 initiative of the Pan American Union, and the report of August 2007. The closest political forerunner is the contents of the Secretary General's report on the issue; others to be borne in mind are elements of the universal system, such as the existing jurisdictional bodies (the Permanent Court of Arbitration in The Hague, the International Court of Justice) and, in the inter-American system, the Pact of Bogotá, which refers disputes to the ICJ.

He said that while there was not a true Inter-American venue available to all the States, there were sources of jurisdiction accessible through different ways: in other words, parties can decide to take their disputes to the International Court of Justice or to a court of arbitration, and they can also enter into bilateral or multilateral agreements for accepting jurisdictional proceedings. He recalled the great step forward that was taken with the creation of the Inter-American Court of Human Rights, even though many States were not prepared to accept that court's jurisdiction. He therefore said it was essential to obtain information from the States regarding whether they wished to establish an inter-American court, because it would be unrealistic to work in the absence of such information. Another point covered by the rapporteur was the possibility of the Inter-American Juridical Committee enjoying jurisdictional powers – a proposal made by Dr. Eduardo Vio in his report – which, in his opinion, has no grounds in either the OAS Charter or the Statute of the IJC. He said he believed the consultative function was among the powers assigned to the Committee under the Charter, and that that function should be strengthened as regards dispute resolution. In addition, bearing in mind the comments made by the members at the meetings at which the topic was addressed, he said that there did not seem to be much interest on the part of the Juridical Committee in assuming jurisdictional functions. In the context of these reflections, he said it was important to explore in greater detail the real intention of the Secretary General in reviving a concept that was not novel within the Hemisphere.

Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, explained that the Secretary General's intent was to fuel a debate among the States on account of the nonexistence of an inter-American jurisdictional body and thus leave the International Court of Justice as the last resort in dispute resolution, as suggested by the spirit of the Pact of Bogotá. In other words, the States should have alternative channels within the inter-American system before taking cases to The Hague. There is currently a significant number of cases involving American States before the Court, some of which even address situations that the OAS is attempting to mediate, which implies high costs and extremely lengthy delays. Many years can pass by from the filing of a case with the Court until judgment is handed down, and meanwhile, relations between the States in the dispute continue to deteriorate. The Secretary General, understanding that situation, thought about a solution within the inter-American system that would help states resolve their cases at a lower cost and more swiftly. Dr. Arrighi thought that Dr. Vio's proposal went further than the Secretary General wanted and did

not address his concerns. In his opinion, neither should the Juridical Committee assume a jurisdictional function.

Dr. Jean-Paul Hubert underscored the fact that the Juridical Committee could play an affirmative role in dispute resolution by progressively stepping up the use of its consultative authority. To that end, he suggested that the Juridical Committee set itself the task of preparing a juridical study to strengthen its consultative function, making the states aware of the cost-free availability of those services. Should the Committee's legal opinion not yield the desired results, the States could always file a case with the ICJ in The Hague.

Dr. Mauricio Herdocia argued that this was a central problem within the inter-American system and the solution was to make the peaceful resolution of disputes in the Americas more effective. The debate within the Juridical Committee should not be limited to creating a court of justice to rival the ICJ, which would lead nowhere. In his opinion, the terms of the Charter had to be obeyed: that is, to seek out within the inter-American system alternative forms of dispute resolution that are not subject to excessive delays, cost less, and are sufficiently streamlined so as to avoid affecting relations between States. He said that existing mechanisms were in place and could be strengthened and, to that end, the Juridical Committee could make a real contribution by discharging its consultative function as provided for in the OAS Charter, but without becoming a court.

Dr. Ana Elizabeth Villalta seconded her colleague's comments and emphasized the need to rescue the peaceful resolution of conflicts within the inter-American system. She recalled the case of El Salvador v. Honduras that was lodged with the Court in The Hague in 1980 and was decided 12 years later. In her opinion, the member States should settle their disputes within the inter-American system.

Finally, Dr. Jean-Paul Hubert proposed that further exchanges be held among the members of the Committee to enable the topic to mature.

11. Institutional and Legal Cooperation with the Republic of Haiti

Document

CJI/doc.302/08 - Report on the Mission to the Republic of Haiti
(presented by Dr. Ricardo Seitenfus)

Annexes: - Diário de Santa Maria, Saturday and Sunday,, 19-20 Apr. 2008.
Especial: Haiti – O presídio do caos. p.16-17 (document in PDF)
- Diário de Santa Maria, Saturday and Sunday, 19-20 abr. 2008.
Especial: Tentativa de melhor o sistema. p.18 (document in PDF)

The Chairman reminded the 72nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2008) that this topic arose from the discussions on the challenges facing the Committee on its 100th anniversary, following a proposal made by Dr. Seitenfus, who presented document CJI/doc.275/07 at the previous meeting.

Dr. Seitenfus reported that the mission to Haiti would take place following the present session, and that he would also participate in it as a representative of the Juridical Committee. It was primarily to be a contact mission, seeking to develop cooperation projects in the areas of judicial procedures and prisons. He was therefore going to meet with ranking authorities and attend a seminar to present a project currently underway in Brazil, Argentina, Chile, and Mexico, and due to begin in Uruguay. This project seeks to identify areas in which countries can make contributions to assist Haiti's integration as a nation of the Americas. As a representative of the Committee, he was to express the support it was willing to give to that OAS member state. He said that prior to the August session, he would submit a report on the topic.

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the rapporteur for this topic, Dr. Ricardo Seitenfus, presented document CJI/doc.302/08, "Report on the Mission to the Republic of Haiti." Dr. Seitenfus described his visit to Haiti and emphasized the delicate political situation facing the country, which was affecting government institutionality and public security and, in general, causing a weakening of its institutions. Given this situation, he regretted that the actions of Juridical Committee as he had initially conceived of them were not feasible, in light of the problems set out in his report, and he invited the members to reflect on other alternatives.

After a lively discussion, it was agreed that the Inter-American Juridical Committee could contact certain agencies and guide them toward the implementation of actions in connection with Haiti, taking the following steps:

- Send a note to the President of the Inter-American Commission on Human Rights and to the International Committee of the Red Cross, describing the situation in the prison system.
- Urge law schools to establish facilities for the training and education of judges and legal practitioners.
- Support the adoption of alternative methods for access to justice.
- Encourage the magistrature councils to study and prepare proposals for reforming the prison system.
- Urge specialized agencies to develop programs to support children.

Document CJI/doc.302/08 is transcribed in the following paragraphs.

CJI/doc.302/08

REPORT ON THE MISSION TO THE REPUBLIC OF HAITI

(presented by Dr. Ricardo Seitenfus)

1. Taking into consideration "the possibility of cooperating with the Organization of American States efforts in juridical matters with the Republic of Haiti", topic adopted unanimously and included in the working agenda of the Inter-American Juridical Committee at its 70th Regular Session (March 2007) through CJI/RES. 121 (LXX-O/07), on the occasion of defining challenges of the IAJC on reaching one hundred years of existence.

2. Considering CJI/RES. 133 (LXXI-O/07), which commissions the rapporteur to prepare "a report on the requirements and needs of Haiti, from the viewpoint of its authorities to initiate a program on juridical-institutional cooperation program" and requests "to undertake all relevant procedures with the Haitian authorities and other public bodies or organizations of civil society", I hereby report that:

3. I undertook a mission to Haiti on 13-25 March 2008. I was accompanied by a group of 7 (seven) persons (two researcher professors, two undergraduate students of Law, one graduate researcher and two press professionals (a reporter and a photographer).

4. The scientific and journalistic work resulting from this mission can be consulted on the site www.brasilhaiti.com. I especially recommend the series of reports "In the heart of Haiti", as well as the corresponding exhibit of photographs.

5. The mission was carried out thanks to the institutional and financial support of the Faculty of Law of Santa Maria (FADISMA, Brazil), the National Council for Scientific and Technological Development (CNPq, Brazil) and the International Center of Research for Development (IDRC, Canada).

6. Interviews and audiences were held with the following personalities:

   - Arthur Gray (Representative of the OAS in Haiti);
   - Carlos Alberto dos Santos Cruz (Force Commander of the MINUSTAH);
   - Danielle Saada (Head of the Justice Section of the MINUSTAH);
   - Gérad Le Chevallier (Director of Political Affairs and Planning of the MINUSTAH);
   - Gervais Charles (President of the Bar Association of Haiti);
   - Hédi Annabi (Special Representative of the Secretary General of the UN);
   - Igor Kipman (Ambassador of Brazil to Haiti);
   - Jean Baptiste Dorce (Prison Department of the Republic of Haiti);
   - Jean Roland Crévilon (Administrative Director of the National Penitentiary - *Prison Civile*);
   - Kelly Bastien (President of the Senate of the Republic of Haiti),
   - René Magloire (Minister of Justice of the Republic of Haiti).

7. I explained to all the interlocutors the purpose of my mission: to reiterate the disposition of the CJI/OEA help the constituent authorities of the Republic of Haiti, in the terms and conditions established by mutual accord, in the legal-institutional and penitentiary re-organization of the country.

8. The interlocutors, without exception, emphasized that the planned reform was not only a necessity but also an urgency. They showed great interest in the cooperation that can be lent by the Inter-American Juridical Committee of the OAS for several reasons, including the fact that the accumulated legal experience of the Americas can adapt better to the needs and conditions of the Republic of Haiti.

9. We found the following Haitian topics to be of interest:

   - Access to justice;
   - Free and universal legal aid;
   - Reform of the Criminal Code;

- Reform of the prison system,
- Support for the School of Magistrates.

10. There are structural problems in the Haitian juridical system that are familiar to all the interlocutors: scant efficiency, absence of financial means, low salaries of magistrates, restricted autonomy of the Judiciary, and outdated norms.

11. The wide range of problems leads the interlocution to concentrate on two aspects that are considered critical. On the one hand, the recurring practice of "Prolonged Provisional Detention (DPP)". Speaking in a generalized manner, DPP affects a rate above 90% of Haiti's prison population. The failure of the juridical system means that the vast majority of the inmates are not tried, they just stay in prison for many years. It is indispensable and urgent to remedy this situation.

12. On the other hand, the physical situation of the Haitian jails portrays an inhumanity that is not compatible with Law, morality and the commitments assumed by countries through international conventions. I became convinced of the magnitude of this drama during a visit to the National Penitentiary, which I report below:

Report on the visit made on 24 March 2008 to the National Penitentiary (*Prison Civile)* in Port-au-Prince, at the corner of Centre and Champs de Mars Sreets

13. Duly authorized by the Haitian penitentiary authorities, the visit took place between 10 and 10:45 a.m., and I was accompanied by journalist Iara Lemos and photographer Fernando Ramos, both from the Rede Brasil Sul de Comunicações (RBS). Needless to say, no photographs were taken inside the prison, only at the entrance and in the vicinity, where hundreds of the prisoners' relatives gathered, since it was visiting hours.

14. Under the guidance of a prison guard, I walked around the surrounding wall of the prison perimeter. In this way I had a view of the ensemble from above, where the guards' outlook posts are positioned. At first I thought that I would only have a perception of the surface occupied by the prison (which, it should be pointed out, in the center of the town), and only see the roofs of the cells and the inner yard. Well, the prison has only a few cells meant to isolate the prisoners considered more dangerous, in addition to the Dispensaire which covers the infirmary, kitchen and pantry. So, almost all the prisoners are permanently to be found in the yards. The reason for this is simple: projected to house 800 prisoners, at that moment the establishment accommodated 3,341 detainees, according to the Administrative Director of the prison, Jean Roland Crévilon.

15. The prison space is divided into several rectangular yards with between 400 and 500 detainees each. At the inner edge of the yard there is a small roof, under which is a pipe from which flows a trickle of water sometimes. At the moment of my visit, in one of these yards the water was being supplied, and the fight among the detainees, with buckets and tins to try to collect the precious, rare liquid, was like something out of Dante. The vast majority was naked and they all elbowed one another amid and shouted loud. At the same time they tried to balance their recipient under the pipe – most of the time a useless attempt.

16. On one side of the yard stands a low wall one meter high, running all along the main wall. Between the walls is a space two meters wide with holes dug in the ground. That is where the detainees perform their physiological necessities, in the sight of all. The excrement and urine remain in that place impregnating the atmosphere with a fetid, nauseating smell that is made all the worse by the high temperature.

17. The kitchen prepared two meals a day, made essentially of rice. Three times a week this is complemented by pieces of meat or gravy. The hygiene conditions of the place are lamentable.

18. The infirmary houses the sick men – both adults from the Prison Civile itself and children from the Prison des Mineurs located in Pétion-Ville. The main diseases are tuberculosis, typhus, yellow fever, syphilis, AIDS, etc. Many of the diseases are infectious-contagious.

The infirmary is divided between an open yard and a covered area. For security reasons, the latter was not visited. Illness is an aggravating factor for people in prison.

19. The case of the children is all the more dramatic because there are two reasons that can lead them to prison. According to the Minister of Justice himself, Sr. René Magloire, they can be inside for having committed a crime, or else due to social problems such as abandonment by the family, need for protection by the State, and so on.

20. There is no computerized register of the detainees. They are enrolled in a big book at the moment they arrive and leave prison. The database organized thanks to the support of the OAS was abandoned.

General considerations

The physical installations of the *Prison Civile* constitute an affront to the most elementary human rights of the detainees. They infringe the minimum standards provided for in the Universal Declaration of Human Rights in respect to the Inter-American Convention of Human Rights (article 7). Besides that, they are not safe (for example, the metal-detector equipment is broken).

The vast majority of detainees are in "Prolonged Provisional Detention (DPP)". According to data from April 2007 of the Inter-American Commission on Human Rights, among the 2,582 detainees in the *Prison Civile*, only 112 were serving sentence because of a condemnation (OEA/Ser.L/V/II.131, p. 11). The others are part of the unacceptable practice of DPP. Minister Magloire declared that a special effort was made to free the prisoners who had already served a prison term, in the case of their having been convicted (they were not, because they did not stand trial), with the heaviest sentence foreseen. However, an increase of nearly one thousand detainees in the *Prison Civile* between April 2007 and March 2008 indicates that this effort failed to produce the expected results.

The United Nations Assistant Secretary-General for the Rule of Law, Dmitry Titov, in a nonetheless optimistic report on the situation in Haiti presented to the Security Council in March 2008, qualified the Haitian penitentiary installations as the worst he had ever seen. He warned that this was a veritable problem of human rights.

Despite this scandalous situation, the Haitian government shows indifference, and the MINUSTAH is incapable of making it sensitive – this was confirmed by Danielle Saada (Head of the Justice Section) and Gérard Le Chevalier (Director of Political Affairs and Planning).

Recommendations

a) To propose to President Préval that the Prison Civile be closed and the detainees transferred to a prison camp to be constructed under the surveillance of the MINUSTAH.

b) To make the continued support of Brazil to the Haitian government conditional upon the urgent solution of this matter.

c) To urge the Haitian authorities to cease the generalized practice of Prolonged Provisional Detention.

d) To help set up a welcome structure for abandoned minors.

e) To prevent detainees who are sick in the Prison des Mineurs in Port of Prince from being treated in the infirmary of the National Penitentiary.

f) To persist with the idea of collaborating with the Haitian authorities despite the political differences faced by the Government.

Annexes: - Diário de Santa Maria, Saturday and Sunday,, 19-20 Apr. 2008. **Especial: Haiti – O presídio do caos.** p.16-17 (document in PDF)

- Diário de Santa Maria, Saturday and Sunday, 19-20 abr. 2008. **Especial: Tentativa de melhor o sistema.** p.18 (document in PDF)

DIÁRIO DE SANTA MARIA | 16 e 17 |
SÁBADO E DOMINGO, 19 E 20 DE ABRIL DE 2008

HAITI

O PRESÍDIO DO CAOS

Na prisão civil de Porto Príncipe, mais de 3 mil homens dividem um espaço onde não há celas erguidas

IARA LEMOS (TEXTOS) E FERNANDO RAMOS (FOTOS)

O grande relógio na sala de entrada da Prison Civile de Port-au-Prince marcava 10h. Era segunda-feira, dia
24 de março, dia e horário combinados para a visita ao centro de detenção considerado o mais calamitoso das Américas: o presídio Civil de Porto Príncipe, capital do Haiti. Do lado de fora, uma longa fila de mulheres, com sacolas em mãos, formava- se sobre uma proteção lateral da prisão. Elas levavam comida, água e itens de higiene pessoal. Algumas levavam livros, revistas, qualquer objeto que pudesse ajudar os detentos na passagem do tempo.

As filas para as visitas se formam duas vezes ao dia, de segunda a sextafeira. As mulheres levam aos presos o que a prisão não fornece. Apesar de a refeição no presídio ser servida duas vezes ao dia, as restrições alimentícias nutrem a peregrinação em frente à casa de detenção. Lá dentro, onde a direção do presídio não permitiu a realização de imagens, um refeitório com sete fogões é o local onde é preparada a comida. O modo de cozinhar contrasta com a realidade de fora das grades. Na prisão o fogão é a gás, e não a carvão, o principal combustível dos haitianos.

Nas panelas, uma refeição básica: o arroz cozido com feijão, gengibre, e coco ralado. Tudo comido sempre
com a mão. Talher é objeto praticamente inexistente até mesmo para quem vive em liberdade no Haiti. Carne é servida no presídio três vezes por semana. A primeira refeição vem logo ao nascer do sol, por volta das 5h. A segunda, entre 12h e 14h. Depois, os presos só comem se a família levar alimentos.

A água, artigo de luxo em todo o país caribenho, torna-se verdadeiro ouro diante dos presos. As famílias levam galões do líquido. Eles regressam de trás das grades vazios. A ordem criada dentro
do caos é impressionante. Não há gritos nem desrespeito com os visitantes. Nem com estrangeiros. A equipe do Diário foi a primeira de brasileiros a visitar o presídio – caminho aberto pelo conselheiro jurídico da Organização dos Estados Americanos (OEA), Ricardo Seitenfus.

Naquela segunda-feira, eram 3.341 homens para 600 vagas disponíveis, de acordo com o diretor administrativo do presídio, Jean Roland Crévilon. Mais de cinco vezes o que o espaço comportaria. Em Santa Maria, por exemplo, são cerca de 400 detentos para 250 vagas. O que já é bem ruim. No Haiti, a superlotação tomou níveis maiores desde o último colapso político de 2004, quando muitas prisões foram queimadas e não mais reestruturadas. Na Prision Civile de Port-au-Prince, não há celas para a maioria dos presos. Os doentes, principalmente com Aids e tuberculose, dividem o mesmo espaço de isolamento independentemente da idade. Até crianças e adolescentes estão lá. Os demais presos ficam expostos em um grande espaço, cercado por muros altos. Vistos de cima, de um mirante, alguns se apertam próximo à parede em busca de sombra. Outros ficam sentados no chão.

Vendas – Sem um sistema judiciário completamente formado (veja reportagem na página ao lado), pessoas são encaminhadas para o presídio mesmo antes do julgamento. Ficam por anos na prisão, no que deveria ser apenas provisório. Envelhecem lá dentro. Ganham mais respeito dentro da detenção. O direito de freqüentar a ala da frente, onde até mesmo um “marché”(mercado) é instalado. Vendem pequenos objetos trazidos pelos familiares. Pasta de dente, aparelho de barbear. O recurso circula entre os próprios detentos. O dinheiro, contudo, não é suficiente para evitar certos constrangimentos. Sem celas nem espaço fechado para banho ou para fazerem suas necessidades, alguns presos caminham nus pelo pátio. Apertam-se em busca de gotas de água que jorram de um pequeno orifício. Pegam o quanto podem, mas a água mal enche um balde. A mesma água do banho é usada para beber e escovar os dentes. A privada a céu aberto é mais um constrangimento aos detentos. Os presos fazem suas necessidades fisiológicas diante de todos os que estão ali. Perderam o limite entre o que é digno e o que é vergonhoso. O cheiro ruim se espalha

12. Evaluation and Follow-up of the Opinion of the Inter-American Juridical Committee on the Return Directive adopted by the European Parliament

Resolution

CJI/RES. 150 (LXXIII-O/08) - Opinion of the Inter-American Juridical Committee on the Directive on Return adopted by the Parliament of the European Union

At the 73rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2008), the working group, comprising Drs. Ricardo Seitenfus, Mauricio Herdocia Sacasa, and Ana Elizabeth Villalta Vizcarra, submitted the draft resolution entitled "Opinion on the Directive on Return approved by the Parliament of the European Union", document CJI/doc.311/08.

The Chairman of the Juridical Committee, Dr. Jaime Aparicio, thanked the Department of International Law for its valuable assistance in contributing support documents for the Committee's analysis. He also asked Dr. Dante Negro, Director of the Department of International Law, to report on possible debates of the matter within the Permanent Council and its committees. Dr. Dante Negro explained that following the adoption of the Return Directive, a special meeting of the Permanent Council had been convened, at which several delegations had expressed their concerns. That special meeting was also attended by many observers from European States, some of whom also gave their opinions on the document. The directive was discussed in political terms only, without conducting a juridical analysis of the matter. The Permanent Council ultimately adopted a resolution instructing the Secretary General to monitor the directive and any effects it might have. Dr. Dante Negro reported that the Secretary General had scheduled a trip to Europe for that purpose.

Dr. Ricardo Seitenfus said that in conducting its legal analysis of the text, the working group remained aware of the autonomy and capacity for initiative of the Juridical Committee, as enshrined in both the OAS Charter and its Statute.

He explained that the draft resolution had taken on board not only the comments made at the earlier meetings and the advisory opinions of the Inter-American Court of Human Rights, in particular OC-18, but also the Statute on Refugees and the applicable human rights conventions and instruments.

A later part of the draft resolution reiterates that States enjoy total autonomy, according to domestic or community law, to adopt measures governing immigration policy, provided they at all times abided by the constraints of international law. It also expresses concern about the contents of the Directive, which contains ambiguities and contradictions that in turn lead to multiple interpretations and subjective enforcement. Similarly, it categorically points out that no State may consider an individual's migratory status to be a crime and consequently impose criminal sanctions. In consideration of these elements, the resolution informs the European Parliament of the need to revise the Directive, in clear and precise terms, and observing the applicable parameters set down in both conventional and customary law. Finally, Dr. Seitenfus explained, the draft covers the possible future enforcement of the principle of reciprocity by the OAS member States, emphasizing that the treatment given to migrants must be in line with the human rights provisions established by the inter-American system.

Dr. Mauricio Herdocia then added that the working group sought to present a text that would reflect the position adopted by the Inter-American Commission on Human Rights, which is the body responsible for overseeing human rights in the Americas, together with the view of the OAS General Secretariat. However, he noted that the draft Opinion of the Juridical Committee contains elements that are truly new compared to those already identified, which act as the chief principle that frames the entire context of the Opinion: that is, it recognizes that a State's immigration policy is governed essentially by its domestic law, but – and herein lies the Committee's contribution –

that recognition takes place within the confines set by international law. Arbitrary policies can no longer be adopted, since domestic laws are subordinated to certain parameters of international law, particularly those dealing with human rights.

Another vitally important aspect, said Dr. Herdocia, was the clear and precise affirmation that no State may hold a person's migratory status *per se* to be a crime, or to impose on that status anything with an effect equivalent to criminal sanctions. He described this as an extremely important development and said it was in line with a number of declarations, including those adopted by the Summits of the Americas and within the Council of Europe.

A third point marking a very clear and important position, said Dr. Herdocia, was that the establishment of certain special regimes in given regions of the world must remain consistent with the general principles of international law. That point required categorical reinforcement, since there were trends of thought that maintained that the establishment of such "self-contained" regimes enjoyed supremacy over international law. That position was absolutely false, because no system – be it community-based or self-contained – can enjoy supremacy over the principles of international law. Rules and directives may not undermine the general principles of international law, particularly in cases involving human rights violations. He said there was a need to revise the Directive, particularly as regards adopting clear, precise, and categorical language to avoid abusive interpretations that could lead to the violation of fundamental freedoms of any person, irrespective of their migratory status. He added that the directive could lead to violations of the Statute of Refugees, by not insisting on the individual identification of each migrant and by not addressing the return of migrants to countries where they suffer persecution.

Dr. Antonio Fidel Pérez said that he thought it was premature to offer final opinions on the directive, which was essentially intended to instruct the member States in the adoption of legislation but did not *per se* constitute applicable law. In his view, the ambiguities in the text would be resolved during its implementation. He explained that a rule of law had legal status and was therefore directly applicable by the courts of the European Union's member States, by the legal institutions of the European Community, and by the European Court of Justice. A directive, in contrast, is an instruction to be taken into account by the member States in enacting legislation. It is secondary legislation; it does not *per se* operate as a law. For that reason, he said, directives are not as precise as rules of law: they are general principles, to be adopted by administrative agencies and not enforced by the courts. In light of those explanations, he thought that the Inter-American Juridical Committee should not concern itself overly with the consequences of the directive and that the Committee's Opinion should take those elements into consideration in preparing judgments condemning the original text.

Dr. Ana Elizabeth Villalta provided an extensive explanation on how the working group had structured the draft opinion, the introductory clauses of which not only reflected the debates of the Juridical Committee on the question, but were also based on the regional and international instruments governing human rights. In the second part, she said, the working group studied the international ramifications, and it expressed its concern that the directive might not be in accordance with existing human rights conventions and other instruments governing human rights; the working group also identified the points in conflict with standards of international law. She stressed that in no way did the draft opinion condemn the directive.

After the Inter-American Juridical Committee had analyzed the contents of the draft submitted by the working group, the Committee unanimously adopted resolution CJI/RES. 150 (LXXIII-O/08), "Opinion of the Inter-American Juridical Committee on the Directive on Return adopted by the Parliament of the European Union". On September 10, 2008, the OAS Permanent Council took note of that resolution and it was forwarded to be considered by the Special Committee on Migratory Affairs. The following day, a press release containing the text of the resolution was published.

Resolution CJI/RES.150 (LXXIII-O/08) is transcribed in the following paragraphs:

CJI/RES. 150 (LXXIII-O/08)

OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE DIRECTIVE ON RETURN ADOPTED BY THE PARLIAMENT OF THE EUROPEAN UNION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING CONSIDERED and debated the Directive on Return adopted by the Parliament of the European Union, the objective of which is to establish uniform procedures and norms for the States of the European Union in respect to the return of non-documented immigrants to their countries of origin;

EMPHASIZING that the migratory policy of a State or group of States is essentially ruled by its internal or community law within the limits set by international law;

BASED ON the contents of the Charter of the Organization of the American States and the Statutes of the Inter-American Juridical Committee as regards the latter's autonomy and capacity for initiative;

ACKNOWLEDGING that Advisory Opinion OC-18/03 issued by the Inter-American Court of Human Rights, on the topic of the legal condition and rights of non-documented immigrants, states that "general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.";

AWARE too that the same opinion states that "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", and that "the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights";

TAKING INTO ACCOUNT that the Statutes of Refugees establishes the Principle of "Non-Return", that is, no State can, "by expulsion or devolution, by any means leave a refugee on the borders of territories where his/her life or liberty are in jeopardy", and that the American Convention on Human Rights prohibits the collective expulsion of foreigners;

RECALLING that the American Convention on Human Rights establishes the pledge of States to "... respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of … national … origin";

EMPHASIZING that the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families sets forth that they "shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin, ... In particular, in case of expulsion, the person concerned shall be informed of this right without delay and the authorities of the expelling State shall facilitate the exercise of such right",

RESOLVES:

1. To manifest its concern that the contents of the Directive approved by the Parliament of the European Union might be applied or interpreted in such a way that it is not consistent with the international instruments with regard to respect and protection of the human rights of immigrants, for the following reasons:

   1.1 It does not offer adequate guarantee of due legal process for immigrants liable to expulsion;

   1.2 It implies mechanisms for internment that are inconsistent with the international principles of International Law and provisions contained in the internal legal systems of the States;

   1.3 It offers inadequate protection to immigrants in vulnerable conditions, especially as regards children and adolescents, or when it refers to situations that could affect family unity;

   1.4 It entails situations of detention in penal centers, thereby affecting basic guarantees of immigrants by likening them to people accused of or condemned for crimes;

1.5 It offers insufficient commitments in respect to asylum and refuge to ensure that individuals who are subjected to persecution in their country are not returned to there;

1.6 It entails internment measures that are not duly proportionate to the situation of immigrants or to pertinent international instruments on human rights;

1.7 The norms as regards prohibited entry allow for arbitrary and inflexible application, which tends to stigmatize expelled individuals by likening them to delinquents and opening the doors to deny them future exercise of essential rights, such as the right to asylum or family regrouping;

1.8 The existence of *lacunae*, imprecision and ambiguity that affect the clarity of the Directive on Return and unduly widen the scope for its interpretation and application.

2. To manifest that establishing a special legal system for a group of countries in a determined geographical area cannot contain norms that do not harmonize with the general principles of international law, to which any international organization or international agreement should be subordinated, including community-type models with certain characteristics of autonomy or exceptionality.

3. To reiterate categorically that no State should consider an individual's migratory status as a crime in itself, or for that reason adopt measures of a criminal nature or for the equivalent effect.

4. To manifest the need to use appropriate means to avoid undue interpretation or application of the Directive on Return approved by the Parliament of the European Union in a manner inconsistent with international obligations on the matter, both of a conventional and customary nature.

5. To stress the importance for the Member States of the OAS to preserve and strengthen the framework of fundamental guarantees in the treatment of immigrants, as an essential and exemplary characteristic within the Inter-American System of Protection of Human Rights and Fundamental Freedoms.

This resolution was approved unanimously at the session held on August 8th, 2008, by the following members: Drs. Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra, Guillermo Fernández de Soto, Jorge Palacios Treviño, Mauricio Herdocia Sacasa, Freddy Castillo Castellanos, Jaime Aparicio, Jean-Paul Hubert, Hyacinth Evadne Lindsay, and Antonio Fidel Pérez.

CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2008

A. Presentation of the Annual Report of the Inter-American Juridical Committee

The Chairman of the Inter-American Juridical Committee, Dr. Jean-Paul Hubert, on the occasion of its 73rd regular session (Rio de Janeiro, August 2008), spoke of his presentation of the Annual Report of the Inter-American Juridical Committee, covering its activities during 2007, to the Committee on Juridical and Political Affairs of the Permanent Council (CJI/doc.300/08) and to the General Assembly (CJI/doc.301/08). The Chairman noted his concern regarding the effectiveness of the presentation of the annual report, firstly because of the short time allotted and, secondly, because it received only formal reactions from the attending delegates. For that reason, he thought it would be better instead of presenting summaries of topics, to select one or two points that might be of interest to those present and thus from their opinions identify some essential aspects to guide the treatment of the topic.

B. Course on International Law

Between August 4 and 29, 2008, the Inter-American Juridical Committee and the Department of International Law of the OAS Secretariat for Legal Affairs organized the XXXV Course on International Law, with the participation of 30 lecturers from various countries of the Americas, Europe, and Africa, 22 recipients of OAS scholarships chosen from among more than 70 candidates, and six students who covered their own participation costs. The central topic of the course was "New Developments in International Law in the Americas."

On August 4, 2008, the XXXV Course of International Law was formally opened at the Hotel Everest Rio Convention Centre. Dr. Hyacinth Evadne Lindsay paid tribute to Kenneth Rattray, a distinguished jurist and former member of the Inter-American Juridical Committee.

The Course timetable was as follows:

XXXV Course of International Law
Rio de Janeiro, August 4 to 29, 2008
"New Developments in International Law in the Americas"

Week One

Monday 4

10:00 – 12:00	**Inauguration** **Jean-Paul Hubert,** Chairman of the Inter-American Juridical Committee **Jean-Michel Arrighi,** Secretary for Legal Affairs of the OAS

Tuesday 5

9:00 – 10:50	**Ricardo Seitenfus** Member of the Inter-American Juridical Committee *New Legal Challenges in the Americas: Migration and Development*
11:10 – 1:00	**Jean-Michel Arrighi** Secretary for Legal Affairs of the OAS *Introduction to the Inter-American Juridical System*
2:30 – 4:30	**G. Bastid-Burdeau** Professor of international law, University of Paris I, Panthéon-Sorbonne, France *Current Problems of the Continental Shelf I*
4:30 – 5:30	**João Carlos Brandes Garcia** Chief Justice of the State of Mato Grosso do Sul

Tercio Waldir de Albuquerque
Professor in public and private international law, University for the Development of the State and the Pantanal Region, Campo Grande, MS, Brazil
Access to Justice in Mato Grosso do Sul

Wednesday 6

9:00 – 10:50 **G. Bastid-Burdeau**
Current Problems of the Continental Shelf II

11:10 – 1:00 **Yusuf Abdulqawi**
Director, UNESCO Office of International Standards and Legal Affairs
The Evolution of the Notion of Cultural Heritage in International Law I

2:30 – 4:30 **Antonio Augusto Cançado Trindade**
Professor in international law, University of Brasilia and the Rio Branco Institute, Brazil
New Developments in the Expansion of International Jus Cogens

Thursday 7

9:00 – 10:50 **Luis Herrera Marcano**
Former member of the Inter-American Juridical Committee
Arbitration between States and Foreign Investors I

11:10 – 1:00 **Yusuf Abdulqawi**
The Evolution of the Notion of Cultural Heritage in International Law II

2:30 – 4:30 **G. Bastid-Burdeau**
Current Problems of the Continental Shelf III

Friday 8

9:00 – 10:50 **Luis Herrera Marcano**
Arbitration between States and Foreign Investors II

11:10 – 1:00 **Yusuf Abdulqawi**
The Evolution of the Notion of Cultural Heritage in International Law III

2:30 – 4:30 **Mauricio Herdocia Sacasa**
Member of the Inter-American Juridical Committee
The Contribution of the Inter-American Juridical Committee to New Developments in International Law in the Americas

Week Two

Monday 11

9:00 – 10:50 **Freddy Castillo**
Member of the Inter-American Juridical Committee
Cultural Diversity

11:10 – 1:00 **Luis 194 Utillano**
Senior Legal Advisor, OAS Secretariat for Legal Affairs
The Draft American Declaration on the Rights of Indigenous Peoples I: The Negotiation Process

2:30 – 4:30 **Stephen Vasciannie**
Former member of the Inter-American Juridical Committee, member of the UN International Law Commission
Caribbean Death Penalty, Issues Revisited

Tuesday 12

9:00 – 10:50 **Nuria González**
Researcher, Legal Research Institute, National Autonomous University of Mexico
Family Law in a Globalized World: Special Reference to International Adoption
11:10 – 1:00 **Stephen Vasciannie**
Caribbean Libel Law and the Inter-American System: The Dudley Stokes Case

2:30 – 4:30 **Stephen Vasciannie**
Elements of Treaty Interpretation in International Law

Wednesday 13

9:00 – 10:50 **Nuria González**
Family Law in a Globalized World: Special Reference to International Adoption II

11:10 – 1:00 **Luis Toro Utillano**
The Draft American Declaration on the Rights of Indigenous Peoples II: Substantive Issues

2:30 – 4:30 **Ignacio Goicoechea**
Legal Liaison Officer for Latin America, The Hague Conference on Private International Law
The Hague Conference I (Objectives, Modus Operandi, Agreements, and Services)

Thursday 14

9:00 – 10:50 **Nuria González**
Family Law in a Globalized World: Special Reference to International Adoption III

11:10 – 1:00 **Adriana Dreyzin**
Lecturer in private international law, National University of Córdoba, Argentina
Mercosur: Reality and Outlook I

2:30 – 4:30 **Ignacio Goicoechea**
The Hague Conference II (Objectives, Modus Operandi, Agreements, and Services)

Friday 15

9:00 – 10:50 **Ignacio Goicoechea**
The Hague Conference III (Objectives, Modus Operandi, Agreements, and Services)

11:10 – 1:00 **Adriana Dreyzin**
Mercosur: Reality and Outlook II

2:30 – 4:30 **Elizabeth Villalta**
Member of the Inter-American Juridical Committee
New Developments in the Central American Integration Process

Week Three

Monday 18 **Free**

Tuesday 19

9:00 – 10:50 **Thierry Bourgoignie**
Lecturer, Director of the Department of Legal Sciences at the University of Québec at Montreal (Montreal, Canada), Director of the Research Group on International and Comparative Consumer Law (RGICCL)
Regional and International Consumer Law I

11:10 – 1:00 **Thierry Bourgoignie**
Regional and International Consumer Law II

2:30 – 4:30 **Marcelo G. Kohen**
Professor of international law, Superior Institute of International Studies and Development (Geneva, Switzerland), associate member of the International Law Institute, Director General of the Latin American International Law Society
Uti Possidetis as a Criterion for the Determination of Borders in Latin America I

Wednesday 20

9:00 – 10:50 **Juan Carlos Murillo**
Regional Legal Advisor, UNHCR
International Protection of Refugees in the Americas: New Developments

11:10 – 1:00	**Marcelo G. Kohen** *Uti Possidetis as a Criterion for the Determination of Borders in Latin America II*
2:30 – 4:30	**Hector Gros Espiell** Former foreign minister of the Republic of Uruguay, President of the Latin American International Law Society *The Development and Broader Thematic Scope of International Law I*

Thursday 21

9:00 – 10:50	**Juan Carlos Murillo** *Strengthening the International Protection of Refugees through the Inter-American Human Rights System*
11:10 – 1:00	**Pablo Saavedra** Secretary of the Inter-American Court of Human Rights *Developments in the Jurisprudence of the Inter-American Court of Human Rights I*
2:30 – 4:30	**Hector Gros Espiell** *The Development and Broader Thematic Scope of International Law II*

Friday 22

9:00 – 10:50	**Juan Carlos Murillo** *The definition of 'refugee' in the 1951 United Nations Convention relating to the Status of Refugees*
11:10 – 1:00	**Claudia Lima Marquez** Professor of international law, Federal University of Rio Grande do Sul *Weaker Party Protection in Private International Law and Consumer Protection Efforts of CIDIP VII*
2:30 – 4:30	**Pablo Saavedra** *Developments in the Jurisprudence of the Inter-American Court of Human Rights II*

Week Four

Monday 25

9:00 – 10:50	**Dario Soto** Deputy Director, Trust for the Americas, OAS *The Right of Access to Information: Fundamental Notions and Recent Development in the Inter-American System I*
11:10 – 1:00	**Ignacio Ibañez** Specialist/Manager of the Counter-Terrorism and Terrorist Financing Legislative Assistance project, Inter-American Committee Against Terrorism (CICTE) *The International Legal Framework for Combating Terrorism. Universal and Inter-American Instruments I*
2:30 – 4:30	**Anton Camen** Legal Adviser for Latin America and the Caribbean, International Committee of the Red Cross *Customary International Humanitarian Law*

Tuesday 26

9:00 – 10:50	**Dario Soto** *The Right of Access to Information: Fundamental Notions and Recent Development in the Inter-American System II*
11:10 – 1:00	**Ignacio Ibañez** *The International Legal Framework for Combating Terrorism. Universal and Inter-American Instruments II*

2:30 – 4:30	**Gabriel Valladares** Legal Adviser for the Southern Cone, International Committee of the Red Cross *Elements of International Humanitarian Law*
Wednesday 27	
9:00 – 10:50	**María del Luján Flores** Ambassador, Permanent Representative of Uruguay to the OAS *Reflections on Challenges for International Law I*
11:10 – 1:00	**Alonso Chaverri** Attorney, Corporate Legal Affairs Division, Legal Department, IDB *The Responsibility of International Organizations and the Organization's Rules: Problems arising out of the Work of the International Law Commission I*
2:30 – 4:30	**Juan José Ruda** Director of the International Studies Institute (IDEI) of the Pontifical Catholic University of Peru *Reflections on International Subjectivity, Religious Activists, and a Recent Interesting Case such as Kosovo I*
Thursday 28	
9:00 – 10:50	**María del Luján Flores** *Reflections on Challenges for International Law II*
11:10 – 1:00	**Alonso Chaverri** *The Responsibility of International Organizations and the Organization's Rules: Problems arising out of the Work of the International Law Commission II*
2:30 – 4:30	**Juan José Ruda** *Reflections on International Subjectivity, Religious Activists, and a Recent Interesting Case such as Kosovo II*
Friday 29	
10:00	**Closing Ceremony and Presentation of Certificates**

C. Relations and Cooperation with Other Inter-American Bodies and with Similar Regional and Global Organizations

Participation of the Inter-American Juridical Committee as an Observer or Guest at Different Organizations and Conferences

The following members of the Inter-American Juridical Committee served as observers and participated at various events and with international agencies on the Committee's behalf during 2008:

1. Dr. Jean-Paul Hubert, Chairman of the Inter-American Juridical Committee, presented the Committee's Annual Report, covering its activities during 2007, to the Committee on Juridical and Political Affairs of the OAS Permanent Council on March 27, 2008. That presentation was recorded as document CJI/doc.300/08, "Presentación del Informe Annual 2007 del Comité Jurídico Interamericano ante la Comisión de Asuntos Jurídicos y Políticos de la Organización de los Estados Americanos (Washington, 27 marzo 2008)".

2. Dr. Jean-Paul Hubert, Chairman of the Inter-American Juridical Committee, presented the Committee's Annual Report, covering its activities during 2007, to the OAS General Assembly in Medellín in June 2008. That presentation was recorded as document CJI/doc.301/08, "Presentación del Informe Annual 2007 del Comité Jurídico Interamericano ante el trigésimo octavo período ordinario de sesiones de la Asamblea General de la Organización de los Estados Americanos.

3. Dr. Antonio Fidel Pérez represented the Inter-American Juridical Committee before the United Nations International Law Commission at its meeting in Geneva in July 2008. That

presentation was recorded as document CJI/doc.303/08, “Report to the International Law Commission of the United Nations on the Recent Activities of the Inter-American Juridical Committee (Geneva, July 15, 2008).”

The following sections transcribe the addresses given by members of the Inter-American Juridical Committee in their capacity as observers, representatives, or participants at different meetings held during 2008. Also included is document CJI/doc.286/08, containing the presentation given by Dr. Mauricio Herdocia as the representative of the Inter-American Juridical Committee before the United Nations International Law Commission in the year 2007.

CJI/doc.300/08

PRESENTACIÓN DEL INFORME ANUAL 2007 DEL COMITÉ JURÍDICO INTERAMERICANO ANTE LA COMISIÓN DE ASUNTOS JURÍDICOS Y POLÍTICOS DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS (Washington, 27 marzo 2008)

(presentado por el doctor Jean-Paul Hubert,
Presidente del Comité Jurídico Interamericano)

Sumario

I. INTRODUCCIÓN

Reflexiones preliminares

(Saludos ……)

Les membres du Comité Juridique Interaméricain attachent beaucoup d’importance à cette occasion qui nous est donnée annuellement de venir résumer pour vous le rapport de nos principales activités pour l’année précédente.

Having had the great privilege of representing Canada in this same room as its first Permanent Representative before the OAS, I can certainly appreciate the importance of your work for the Organization and its Member-States. Our Committee follows your activities and deliberations with attention, and we hope that our own studies and reflections contribute to the accomplishment of your duties

Thank you for your invitation, President Álvarez.

I do not propose to go through an exhaustive review of the content of the full Annual Report for 2007, which no doubt you are already familiar with. Rather, as is customary, and with your agreement Mr. President, I would intend to highlight some of its most salient features.

Pero antes de pasar revista a los temas tratados por el Comité Jurídico durante el año 2007, quisiera compartir con Ustedes algunas orientaciones generales que vienen guiando nuestros trabajos. Y para ello me permitiré recurrir en buena parte a reflexiones hechas por nuestro colega el doctor Mauricio Herdocia Sacasa en una reciente intervención, en representación del Comité, ante la Comisión de Derecho Internacional de las Naciones Unidas en Ginebra.

Ya es un *cliché* decir que el mundo está cambiando a una velocidad vertiginosa. Con estos cambios vienen surgiendo nuevas preocupaciones en la Comunidad Internacional, y nuevas cuestiones en el ámbito del Derecho Internacional.

¿Cómo negar, por ejemplo, que asistimos a una expansión acelerada de los ámbitos de acción del Derecho Internacional, en áreas otrora reservadas a la jurisdicción interna de los Estados? El Derecho Internacional está constantemente confrontado con la necesidad de ampliar las materias sujetas a su competencia. Hasta existe ahora en el ámbito de las Naciones Unidas un "Grupo Especial de Estudio" sobre el tema de la fragmentación del Derecho Internacional.

¿Cómo negar que se viene consolidando un mundo que ha roto el monopolio del Estado para abrir paso a los nuevos sujetos del Derecho Internacional y otros actores emergentes que vienen ocupando o reivindicando su lugar en la mesa ampliada de la nueva sociedad internacional?

¿Cómo no reconocer que vertiginosos avances tecnológicos y de la Comunicación están abriendo nuevos espacios de acción al Derecho Internacional ante la necesidad de regular un mundo 'invisible' que se mueve sin fronteras ni conceptos clásicos de división territorial?

¿Cómo no reconocer la emergencia de una creciente 'permeabilidad' e interdependencia entre los mundos normativos del Derecho Interno de los Estados y el Derecho Internacional? ¿Y acompañando ese fenómeno, el salto del individuo al mundo jurisdiccional internacional?

¿Qué decir – y esto nos concierne a todos aquí en nuestro Hemisferio - del surgimiento, junto a un derecho clásico sustentado en la voluntad de los Estados, de un nuevo derecho común que se expresa en normas imperativas, reflejadas en normas recogidas en los sistemas regionales, y que reflejan obligaciones establecidas para la protección de un interés colectivo esencial a la vida mismo del grupo de Estados como tal? Y aquí se evocan, como lo adivinarán, las normas interamericanas relativas a la democracia representativa y a los derechos humanos que conforman un Orden Público Regional Americano *interpartes.*

Mr. President, one way to summarize the above is to recognize that International Law finds itself at the core of an important battle for the greater consolidation of a ius gentium with new social dimensions. The Member-States of this Organization are fully cognizant of that pressing reality and it was no accident that one of the recent studies they have commissioned to the Inter-American Juridical Committee relates precisely to the juridical aspects of the interdependence between democracy and socio-economic development, two key concerns in the Inter-American System that seek a new synthesis.

Finally, I would like to suggest that as a direct result of the above considerations there is in the Committee's current activities a common thread that evidences our desire to put more emphasis on, and devote more time to, topics that have a more direct impact on people. That explains why the Committee is considering themes such as consumer protection, access to information, protection of personal data, the right to identity, protection of migrant workers and their families, and the struggle against new or contemporary forms of discrimination.

We remain mindful of the fact that by virtue of the OAS Charter our mandate as an advisory organ doubles up with an autonomous capacity for the Committee to initiate studies of its own (Art. 100). That certainly gives us room for imagination – and, dare I say, audacity? - to accompany the Organization and its Member-States in situations that defy and confront international law.

II. TEMAS TRATADOS POR EL COMITÉ JURÍDICO INTERAMERICANO DURANTE LOS PERÍODOS ORDINARIOS DE SESIONES CORRESPONDIENTES AL AÑO 2006

Mr. President, I will now proceed with an overview of some of the various themes the Committee has dealt with during its two regular sessions held in 2007.

Pero antes de entrar en materia, y en nombre del Comité, sus miembros, y su Secretariado, quiero rendir un homenaje muy especial, y expresar nuestro profundo y sincero agradecimiento, al Gobierno y al pueblo de la República de El Salvador por la insuperable generosidad y difícilmente igualable calidad de su recibimiento.

1. El Alcance del Derecho a la Identidad

La Presidenta del Consejo Permanente le solicitó al Comité Jurídico Interamericano en marzo de 2007 un estudio sobre “el alcance del derecho a la identidad”.

El Comité no tardó en establecer el carácter multidimensional de dicho derecho. Y un extenso informe preparado por el doctor Mauricio Herdocia Sacasa, luego aprobado por el Comité (con un voto razonado disidente), se le reconoció una triple dimensión. Por una parte, es un derecho en sí mismo, y en este sentido tiene un carácter autónomo. Por otra parte, es un derecho instrumental indispensable para el ejercicio de derechos civiles, políticos, económicos y sociales. Posee asimismo una tercera dimensión, ya que el derecho a la identidad es también la conjunción articulada de diferentes derechos, porque la identidad no está limitada al derecho al nombre, ni se trata simplemente del derecho al nombre más la nacionalidad, más el derecho a la familia, sino que se trata de un conjunto de derechos que se concatenan y brindan la condición de singularidad al individuo. Por consiguiente, la naturaleza de ese derecho se vincula a valores y a principios inherentes a la dignidad humana, a la vida en sociedad, y al ejercicio de los derechos humanos.

Es por lo tanto un derecho oponible erga omnes, es decir, un derecho oponible universalmente. Tiene además un carácter imperativo de jus cogens, porque es un derecho tan esencial, que sin él no se podrían tornar realidad otros tipos de derechos fundamentales. Forma parte de la categoría de derechos que de acuerdo con la “Convención Americana sobre Derechos Humanos” no pueden ser objeto de suspensión bajo ninguna circunstancia. Es de observancia obligatoria para los Estados.

El Comité también se expresó sobre las consecuencias que pueden resultar de la privación de este derecho a la identidad, o de las lagunas legales existentes en la legislación interna para su efectivo ejercicio, lo cual afecta a la persona humana, condenándola a la muerte civil, a la inseguridad jurídica, al aislamiento y a la exclusión social.

El tema sigue en la agenda del Comité.

2. Corte Penal Internacional

La OEA ha asignado un valor especial a la promoción del Estatuto de la Corte Penal Internacional. El fortalecimiento de la cooperación entre los Estados – hayan o no ratificado el Estatuto – y la Corte ha sido, y sigue siendo, objeto de mucha atención por parte del Comité.

Un avance significativo a ser realizado por el CJI durante el año en consideración ha sido la aprobación durante su sesión de San Salvador (marzo 2007) de un informe preparado por el relator del tema, el doctor Mauricio Herdocia Sacasa. Cabe resaltar las varias recomendaciones concretas formuladas por el relator, que proponen a los Estados miembros una serie de medidas dirigidas al fortalecimiento de su cooperación con la Corte Penal Internacional.

El Comité también resolvió reiterar la solicitud a los Estados miembros que aun no hayan respondido al cuestionario elaborado por el Comité, que lo completen; y a aquellos Estados Partes del “Estatuto de la Corte” que hayan cumplido el proceso de aprobación de leyes de implementación del mismo, que remitan tal información al Comité. También reiteró la solicitud a los Estados que hayan concluido el proceso de aprobación de leyes que incorporen, modifiquen o adicionen los tipos penales consagrados en el “Estatuto de Roma”, que brinden dicha información actualizada al Comité.

La Asamblea General de Junio del 2007, con base a la información ya recibida por parle del CJI, dio un paso más adelante, solicitando al Comité elabore una legislación modelo sobre cooperación de los Estados con la Corte.

Me complace adelantar que durante su sesión celebrada hace dos semanas en Rio de Janeiro el Comité adoptó un extenso e importante informe del relator, que recoge una elaborada “Guía de Principios Generales y Pautas en Materia de Cooperación de los Estados con la Corte Penal Internacional”. Y que en breve será sometido a la atención del Consejo Permanente y de la Asamblea General.

3. Acceso a la Información y Protección de Datos Personales

La implicación del CJI en este tema tiene como origen un doble mandato de la Asamblea General, uno de los cuales ya se cumplió a principios del año pasado. En cuanto al otro, relacionado con la protección de datos personales con base a legislación comparada, el relator

del tema, doctor Jaime Aparicio, presento en nuestra sesión de San Salvador (marzo 2007) un Comentario relativo a las respuestas al cuestionario elaborado a tal efecto por el Comité Jurídico, recibidas tan solo de tres estados (Guatemala, Jamaica y México). En la discusión se subrayó la relación existente entre el acceso a la información y el fortalecimiento de la democracia, y la importancia de la transparencia en las gestiones públicas como base de la lucha contra la corrupción.

En la misma ocasión, el Comité Jurídico celebró una reunión de trabajo con la doctora Laura Neuman, Directora Adjunta para las Américas del Centro Carter, y experta en el tema de acceso a la información.

Durante su sesión de agosto 2007 (Rio de Janeiro), el Comité Jurídico recibió al señor Darío Soto, Sub-Director del Trust for the Americas, institución afiliada a la Organización, que está desarrollando un proyecto con la sociedad civil con relación al tema de acceso a la información.

No habiéndose recibido más respuestas que las tres anteriormente mencionadas, el relator estimó carecer por lo tanto de información suficiente para presentar una ley modelo o proyecto de convención sobre el tema. El Comité resolvió entonces encomendarle continúe trabajando en este tema con los Órganos de la OEA, en colaboración con instituciones como el Trust for the Americas, el Centro Carter y la Alianza para la Libertad de Expresión e Información, con vistas a elaborar una lista de indicadores y principios legales en materia de acceso a la información.

4. Seguimiento de la Aplicación de la Carta Democrática Interamericana

El Comité aprovechó la presencia del Secretario General de la OEA en el Curso anual de Derecho Internacional en agosto 2007 para sostener un amplio y un provechoso intercambio con él sobre su informe “La Carta Democrática Interamericana: Informe del Secretario General en cumplimiento de las resoluciones AG/RES. 2154 (XXXV-O/05) y AG/RES. 2251 (XXXVI-O/06)”.

También consideró un “Reporte relativo al informe del Secretario General (…)” elaborado por el doctor Antonio F. Pérez, uno de los co-relatores del tema. Dicho reporte se limitaba en identificar cuestiones abordadas en el informe del Secretario General, como la misma definición jurídica de la democracia (lo que a su vez dificulta la definición de lo que pueda constituir una amenaza grave a la democracia); como el mecanismo que el Secretario General, sin una decisión previa de los Estados miembros, podría utilizar para iniciar un diálogo con el Estado de que se trate en caso de amenaza a la democracia; como la interpretación del término “gobierno” en la Carta Democrática; como, en fin, al estatus jurídico preciso de la Carta Democrática.

Después de haber considerado varios ángulos sobre los cuales el Comité Jurídico podría o no emprender estudios sobre unas u otras de las interrogativas suscitadas en el Informe del Secretario General, se aprobó (con un voto disidente) una resolución mediante la cual se resuelve realizar una interpretación sobre las condiciones y vías de acceso para la aplicabilidad de la Carta Democrática Interamericana, a la luz de la Carta de la OEA y de otros instrumentos jurídicos básicos referidos a la defensa y promoción de la democracia en las Américas.

5. Lucha contra la Discriminación y la Intolerancia en la Américas

Con fecha 10 de octubre de 2006, la Presidenta del Grupo de Trabajo encargado de elaborar un “Proyecto de Convención Interamericana contra el Racismo y toda Forma de Discriminación e Intolerancia”, le solicitó por carta al Comité Jurídico Interamericano una opinión sobre el referido anteproyecto.

Durante la sesión de marzo (San Salvador), el relator del tema, doctor Jaime Aparicio, expresó que del análisis de los documentos disponibles le quedaba claro que el Comité podría contribuir a una mejor definición sobre los objetivos y alcances del anteproyecto. Se subrayó también que los problemas de racismo y discriminación en el Continente pueden ser de naturaleza social, además de jurídica, y atribuirse en parte al menos a la falta de legislación interna que hagan efectivos los compromisos ya contraídos por vía de instrumentos internacionales.

El Comité aprobó, con una abstención y un voto a favor razonado, una resolución mediante la cual, como contribución a las negociaciones en curso por parte del Grupo de Trabajo, adoptó un documento que recoge, entre otros, los siguientes puntos: (1) la futura convención debe ser coherente con los instrumentos regionales y universales vigentes; (2) el término genérico y amplio que se recomienda utilizar es el de "discriminación" en lugar de "racismo", el cual constituye sólo una forma de discriminación por razones de raza; (3) las normas contenidas en el anteproyecto deben ser precisas y no repetir aquellas normas de alcance regional o universal existentes ni contradecirlas; (4) tener presente que los actos de discriminación pueden constituir una expresión de conductas no atribuibles únicamente a los Estados; (5) prestar atención a cuál sería el eventual rol de la Corte y la Comisión Interamericanas de Derechos Humanos en relación a la futura nueva convención.

Puedo adelantar que durante su sesión del presente mes el Comité consideró con mucha satisfacción la última versión de proyecto de convención en la materia. Pero vio con gran preocupación el texto preliminar del Articulo 4 de dicho proyecto, el cual se lee: *"Todas las personas tienen derecho al reconocimiento, goce, ejercicio y protección, en condiciones de igualdad, de todos los derechos humanos y libertades fundamentales consagrados en los instrumentos* ***aplicables a los Estados Partes****, en el plano individual o colectivo, sin ninguna discriminación".*

Esa referencia a "derechos humanos consagrados en instrumentos **aplicables a los Estados Partes**" nos parece inaceptablemente limitativa. Los derechos humanos son los derechos y las libertades fundamentales que tienen todos los seres humanos por el solo hecho de serlo, es decir, que son inseparables de la persona humana y tienen su fundamento en la propia naturaleza del ser humano, por lo que estos derechos y libertades deben ser respetados en cualquier situación; la validez y la vigencia de los derechos humanos no dependen entonces de que estén previstos en las leyes de un país o en un instrumento internacional, ya que surgen de la sola existencia de la persona humana y no se pueden separar de ella. Si los Estados comenzaron a incluir en su legislación interna disposiciones para proteger los derechos humanos, y después, la Comunidad Internacional de Estados hizo lo mismo en tratados, declaraciones y otros instrumentos internacionales, lo hicieron con el fin de precisar esos derechos y asegurar su cumplimiento, es decir, como una garantía. En conclusión, todos los Estados tienen en todas circunstancias la obligación de respetar todos los derechos humanos y, de ser el caso, de castigar su violación por lo que deben de establecer los medios necesarios para este efecto.

6. <u>Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado – CIDIP-VII</u>

Durante su sesión de marzo 2007 (San Salvador), el Comité Jurídico escuchó los informes del doctor Dante Negro, Director del Departamento de Asuntos Jurídicos Internacionales de la OEA, sobre la reunión de Porto Alegre de diciembre de 2006, y la posterior reunión de esta Comisión (CAJP), en donde los coordinadores brasileños, norteamericanos y canadienses expusieron sus respectivas propuestas. Señaló que parecía indicado esperar la finalización del "Informe Final" de Porto Alegre anunciado por dichos coordinadores para que todos, incluyendo el Comité, puedan manifestarse al respecto.

Después de que le Comité oyera informes de los co-relatores del tema, la doctora Elizabeth Villalta y el doctor Antonio F. Pérez, el Comité decidió aguardar las conclusiones del Grupo de Expertos, manteniéndose dispuesto a colaborar con la celebración de una CIDIP-VII exitosa.

Durante la sesión de agosto 2007 (Rio de Janeiro) se lamentó que el Comité no este en condición todavía de contribuir mejor a la resolución de cuestiones que aún no cuentan con consenso en dichas negociaciones. Y el tratamiento del tema se pospuso para el siguiente período ordinario de sesiones, en espera del "Documento final" de Porto Alegre.

Aquí puedo adelantar que en nuestra sesión del presente mes en Rio de Janeiro pudimos contar por la primera vez con las tres proposiciones actualizadas de los negociadores, y con un extenso análisis jurídico por parte de uno de los co-relatores, el doctor Antonio F. Pérez, que le ha permitido al Comité adoptar una resolución que esperamos pueda contribuir en forma

concreta a una CIDIP VII que adopte o recomiende instrumentos que faciliten, hagan efectiva y garanticen la protección al consumidor.

7. Implementación del Derecho Internacional Humanitario en los Estados miembros de la OEA

Durante la última Asamblea General de la OEA (Panamá, 2007), se le solicitó al Comité que elabore y proponga leyes modelo que apoyen los esfuerzos emprendidos en la implementación de obligaciones derivadas de tratados en materia de derecho internacional humanitario, debiéndose hacer esto sobre la base de temas prioritarios definidos en consulta con los Estados miembros y con el Comité Internacional de la Cruz Roja.

En la siguiente sesión del Comité en agosto del 2007 (Rio de Janeiro), el doctor Dante Negro recordó que el tema viene tratándose actualmente en el marco de esta Comisión (CAJP) y que en los últimos tres años ha cobrado gran importancia. Y remitió un documento preparado por su oficina bajo el título “Implementación del Derecho Internacional Humanitario en los Estados Miembros de la OEA: preparación y presentación de leyes tipo”.

Durante nuestras consideraciones iníciales con vista a la satisfacción de nuestro mandato, el doctor Negro señaló que muchos de los tratados internacionales sobre la materia no desarrollan en detalle todos los aspectos posibles, y dejan al derecho interno la labor de cumplir con esa tarea.

Para cumplir con su mandato, el Comité Jurídico decidió solicitar a los Estados miembros, por medio de notas verbales, una indicación de los que para ellos son los temas prioritarios para la implementación de sus obligaciones en la materia. Notas que se volvieron a enviar en enero de 2008 con ocasión de la sesión especial que sobre el tema iba a realizar la CAJP. También el Comité resolvió invitar al Comité Internacional de la Cruz Roja en su próxima sesión (lo que acaba se hacerse ahora en Rio de Janeiro).

Hasta la fecha no se ha recibido ninguna respuesta de parte de les Estados, y debo subrayar que sin esas respuestas, el CJI difícilmente podrá seguir adelante con el mandato, pues falta lo más importante: que los Estados señalen sus áreas prioritarias.

8. Situación Jurídica de los Trabajadores Migratorios y sus Familias en el Derecho Internacional

Ese se incorporó a la agenda del CJI durante nuestra sesión de marzo del 2007 (San Salvador), a iniciativa del doctor Jorge Palacios.

Durante su siguiente período ordinario de sesión (agosto, 2007, Rio de Janeiro) el Comité, además de contar con un documento elaborado por la Oficina de Derecho Internacional sobre “El papel de la OEA en la protección de los derechos humanos de los migrantes”, escuchó una descripción del “Programa Interamericano para la Promoción y Protección de los Derechos Humanos de lo Migrantes, incluyendo los Trabajadores Migratorios y sus Familias” aprobado por la Asamblea General de la OEA tres años atrás. También tomó conocimiento de un plan de trabajo del Secretario General para el debido cumplimiento del mismo de dicho Programa.

En un informe preliminar, el doctor Treviños sugirió el Comité trabajará en un documento que haga referencia al mínimo de derechos humanos que deben observarse en situación de movilidad, desde la salida del país de origen, en el tránsito por terceros países, y durante la estancia y el trabajo en el país de destino, incluso en el retorno al país de origen. Y incluyó en su presentación la idea de que se elabore una especie de manual sobre todos los derechos de los trabajadores migratorios, con el objeto de diseminar información a quienes se encuentran en tal situación.

En otro informe, la co-relatora del tema, doctora Ana Elizabeth Villalta Vizcarra, se refirió, como antecedentes, a dos Opiniones Consultivas de la Corte Interamericana de Derechos Humano donde esta expresó que los derechos humanos de todas las personas son inviolables, estando obligado los Estados a no introducir en su ordenamiento reglas discriminatorias, y a combatir prácticas que violen el principio de igualdad y no discriminación. Se refirió también al derecho a la asistencia consular que tienen todas las personas en territorio extranjero, consagrado la “Convención de Viena sobre Relaciones Consulares”.

El Comité les solicitó a los co-relatores que presenten un informe consolidado para el siguiente período ordinario de sesiones.

Con gusto les anticipo que a principios del presente mes el CJI aprobó una "Cartilla o Manual sobre los Derechos de los Trabajadores Migrantes y sus Familias" que será enviado en breve al Consejo Permanente.

9. Administración de Justicia en las Américas: ética judicial y acceso a la justicia

En nuestra sesión de marzo 2007 (San Salvador) la doctora Ana Elizabeth Villalta Vizcarra presentó un informe sobre "Principios de ética judicial", en el que registra los avances logrados en las distintas Cumbres Iberoamericanas de Cortes Supremas de Justicia, y menciona varios otros documentos relacionados con la ética judicial adoptados en varios foros internacionales estos últimos años.

Para algunos miembros, la importancia del tema de la administración de la justicia en general radica en su relación con la necesidad de fortalecer la independencia de los poderes, siendo muy legítimo que el Comité Jurídico tenga algo que señalar en este tema ya que es trascendental para la consolidación de la democracia. También se destacó el estrecho vínculo que existe entre la ética judicial y el acceso a la justicia como temas fundamentales para el fortalecimiento del Estado de Derecho en las Américas.

Durante la sesión de agosto 2007 (Rio de Janeiro) la doctora Villalta abogó por una visión más amplia de la problemática de la ética judicial, y la necesidad de considerar que el acceso a la justicia abarca a todos los operadores de la justicia, incluyendo los fiscales, la policía, y los defensores. Al Comité Jurídico le pareció necesario también tener en cuenta las diferencias regionales, mencionándose por ejemplo los fenómenos propios a las pequeñas comunidades, y por lo tanto explorar mecanismos alternativos de acceso a la justicia, y asegurar que la justicia atienda las realidades sociales.

Finalmente, el Comité decidió encomendar a los relatores que presenten en el próximo período de sesiones un informe acerca de los alcances del tema de la ética judicial y acceso a la justicia en el contexto del derecho internacional, incluyéndose las formas alternativas.

10. Tribunal Interamericano de Justicia

Cuando el doctor Eduardo Vio Grossi introdujo durante la sesión de marzo del 2007 (San Salvador) su documento "Algunas consideraciones sobre los desafíos del Comité Jurídico Interamericano al cumplir cien años; Tribunal Interamericano de Justicia", indicó que la creación de un Tribunal de Justicia Interamericano no era una idea novedosa, habiendo sido abordada en la V Conferencia Internacional Americana de 1923, y retomada en 1938 por la VIII Conferencia Internacional Americana. El relator indicó que en principio había pensado que fuera un tribunal para resolver controversias de los Estados americanos que no pudieran ser resueltas por otros tribunales, incluso con facultades de interpretar la "Carta de la OEA", haciendo énfasis en que esa función interpretativa no quedara circunscrita a los Órganos políticos de la Organización.

Tal como se relata con más detalles en nuestro Informe Anual, a casi todos los miembros les pareció sumamente difícil de llevar a la práctica tal proposición, por lo menos en la forma sugerida por el relator. Y se le encomendó al doctor Vio Grossi preparar un nuevo informe que tome en cuenta el intercambio de opiniones realizado, complemente y desarrolle el contenido de su informe anterior.

En agosto del 2007 (Rio de Janeiro) el doctor Vio Grossi sometió un nuevo informe, reiterando que lo que le había servido de orientación a ese respecto es el deseo de que el Comité Jurídico se vinculara más íntimamente a los temas de la Organización. En su opinión, sería importante retomar la creación de un órgano interamericano de justicia, a ser incluido en la "Carta de la OEA", que tenga carácter autónomo, y cuyas finalidades serían la solución de controversias y la emisión de opiniones consultivas.

A una mayoría de miembros les pareció muy poco probable que los Estados miembros consideren la creación de un tribunal interamericano, y menos aún que favorecieran la propuesta de hacer del Comité Jurídico una especie de tribunal ad hoc. Si, en un plano jurídico, la propuesta merecía ser considerada, tal idea necesitaba de un tiempo adicional a fin de lograr su consolidación, dado que abarcaba aspectos de orden político. Mientras, y no obstante, se

expresó que si no fuera posible trabajar en esa dirección, tampoco se podía dejar de hacer algo en pro del fortalecimiento de la función consultiva del Comité Jurídico. Este resolvió entonces continuar analizando el tema, teniendo presente lo desarrollado en los documentos ya presentados.

Puedo adelantar que en nuestra sesión del presente mes en Rio de Janeiro se resolvió cambiar el enfoque de este tema, el cual se designara en adelante "Reflexiones sobre una jurisdicción interamericana de justicia".

11. Cooperación jurídico-institucional con la República de Haití

Ese tema fue incorporado al temario del Comité Jurídico en marzo de 2007 (San Salvador) como sub-tema de aquel relativo a las "Reflexiones sobre los desafíos del Comité Jurídico Interamericano", a solicitud del doctor Ricardo Seitenfus, nombrado relator del mismo. En agosto del 2007 (Rio de Janeiro), el doctor Seitenfus presentó un informe en el cual recordó que desde 1986 la OEA ha jugado un rol importante en el proceso de Haití con el objetivo de que dicho país, ante un proceso histórico impregnado de violencia, pudiera transformarse finalmente en un Estado democrático de derecho, y aludió a la responsabilidad muy grande que tiene la sociedad interamericana con Haití.

En cuanto al rol que el Comité Jurídico podría desarrollar en la materia, apuntó un campo de acción al respecto, relacionado con el interés que el Comité debe mantener por acompañar la reconstrucción del Estado haitiano, notablemente de su sistema judicial.

Se decidió entonces que el tema seria un tema independiente dentro de la agenda del Comité, vista su importancia y en la medida en que abre una puerta para que el Comité tenga participación en el proceso de renovación institucional de Haití; se aprobó además que el doctor Seitenfus aproveche una próxima visita a Haití para, como representante del Comité, poder realizar un informe sobre las solicitudes y necesidades de Haití, según la perspectiva de sus autoridades, y eventualmente recomendar un programa de cooperación jurídico-institucional.

III. OTRAS ACTIVIDADES REALIZADAS DURANTE EL AÑO 2007

A. Sesión especial de la CAJP sobre los principios del derecho internacional contenidos en la Carta de la OEA

El 22 de marzo 2007 se celebró una Sesión especial de la CAJP sobre los principios del derecho internacional contenidos en la Carta de la OEA, siendo presentes, además del Presidente del CJI, doctor Hubert, los doctores Jaime Aparicio, Mauricio Herdocia Sacasa, Antonio Fidel Pérez y Ricardo Seitenfus. El doctor Herdocia hizo una extensa presentación de los 14 principios de derecho internacional contenidos en la Carta de la OEA. El Presidente hizo observaciones sobre la falta de normas uniformes con relación al derecho a la democracia y las obligaciones de los Estados miembros para el desarrollo. El doctor Aparicio instó a los representantes a utilizar el Comité Jurídico en los estudios de temas que guardan vinculación con el derecho internacional. El doctor Seitenfus subrayó la importancia del artículo 3º de la Carta de la OEA sobre las normas de conducta impuestas a los Estados. Y el doctor Pérez expresó el interés del Comité Jurídico en contar con mandatos por parte de los Estados miembros que sean afines con las funciones de este órgano de la OEA.

El Presidente del Comité aprovechó para apoyar la idea que los miembros del Comité Jurídico tuvieran más contactos con la CAJP y que éste no se restringiera a apenas una presentación anual.

B. Curso de Derecho Internacional

El Comité Jurídico Interamericano y la Oficina de Derecho Internacional del Departamento de Asuntos Jurídicos Internacionales de la OEA organizaron entre el 30 de julio y el 24 de agosto de 2007 el XXXIV Curso de Derecho Internacional, con la participación de 26 profesores de distintos países de América y Europa, 28 becarios de la OEA elegidos entre más de 70 candidatos, y 10 alumnos que sufragaron sus costos de participación. El tema central del Curso fue "Aspectos Jurídicos del Desarrollo Regional".

Se inauguró el Curso con la asistencia del Secretario General de la OEA, señor José Miguel Insulza, quien presentó observaciones sobre la aplicación de la Carta Democrática

Interamericana. El doctor Eduardo Vio Grossi hizo un homenaje al distinguido jurista Santiago Benadava.

IV. CONCLUSIONES

No quisiera terminar mi informe, señor Presidente, sin aludir brevemente a las dificultades que se encontraron en junio del año pasado para incluir en la agenda de la Asamblea General la presentación del Informe Anual del Comité Jurídico. Y agradecer al su predecesor, el Embajador Osmar Chohfi de Brasil, y al doctor Jean-Michel Arrighi, por sus gestiones con el Secretario General Adjunto de la OEA para que el Comité Jurídico presentara formalmente su Informe en la Asamblea General. Nos parece sumamente importante que se mantenga la presentación en el seno de la Asamblea General del Informe del Comité Jurídico Interamericano, por ser este un órgano de la OEA, y por disponer el Articulo 13 de su "Estatuto" que este Comité Jurídico así le haga.

Monsieur le Président, mes dames et messieurs les Représentants Permanents et leurs substituts, je vous réitère tout l'intérêt que les membres du Comité Juridique Interaméricain portent à vos travaux. Soyez assurés aussi de notre désir et disponibilité à nous associer en personne à vos sessions dédiés à l'étude, entre autres, de sujets faisant l'objet de nos considérations.

Je vous remercie de votre bienveillante attention.

CJI/doc.301/08

PRESENTACIÓN DEL INFORME ANUAL 2007 DEL COMITÉ JURÍDICO INTERAMERICANO ANTE EL TRIGÉSIMO OCTAVO PERÍODO ORDINARIO DE SESIONES DE LA ASAMBLEA GENERAL DE LA ORGANIZACIÓN DE LOS ESTADOS AMERICANOS

(presentado por el doctor Jean-Paul Hubert,
Presidente del Comité Jurídico Interamericano)

Sumario

I. TEMAS TRATADOS POR EL COMITÉ JURÍDICO INTERAMERICANO DURANTE LOS PERÍODOS ORDINARIOS DE SESIONES CORRESPONDIENTES AL AÑO 2007: 1. El Alcance del Derecho a la Identidad; 2. Corte Penal Internacional; 3. Acceso a la Información y Protección de Datos Personales; 4. Seguimiento de la Aplicación de la Carta Democrática; 5. Lucha contra la discriminación y la intolerancia en las Américas; 6. Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado – CIDIP-VII; 7. Implementación del Derecho Internacional Humanitario en los Estados miembros de la OEA; 8. Situación Jurídica de los Trabajadores Migratorios y sus Familias en el Derecho Internacional; 9. Administración de Justicia en las Américas: Ética Judicial y Acceso a la Justicia; 10. Tribunal Interamericano de Justicia; 11. Cooperación Jurídico-Institucional con la República de Haití. II. OTRAS ACTIVIDADES REALIZADAS DURANTE EL AÑO 2007.

Medellín, Colombia, 3 junio 2008

Monsieur le Président de l'Assemblée générale,
Mesdames et Messieurs les Ministres et Délégués,
Monsieur le Secrétaire général,
Monsieur le Secrétaire général adjoint,
Mesdames et Messieurs du Secrétariat général,
Mesdames et Messieurs les Observateurs permanents,
Mesdames et Messieurs,

Durante el año 2007, el Comité Jurídico Interamericano celebró dos períodos ordinarios de sesiones, en San Salvador y Río de Janeiro.

Pero antes de pasar revista a los temas sobresalientes tratados por el Comité durante ese año, quisiera compartir con Ustedes algunas orientaciones generales que vienen guiando nuestros trabajos.

Tal como lo dijera mi colega el doctor Mauricio Herdocia Sacasa en una reciente intervención ante la Comisión de Derecho Internacional de las Naciones Unidas en Ginebra asistimos a una expansión acelerada de los ámbitos de acción del Derecho Internacional, en áreas otrora reservadas a la jurisdicción interna de los Estados. Se viene abriendo paso a nuevos sujetos del Derecho Internacional y otros actores emergentes que buscan ocupar o reivindican su lugar en la mesa ampliada de la nueva sociedad internacional. Vertiginosos avances tecnológicos están abriendo nuevos espacios de acción al Derecho Internacional ante la necesidad de regular un mundo 'invisible' que se mueve sin fronteras ni conceptos clásicos de división territorial. Salta a la vista la emergencia de una creciente 'permeabilidad' e interdependencia entre los mundos normativos del Derecho Interno de los Estados y el Derecho Internacional, y con ellos un salto del individuo al mundo jurisdiccional internacional.

¿Y qué decir – y esto nos concierne a todos aquí en nuestro Hemisferio - del surgimiento, junto a un derecho clásico sustentado en la voluntad de los Estados, de un nuevo derecho común que se expresa en normas imperativas que reflejan obligaciones establecidas para la protección de un interés colectivo considerado como esencial para el mayor desarrollo comunitario? Aquí se evocan, como lo adivinarán, las normas interamericanas relativas a la democracia representativa y a los derechos humanos que conforman un Orden Público Regional Americano interpartes.

Mr. President, the Member-States of this Organization are fully cognizant of those pressing realities, and it was no accident that one of the recent studies they have commissioned to the Inter-American Juridical Committee related precisely to the juridical aspects of the interdependence between democracy and socio-economic development, two key concerns in the Inter-American System that seek a new synthesis

I would like to suggest that as a direct result of the above considerations there is in our Committee's current activities a common thread that evidences our desire to put more emphasis on, and devote more time to, topics that have a more direct impact on people. That explains why the Committee is considering themes such as consumer protection, access to information, protection of personal data, the right to identity, protection of migrant workers and their families, and the struggle against new or contemporary forms of discrimination.

I. TEMAS TRATADOS POR EL COMITÉ JURÍDICO INTERAMERICANO DURANTE LOS PERÍODOS ORDINARIOS DE SESIONES CORRESPONDIENTES AL AÑO 2007

1. El Alcance del Derecho a la Identidad

A solicitud de la Presidenta del Consejo Permanente el CJI preparó y adoptó una "Opinión sobre el derecho a la identidad" (CJI/doc.276/07), con base a un extenso informe preparado por el doctor Mauricio Herdocia Sacasa, donde le reconoció a dicho derecho una triple dimensión. Primero como un derecho en sí mismo, con carácter autónomo. Luego, como un derecho instrumental indispensable para el ejercicio de derechos civiles, políticos, económicos y sociales. Posee asimismo una tercera dimensión, ya que el derecho a la identidad es también la conjunción articulada de diferentes derechos, tales como el derecho al nombre, el derecho a la nacionalidad, el derecho a la familia, tratándose entonces de un conjunto de derechos que se concatenan y brindan la condición de singularidad al individuo. Por consiguiente, la naturaleza de ese derecho se vincula a valores y a principios inherentes a la dignidad humana, a la vida en sociedad, y al ejercicio de los derechos humanos.

Tiene también un carácter imperativo de *jus cogens*, porque es un derecho tan esencial, que sin él no se podrían tornar realidad otros tipos de derechos fundamentales. Forma parte de la categoría de derechos que de acuerdo con la "Convención Americana sobre Derechos Humanos" no pueden ser objeto de suspensión bajo ninguna circunstancia. Es de observancia obligatoria para los Estados.

El Comité también se expresó sobre las consecuencias que pueden resultar de la privación de este derecho a la identidad, o de las lagunas legales existentes en la legislación interna para su efectivo ejercicio, lo cual afecta a la persona humana, condenándola a la muerte civil, a la inseguridad jurídica, al aislamiento y a la exclusión social.

La Opinión antes mencionada y la explicación de voto en disidencia del doctor Antonio Fidel Pérez fueron enviados al Presidente del Consejo Permanente por a Oficina de Derecho

Internacional, con fecha 30 de agosto de 2007, adjuntándose la resolución CJI/RES.137 (LXXI-O/07).

2. Corte Penal Internacional

Un avance significativo a ser realizado por el CJI durante el año en consideración ha sido la aprobación durante su sesión de San Salvador (marzo 2007) de un informe preparado por el relator del tema, el doctor Mauricio Herdocia Sacasa, con recomendaciones concretas dirigidas al fortalecimiento de su cooperación con la Corte Penal Internacional.

El Comité también resolvió reiterar la solicitud a los Estados miembros que aun no hayan respondido al cuestionario elaborado por el Comité, que lo completen; y a aquellos Estados Partes del "Estatuto de la Corte" que hayan cumplido el proceso de aprobación de leyes de implementación del mismo, que remitan tal información al Comité. También reiteró la solicitud a los Estados que hayan concluido el proceso de aprobación de leyes que incorporen, modifiquen o adicionen los tipos penales consagrados en el "Estatuto de Roma", que brinden dicha información actualizada al Comité.

Dando un paso más adelante, la Asamblea General de Junio del 2007 le solicitó al Comité elabore una legislación modelo sobre cooperación de los Estados con la Corte. En su sesión de marzo del año en curso el Comité adoptó un nuevo y extenso informe del mismo relator, que recoge una elaborada "Guía de Principios Generales y Pautas en Materia de Cooperación de los Estados con la Corte Penal Internacional", guía que ya fue sometida a la atención del Consejo Permanente y de la Asamblea General.

3. Acceso a la Información y Protección de Datos Personales

La actual implicación del CJI en este tema esta relacionada con la protección de datos personales con base a legislación comparada. Durante 2007 el Comité celebró una reunión de trabajo con la doctora Laura Neuman, del Centro Carter, experta en el tema de acceso a la información, y con al señor Darío Soto del *Trust for the Americas*, institución afiliada a la Organización, que está desarrollando un proyecto con la sociedad civil con relación al tema.

Habiéndose recibido solo tres respuestas (Guatemala, Jamaica y México) a su cuestionario, y careciendo por lo tanto de información suficiente para que el relator, doctor Jaime Aparicio, pueda presentar una ley modelo o proyecto de convención sobre el tema, el Comité resolvió entonces encomendarle continúe trabajando con los Órganos de la OEA, en colaboración con las instituciones arriba mencionadas y con la Alianza para la Libertad de Expresión e Información, con vistas a elaborar una lista de indicadores y principios legales en materia de acceso a la información.

En sus discusiones subrayaron los miembros del Comité la relación existente entre el acceso a la información y el fortalecimiento de la democracia, y la importancia de la transparencia en las gestiones públicas como base de la lucha contra la corrupción.

4. Seguimiento de la Aplicación de la Carta Democrática Interamericana

El Comité aprovechó la presencia del Secretario General de la OEA en su Curso anual de Derecho Internacional en agosto 2007 para sostener un amplio y un provechoso intercambio con él sobre su informe "La Carta Democrática Interamericana: Informe del Secretario General en cumplimiento de las resoluciones AG/RES. 2154 (XXXV-O/05) y AG/RES. 2251 (XXXVI-O/06)".

También consideró un reporte del doctor Antonio F. Pérez, uno de los co-relatores del tema, consagrado a la identificación de las principales cuestiones de carácter jurídico abordadas en el informe del Secretario General (definición jurídica de la democracia con relación a lo que pueda constituir una amenaza grave a la democracia; mecanismos al alcance del Secretario General en caso de amenaza a la democracia, sin una decisión previa de los Estados miembros, interpretaciones del término "gobierno"; estatus jurídico preciso de la Carta Democrática; ...).

Después de haber considerado varios ángulos sobre los cuales el Comité Jurídico podría o no emprender estudios sobre unas u otras de las interrogativas suscitadas en el Informe del Secretario General, se aprobó (con un voto disidente) una resolución mediante la cual se resuelve realizar una interpretación sobre las condiciones y vías de acceso para la aplicabilidad

de la Carta Democrática Interamericana, a la luz de la Carta de la OEA y de otros instrumentos jurídicos básicos referidos a la defensa y promoción de la democracia en las Américas.

5. Lucha contra la Discriminación y la Intolerancia en la Américas

Invitado a opinar sobre un "Proyecto de Convención Interamericana contra el Racismo y Toda Forma de Discriminación e Intolerancia", el CJI, durante su sesión de marzo (San Salvador), aprobó una resolución orientada a contribuir a las negociaciones en curso por parte del Grupo de Trabajo, con, entre otros, los siguientes puntos: (1) la futura convención debe ser precisa, coherente con los instrumentos regionales y universales vigentes y sin repetir ni contradecir las normas contenidas en dichos instrumentos; (2) hay que tener presente que los actos de discriminación pueden constituir una expresión de conductas no atribuibles únicamente a los Estados; (3) y hay que prestar atención a cuál sería el eventual rol de la Corte y la Comisión Interamericanas de Derechos Humanos en relación a la futura convención.

Más recientemente el Comité consideró con mucha satisfacción la última versión del proyecto de convención. Pero vio con gran preocupación el texto preliminar del Artículo 4 de dicho proyecto, el cual se lee: *"Todas las personas* tienen *derecho al reconocimiento, goce, ejercicio y protección, en condiciones de igualdad, de todos los derechos humanos y libertades fundamentales consagrados en los instrumentos* ***aplicables a los Estados Partes****, en el plano individual o colectivo, sin ninguna discriminación"*.

Esa referencia a "derechos humanos consagrados en instrumentos **aplicables a los Estados Partes**" nos pareció abierta a una interpretación inaceptablemente limitativa. Ya que los derechos humanos son los derechos y las libertades fundamentales que tienen todos los seres humanos por el solo hecho de serlo, es decir, que son inseparables de la persona humana y tienen su fundamento en la propia naturaleza del ser humano, por lo que estos derechos y libertades deben ser respetados en cualquier situación; su validez y vigencia no dependen entonces de que estén previstos en las leyes de un país o en un instrumento internacional.

6. Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado – CIDIP-VII

Durante su sesión de marzo 2007 (San Salvador), el Comité escuchó informes sobre la reunión de Porto Alegre de diciembre de 2006, y posteriores reuniones de la CAJP, en donde los coordinadores brasileños, norteamericanos y canadienses expusieron sus respectivas propuestas, y se quedó a la espera de la finalización del "Informe Final" de Porto Alegre anunciado por ellos para poder manifestarse al respecto.

Durante la sesión de agosto 2007 (Rio de Janeiro) se lamentó que el Comité no este en condición todavía de contribuir mejor a la resolución de cuestiones que aún no cuentan con consenso en dichas negociaciones, posponiéndose el tratamiento del tema hasta disponer del "Documento final" de Porto Alegre.

Aquí puedo adelantar que en su sesión de marzo del presente año el Comité Jurídico pudo contar por la primera vez con las tres proposiciones actualizadas de los negociadores, y con un extenso análisis jurídico por parte de uno de los co-relatores, el doctor Antonio F. Pérez. Dicho documento, "Estado de las negociaciones sobre protección al consumidor en la Séptima Conferencia Especializada Interamericana sobre Derecho Internacional Privado" (CJI/doc.288/08 rev.1) fue enviado al Consejo Permanente en mayo de 2008, como contribución concreta a una CIDIP VII que adopte o recomiende instrumentos que faciliten, hagan efectiva y garanticen la protección al consumidor.

7. Implementación del Derecho Internacional Humanitario en los Estados miembros de la OEA

Durante la última Asamblea General de la OEA (Panamá, 2007), se le solicitó al Comité que elabore y proponga leyes modelo que apoyen los esfuerzos emprendidos en la implementación de obligaciones derivadas de tratados en materia de derecho internacional humanitario, sobre la base de temas prioritarios definidos en consulta con los Estados miembros y con el Comité Internacional de la Cruz Roja.

Para cumplir con su mandato, el Comité Jurídico decidió solicitar a los Estados miembros, por medio de notas verbales, una indicación de los que para ellos son los temas

prioritarios para la implementación de sus obligaciones en la materia. Notas que se volvieron a enviar en enero de 2008 con ocasión de la sesión especial que sobre el tema iba a realizar la CAJP. También el Comité resolvió invitar al Comité Internacional de la Cruz Roja en su próxima sesión (lo que acaba se hacerse ahora en Rio de Janeiro).

Hasta la fecha no se ha recibido ninguna respuesta de parte de les Estados, y debo subrayar que sin esas respuestas, el CJI difícilmente podrá seguir adelante con el mandato, pues falta lo más importante: que los Estados señalen sus áreas prioritarias.

8. Situación Jurídica de los Trabajadores Migratorios y sus Familias en el Derecho Internacional

Ese tema se incorporó a la agenda del CJI durante nuestra sesión de marzo del 2007 (San Salvador), a iniciativa del doctor Jorge Palacios. Se acordó trabajar en un documento que haga referencia a un mínimo de derechos humanos que deben observarse en situación de movilidad, desde la salida del país de origen, en el tránsito por terceros países, y durante la estancia y el trabajo en el país de destino, incluso en el retorno al país de origen. Y que podría incorporar una especie de manual sobre esos derechos, con el objeto de diseminar información a quienes se encuentran en tal situación.

En otro informe, la co-relatora del tema, doctora Ana Elizabeth Villalta Vizcarra, se refirió, como antecedentes, a dos Opiniones Consultivas de la Corte Interamericana de Derechos Humano donde esta expresó que los derechos humanos de todas las personas son inviolables. Además de referirse también al derecho a la asistencia consular que tienen todas las personas en territorio extranjero, consagrado la “Convención de Viena sobre Relaciones Consulares”.

Con gusto les anticipo que hace poco el CJI aprobó una Cartilla o Manual sobre los Derechos de los Trabajadores Migrantes y sus Familias que ya se envió al Consejo Permanente.

9. Administración de Justicia en las Américas: ética judicial y acceso a la justicia

En nuestra sesión de marzo 2007 (San Salvador) la doctora Ana Elizabeth Villalta Vizcarra presentó un informe sobre “Principios de ética judicial”, en el que registra los avances logrados en las distintas Cumbres Iberoamericanas de Cortes Supremas de Justicia, y menciona varios otros documentos relacionados con la ética judicial adoptados ya en varios foros internacionales.

Para el Comité, la importancia del tema en general radica en parte en su relación con la necesidad de fortalecer la independencia de los poderes, lo que a su vez es trascendental para la consolidación de la democracia. También destacó el estrecho vínculo entre la ética judicial y el acceso a la justicia como temas fundamentales para el fortalecimiento del Estado de Derecho en las Américas.

Durante su sesión de agosto 2007 (Rio de Janeiro) el Comité Jurídico abogó por una visión amplia de la problemática de la ética judicial, y la necesidad de considerar que el acceso a la justicia abarca a todos los operadores de la justicia, incluyendo los fiscales, la policía, y los defensores. Al Comité le pareció necesario también tener en cuenta las diferencias regionales, y por lo tanto explorar mecanismos alternativos de acceso a la justicia, y asegurar que la justicia atienda las realidades sociales.

10. Tribunal Interamericano de Justicia

Cuando el doctor Eduardo Vio Grossi introdujo durante la sesión de marzo del 2007 (San Salvador) su documento “Algunas consideraciones sobre los desafíos del Comité Jurídico Interamericano al cumplir cien años; Tribunal Interamericano de Justicia”, indicó que la creación de un Tribunal de Justicia Interamericano no era una idea novedosa, habiendo sido abordada en la V Conferencia Internacional Americana de 1923, y retomada en 1938 por la VIII Conferencia Internacional Americana. Tal como se relata con más detalles en nuestro Informe Anual, a casi todos los miembros les pareció sumamente difícil de llevar a la práctica tal proposición, por lo menos en la forma sugerida por el relator.

En la sesión siguiente (agosto 2007, Rio de Janeiro) el doctor Vio Grossi precisó que en su opinión, sería importante retomar la creación de un órgano interamericano de justicia, a ser incluido en la “Carta de la OEA”, que tenga carácter autónomo, y cuyas finalidades serían la solución de controversias y la emisión de opiniones consultivas. Y que lo que le había servido

de orientación era el deseo de que el Comité Jurídico se vinculara más íntimamente a los temas de la Organización.

A una mayoría de miembros les pareció muy poco probable que los Estados miembros consideren la creación de un tribunal interamericano, y menos aún que favorecieran la propuesta de hacer del Comité Jurídico una especie de tribunal ad hoc. Mientras, y no obstante, se expresó que si no fuera posible trabajar en esa dirección, tampoco se podía dejar de hacer algo en pro del fortalecimiento de la función consultiva del Comité Jurídico. Este resolvió entonces continuar analizando el tema, y hace poco, cambiarle el enfoque, designándolo en adelante "Reflexiones sobre una jurisdicción interamericana de justicia".

11. Cooperación Jurídico-Institucional con la República de Haití

Ese tema fue incorporado al temario del Comité en marzo de 2007 (San Salvador) como sub-tema de aquel relativo a las "Reflexiones sobre los desafíos del Comité Jurídico Interamericano", a solicitud del doctor Ricardo Seitenfus, nombrado relator del mismo. En agosto del 2007 (Rio de Janeiro), el doctor Seitenfus, aludiendo a la responsabilidad muy grande que tiene la sociedad interamericana con Haití, presentó un informe en el cual recordó que desde 1986 la OEA ha jugado un rol importante en el proceso de Haití con el objetivo de que dicho país, ante un proceso histórico impregnado de violencia, pudiera transformarse finalmente en un Estado democrático de derecho.

En cuanto al rol que el Comité Jurídico podría desarrollar en la materia, apuntó un campo de acción al respecto, relacionado con el interés que el Comité debe mantener por acompañar la reconstrucción del Estado haitiano, notablemente de su sistema judicial. Se decidió entonces que el tema seria un tema independiente dentro de la agenda del Comité, vista su importancia y en la medida en que abre una puerta para que el Comité tenga participación en el proceso de renovación institucional de Haití; se aprobó además que el doctor Seitenfus aproveche una próxima visita a Haití para, como representante del Comité, poder realizar un informe sobre las solicitudes y necesidades de Haití, según la perspectiva de sus autoridades, y eventualmente recomendar un programa de cooperación jurídico-institucional.

II. OTRAS ACTIVIDADES REALIZADAS DURANTE EL AÑO 2007

A. Sesión especial de la CAJP sobre los principios del derecho internacional contenidos en la Carta de la OEA

Entre las otras actividades realizadas durante en año 2007 merece subrayarse la Sesión especial de la CAJP sobre los principios del derecho internacional contenidos en la Carta de la OEA, con la participación de varios miembros del CJI, y donde, entre otros temas, se hizo una extensa presentación de los 14 principios de derecho internacional contenidos en la Carta de la OEA, y se discutió la falta de normas uniformes con relación al derecho a la democracia y las obligaciones de los Estados miembros para el desarrollo.

El Presidente del Comité aprovechó la ocasión para apoyar la idea que los miembros del Comité Jurídico tuvieran contactos más seguidos con la CAJP.

B. Curso de Derecho Internacional

El Comité Jurídico Interamericano y el Departamento de Derecho Internacional de la Secretaría de Asuntos Jurídicos de la OEA organizaron entre el 30 de julio y el 24 de agosto de 2007 el XXXIV Curso de Derecho Internacional, con la participación de 26 profesores de distintos países de América y Europa, 28 becarios de la OEA elegidos entre más de 70 candidatos, y 10 alumnos que sufragaron sus costos de participación. El tema central del Curso fue "Aspectos Jurídicos del Desarrollo Regional".

Merci à tous pour votre bienveillante attention.

CJI/doc.303/08

REPORT TO THE INTERNATIONAL LAW COMMISSION OF THE UNITED NATIONS ON THE RECENT ACTIVITIES OF THE INTER-AMERICAN JURIDICAL COMMITTEE (Geneva, July 15, 2008)

(presented by Dr. Antonio F. Pérez) [*]

I. INTRODUCTION

It is an honor to represent the Inter-American Juridical Committee of the Organization of American States (the IAJC) before the International Law Commission of the United Nations (the ILC). The purpose of my appearance before this distinguished body is to report to you, in accordance with the customary practices of our two Organizations on the current activities of the IAJC and to report back to the IAJC your comments and questions about the IAJC's work.

Let me begin by drawing your attention to the agenda that has been adopted for the IAJC's next meeting next month in Rio de Janeiro, its 73rd regular session.[1] Without belaboring the obvious, let me note the diversity of the issues addressed by the IAJC, which to some of you might seem to go well beyond the mandate of the ILC. The agenda covers issues that range across private and public international law. It deals with a vast range of important and difficult conflicts in areas of policy, such as the relationship between international trade and economic development; between national security, democracy and public access to information; between universal principles and regimes for the protection of human rights and the asserted need, particularly in the context of anti-discrimination law, for systems calibrated to address regional realities; and even issues that might be considered "constitutional" questions for the OAS legal system. These are all complicated and difficult tasks facing the IAJC in discharging its responsibilities under the Charter of the OAS, and their breadth can be explained in part by the unique nature of the IAJC's mandate, which includes not only progressive development and codification of public international law but also a special responsibility to promote harmonization of private international law among OAS member States. Moreover, the IAJC's competence to provide advisory opinions on matters submitted to it by the OAS General Assembly and Permanent Council, as well is its own authority to address issues ex proprio motu, can even further expand the range of issues addressed by the IAJC.[2]

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[*] Professor of Law, The Catholic University of America, Washington, DC, Inter-American Juridical Committee Member (elected by OAS General Assembly, at Quito, Ecuador, 2004).

[1] The agenda for the next session this August, which was adopted in CJI/RES. 142 (LXXII-O/08), is as follows:

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. Innovating forms of access to justice in the Americas
   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. Considerations on an inter-American jurisdiction of justice
   Rapporteurs: Drs. Guillermo Fernández de Soto and Freddy Castillo Castellanos
7. Juridical-Institutional cooperation with the Republic of Haiti
   Rapporteurs: Drs. Ricardo Seitenfus and Freddy Castillo Castellanos
8. Follow-up on the application of the Inter-American Democratic Charter
   Rapporteurs: Drs. Ricardo Seitenfus, Jaime Aparicio, Mauricio Herdocia Sacasa, Ana Elizabeth Villalta Vizcarra, Jean-Paul Hubert, Freddy Castillo Castellanos and Guillermo Fernández de Soto
9. Implementation of international humanitarian law in OAS Member States
   Rapporteurs: Drs. Ricardo Seitenfus, Ana Elizabeth Villalta Vizcarra, and Jorge Palacios Treviño

[2] See Charter of the Organization of American States, 119 U.N.T.S. 3, entered into force December 13, 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, entered into force Feb. 27, 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, entered into force Nov. 16, 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, entered into force September 25, 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, entered into force January

Let me suggest that this agenda should, nonetheless, be of interest to the members of the ILC. Notwithstanding the unique nature of the IAJC's mandate, one might argue that the increasing artificiality of the classical division between public and private international law, as well as the day-by-day expansion of the topics and policy tensions addressed by international law, will make the work of the IAJC of increasing relevance to universal organizations, such as the ILC, that nominally address only issues of public international law. That is my hope, at least, in making this presentation to you today and spirit in which I will attempt to answer your questions.

II. REPORT ON CURRENT DEVELOPMENTS IN THE WORK OF THE IAJC

Let me now report to you on the IAJC's current and recently concluded work,[3] drawing on the summary of the IAJC's Annual Report for 2007 presented by our president, Jean-Paul Hulbert, to the OAS General Assembly held at Medellin, Colombia, in June of 2008, and the work of the Department of International Law of the OAS General Secretariat, principally Dr. Dante Negro, in the preparation of the Annotated Agenda for the IAJC's next meeting.

1. The Scope of the Right to Identity

During the IAJC's 71st regular session (Rio de Janeiro, August 2007), it was informed that on March 15, 2007 the Chair of the Permanent Council of the OAS had sent a note to the president of the IAJC in which, based on an exchange of views that had occurred at a Permanent Council meeting, she requested that the IAJC study the scope of the right to identity. The IAJC reviewed a draft opinion prepared by one of its members,[4] which it then approved with minor changes,[5] albeit with one dissenting vote. In brief, the opinion concluded that the right to identity has three dimensions. First, it has its own autonomous character. In addition, it is indispensable as a means for the exercise of civil, political, economic and social rights. Finally, it encompasses other rights, such as the right to a name, nationality, and family, and thus establishes a set of rights which comprise individual identity. Therefore, the nature of this right is connected to values and principles inherent in human dignity, social life, and the exercise of human rights. It also constitutes *jus cogens*, because it is the *sine qua non* for other fundamental rights. It is thus the kind of right that may not under any circumstances be suspended under the American Convention on Human Rights.

The General Secretariat's Department of International Law has informed the IAJC that, in part in response to the IAJC's opinion, a Working Group on the topic had been formed in the Permanent Council's Committee on Juridical and Political Affairs. This group worked on a draft inter-American program for a "Universal Civil Registry and the Right to Identity."[6] And the OAS General Assembly last month adopted that work program.[7]

29, 1996 (available at http://www.oas.org/juridico/English/charter.html).
Two key articles set forth the IAJC's responsibilities. Article 99 provides:
"The purpose of the Inter-American Juridical 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.
Article 100: The Inter-American Juridical Committee shall undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences."

3 The current agenda is not the exclusive basis for this report. The first two items concern matters that have been concluded and longer remain on the agenda. It should also be understood that this report does not purport to be a complete recitation of all matters addressed by the IAJC under its agenda. For example, it does not discuss the IAJC's role in the supervision of the Annual Course on International Law held in Rio de Janeiro each August, at which some members of the ILC may have lectured, or the publication of the lectures given at that course. But I would be happy to respond to your questions on these or any other matters to the maximum extent possible and refer any remaining questions to the IAJC or the Secretariat, as appropriate.

4 INTER-AMERICAN JURIDICAL COMMITTEE. **Opinion by the Inter-American Juridical Committee on the Scope of the Right to Identity**, CJI/doc.276/07, 10 August 2007.

5 INTER-AMERICAN JURIDICAL COMMITTEE . **The Scope of the Right to Identity**, CJI/RES. 137 (LXXI-O/07), 10 August 2007.

6 ORGANIZATION OF AMERICAN STATES. Department of International Law. **Report on the Current Status of the Draft Inter-American Program for a Universal Civil Registry and the 'Right to Identity'.** DIL/doc.2/08 (containing two annexes: CJPGT/DI-2/07 rev. 4 "Draft Inter-American program for a Universal Civil Registry and the Right to Identity," and CJP/GT/DI-20/08, "Report of the Special Meeting of the Working Group to Prepare an Inter-American Program for a Universal Civil Registry and the Right to Identity, held on December 5, 2007", with comments on the document). It is also the committee's understanding that its opinion has been cited by the Inter-American Court on Human Rights, and that it has received favorable scholarly attention.

7 ORGANIZATION OF AMERICAN STATES. General Assembly. **Inter-American Program for a Universal Civil Registry and the**

2. The Legal Status of Migrant Workers and their Families in International Law

At its 70th regular session (San Salvador, February-March 2007), the IAJC adopted a resolution approving the proposal of a member of the Juridical Committee that the topic of the rights of migrant workers and their families be added to the agenda.[8] After a year of extensive work, two rapporteurs produced at document entitled "Primer or Manual on the Rights of Migrant Workers and Their Families."[9] The IAJC then adopted a resolution approving that document and forwarding it to the Permanent Council for its information and, through it, to the member States of the OAS so that they may disseminate it as they consider appropriate in their respective countries. The object of this document is to further respect for, and promotion of, the rights of migrant workers and their families, including, but not limited to, respect for the provisions of the Vienna Convention on Consular Relations.[10]

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

At its 35th regular session (Fort Lauderdale, June 2005), the OAS General Assembly adopted a resolution approving the following agenda for the Seventh Specialized Conference on Private International Law (known under its Spanish acronym as CIDIP-VII):

a. Consumer Protection: Applicable law, Jurisdiction and Monetary Restitution (Conventions and Model Laws);

b. Secured Transactions: Electronic Registration for the implementation of the Inter-American Model Law on Secured Transactions.[11]

The General Assembly also asked the IAJC to collaborate in preparations for CIDIP-VII.[12]

Thereafter, proposals on the consumer protection issue were submitted by the Governments of Brazil, the United States and Canada, by means of an innovative internet discussion group created by the OAS General Secretariat with the support of the IAJC, and this internet discussion group facilitated the participation of civil society experts for the first time in the CIDIP process. A meeting of experts was then held in December 2006 at Porto Alegre, Brazil.

However, during the IAJC's 72nd regular session (Rio de Janeiro, March 2008), it was reported that no additional documents had been received, and that only informal meetings of the countries that presented proposals – Brazil, the United States, and Canada – were ongoing. After receiving and discussing the report of one of its rapporteurs on the topic, which suggested that negotiations were at an impasse,[13] the IAJC adopted a resolution seeking to provide guidance to the negotiators in CIDIP-VII to enable them to move the negotiations forward.[14]

'Right to Identity', AG/RES.2362 (XXXVIII-O/08).

8 INTER-AMERICAN JURIDICAL COMMITTEE. **The Legal Status of Migrant Workers and their Families in International Law,** CJI/RES.127 (LXX-O/07).

9 CJI/doc.292/08. For earlier versions of this consolidated documents, see "The Legal Status of Migrant Workers and their Families in International Law," CJI/doc.266/07 rev. 1; "Handbook on the Human Rights of All Migrant Workers and their Families, CJI/doc.287/08; and "Primer or Manual on the Rights of Migrant Workers and their Families," CJI/doc.289/08 corr.1.

10 INTER-AMERICAN JURIDICAL COMMITTEE. **The Legal Status of Migrant Workers and their Families in International Law**, CJI/RES.139 (LXXII-O/08).

11 ORGANIZATION OF AMERICAN STATES. General Assembly. **Seventh Inter-American Specialized Conference on Private International Law**, AG/RES.2065 (XXXV-O/05).

12 ORGANIZATION OF AMERICAN STATES. General Assembly. **Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee**, AG/RES.2069 (XXXV-O/05). This CIDIP is one of the "specialized conferences" referenced in Article 100 of the OAS Charter, in which the IAJC must play a vital role. See supra note 2.

13 **Status of the Consumer Protection Negotiations at the Seventh Inter-American Specialized Conference on Private International Law**, CJI/doc.288/08 rev.1. In the discussion that followed, the committee took note of the following important developments. There have been two important advances in the CIDIP process, which have substantially modified the potential role of the Inter-American Juridical Committee. First, prior CIDIP's had focused on the preparation of documents in treaty form, which required the experience and technical and drafting knowledge belonging to experts in public international law, such as that of the members of the Juridical Committee. In CIDIP-VI and VII, the Member States of the OAS have begun to draft model laws and other similar instruments, which require skill in legislative rather than treaty drafting. Second, until CIDIP-VI, CIDIP negotiations had concentrated on the technical problems of international legal cooperation, such as the gathering of international evidence and the traditional problems regarding applicable law (for example, the Convention of CIDIP-V on the choice of law in international contracts). In CIDIP-VI and VII, the member states began to address topics related to important substantive policy issues in which competing interest groups might differ. For example, CIDIP-VI drafted a model law on "secured transactions," that would in fact create a new type of interest in property that could serve as collateral for those engaging in debtor-creditor transactions, thus reducing the cost of capital and increasing the possibility of investment. CIDIP-VII now also was undertaking the topic of consumer protection, which may potentially have similar distributive consequences. These substantive issues involve political questions

The resolution stressed that consumer protection is one of the key emerging issues in the development of trans-border trade, and it expresses the hope that deliberations and negotiations lead to a successful CIDIP-VII. The IAJC also stated that, for the CIDIP-VII to be successful, it must be guided by the need to ensure that consumers involved in trans-border commercial transactions have available to them remedies at a cost that is proportionate to the value of their claims and that guarantee an adequate, effective, and prompt reparation. Finally, the resolution suggested that, given the wide range of substantive topics involved in trans-border commercial contracts between consumers and providers, the ongoing negotiations and deliberations to deal with and resolve the various issues – ranging across jurisdiction, applicable law, recognition and enforcement of judgments, and methods for alternative dispute resolution such as arbitration and collective or class action proceedings – may require innovative forms of international cooperation on the part of OAS member States.

4. Access to Information and the Protection of Personal Data

At its 37th regular session (Panama, June 2007), the General Assembly of the OAS called on the IAJC to include in its next annual report a comparative study on existing laws of members States concerning the protection of personal data.[15] At its 71st session (Rio de Janeiro, August 2007), complying with this mandate, the IAJC updated a report submitted previously by one of its members.[16] However, the IAJC 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. Accordingly, it adopted a resolution instructing its rapporteurs to continue working on this topic in partnership with the organs of the OAS, as well as other institutions such as the Carter Center, in order to develop a list of indicators and legal principles on the subject of access to information.[17] The IAJC's rapporteur is now actively participating in the effort launched by the Carter Center to hold a seminar on access to information, which will issue a declaration and a plan of action. Also, the OAS Department of International Law has received a mandate from the Committee on Juridical and Political Affairs of the OAS Permanent Council to coordinate the work of different areas of the Secretariat for the purpose of preparing recommendations on the topic, a process in which the IAJC's rapporteur is also actively involved.

5. The International Criminal Court

Last year, the OAS General Assembly asked the IAJC, on the "…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 (ICC), "…taking into account the Hemisphere's different legal systems," and to submit that model law to the General Assembly.[18] During the IAJC's 71st regular session (Rio de Janeiro, August 2007), the Secretariat was asked to compile existing laws in the hemisphere, so that the IAJC might present a draft model law that is responsive to the needs of civil law and common law countries. Thereafter, the Committee's rapporteur re-transmitted to member States through the OAS General Secretariat a questionnaire concerning their existing laws and legal impediments to cooperation with the ICC.[19] During the 72nd regular session of the IAJC (Rio de Janeiro, March 2008), the rapporteur presented two reports extensively discussing the issues raised by the mandate.[20] With respect to the General Assembly's mandate for the IAJC to prepare a model

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outside the IAJC's expertise and experience regarding technical and specialized problems exclusively focused on international civil cooperation in matters of private international law.

14 INTER-AMERICAN JURIDICAL COMMITTEE. **Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)**, CJI/RES.144 (LXXII-O/08).

15 AG/RES.2265 (XXXVII-O/07) and AG/RES.2288 (XXXVII-O/07).

16 **Right to Information: Access to and Protection of Information and Personal Data in Electronic Form.** CJI/doc.25/00 rev.2 (updating report prepared previously by Dr. Jonathan Fried, who is no longer a members of the IAJC).

17 INTER-AMERICAN JURIDICAL COMMITTEE. **Access to Information and Protection of Personal Data**," CJI/RES.130 (LXXI-O/07).

18 ORGANIZATION OF AMERICAN STATES. General Assembly. **Promotion of the International Criminal Court**, AG/RES.2279 (XXXVII-O/07).

19 CJII/RES.105 (LXVIII-O/06) and CJII/doc.198/05 rev.1 (containing questionnaire).

20 **Report on Perspectives for a Model Law on State Cooperation with the International Criminal Court**, CJI/doc.290/08 rev.1; and **Guide to General Principles and Agendas for Cooperation of States with the International Criminal Court**, CJI/doc.293/08 rev.1. In those submissions, the rapporteur described the background to the IAJC's consideration of the topic,

law on the cooperation of OAS member States with the ICC, the rapporteur as an *interim* proposal made reference to existing laws, such as those enacted by Canada, Uruguay, Peru, Costa Rica, Argentina and Trinidad and Tobago, which reflect experience with respect to the implementation of the Rome Statute in the different contexts of the varying legal systems of the hemisphere. IAJC adopted a resolution approving the two reports submitted by the rapporteur as the basis for continued work on this topic.[21]

6. Implementation of International Humanitarian Law in the OAS Member States

At its 37th regular session (Panama, June 2007), the General Assembly instructed the IAJC 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 (the ICRC).[22] At its most recent meeting, the IAJC met with a representative from the ICRC; and, through a questionnaire, it has begun a process of consultation with member States in order to identify their priorities in the implementation of the resolution.

7. The Struggle Against Discrimination and Intolerance in the Americas

At its 35th regular session (Fort Lauderdale, June 2005), the General Assembly instructed the Permanent Council to establish a working group in charge of receiving input from the IAJC, as well as from other bodies of the OAS, with a view to the Working Group's preparation of a draft Convention Against Racism and All Forms of Discrimination and Intolerance.[23] The Working Group of the Committee on Juridical and Political Affairs held its first meeting on September 23, 2005, and it has been meeting regularly since then. As its initial response, the IAJC adopted a resolution conveying its comments on the Working Group's preliminary draft of a proposed Inter-American convention; the IAJC recommended, among other things, that (1) the proponed convention should be precise, consistent with existing regional and universal instruments; (2) apply not only to acts that are attributable only to governments but also to private acts; and (3) address the question of the role of the Inter-American Court of Justice and the Inter-American Commission on Human Rights.[24] Since then, the drafting process has moved in a more positive direction, and the IAJC expects at its next session to provide more detailed comments on the current draft produced by the Working Committee.

8. Considerations on an inter-American jurisdiction of justice

One of the IAJC's most senior members recently suggested renewed consideration of the possibility of an Inter-American Court of Justice.[25] He proposed that the OAS Charter be amended to create a body whose purpose would be, like the International Court of Justice, to decide cases and issue advisory opinions. In that member's opinion, the IAJC could take on the role of a court serving both these new functions. At 72nd regular session (Rio de Janeiro, March 2008), the IAJC decided to give the idea further study, in view of the fact that the OAS Secretary General has indicated his support for the creation of a new Inter-American Court and many

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including the mandates issued by the General Assembly, the previous reports prepared by the rapporteur, the responses of the OAS member states to the questionnaire sent to them by the IAJC, the meetings of the Committee on Juridical and Political Affairs of the Permanent Council, and the supporting documents prepared by the Secretariat's Department of International Law. He explained the more difficult points for accession to, or ratification of, the Rome Statute; possible measures for cooperation with the International Criminal Court; and he identified the adjustments of domestic criminal law to accord with the Rome Statute that might bring about conflict with constitutional norms for some Member States. The IAJC's recommendation, he pointed out, should indicate the areas requiring development of domestic procedures, whose implementation will be subject to the institutional legal order of the States individually considered, and he noted the need to determine a central authority in each country to deal with the subject matter, in order to avoid the proliferation of hierarchies. Finally, with respect to the process of revising domestic legislation, the rapporteur noted that humanitarian law treaties, the Rome Statute, the Geneva Conventions of 1949 and its First Protocol should all be borne in mind as a systematic whole; also to be kept in mind was the need that that principles be directed towards all – parties and non-parties – so as to allow for a harmonization of national law.

21 INTER-AMERICAN JURIDICAL COMMITTEE. **Promotion of the International Criminal Court**, CJI/RES.140 (LXXII-O/08).

22 ORGANIZATION OF AMERICAN STATES. General Assembly. **Promotion of and Respect for International Humanitarian Law**, AG/RES.2293 (XXXVII-O/07).

23 ORGANIZATION OF AMERICAN STATES. General Assembly. **Prevention of Racism and All Forms of Discrimination and Intolerance and Consideration of the Preparation of a Draft Inter-American Convention**, AG/RES. 2126 (XXXV-O/05).

24 INTER-AMERICAN JURIDICAL COMMITTEE. **The struggle against discrimination and intolerance in the Americas**, CJI/RES. 124 (LXX-O/07) (adopting "The Inter-American Juridical Committee Report on the Preliminary Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance," CJI/doc.258/07).

25 **Inter-American Court of Justice**, CJI/doc.267/07.

member States have also indicated concerns about the expediency of relying on the International Court of Justice for the resolution of wholly Inter-American disputes. However, this study will not be predicated, as was initially proposed, on an expansion of the role of the IAJC.

9. Follow-up on the Application of the Inter-American Democratic Charter

In addition to studying the possibility of an Inter-American Court, the IAJC is studying other matters of "constitutional" concern in the affairs of the OAS. The IAJC met in August 2007 with the Secretary General of the OAS to discuss the Secretary General's report on the implementation of the Inter-American Democratic Charter (the Democratic Charter), which he had prepared at the request of the General Assembly.[26] The Charter was adopted in the form of a resolution on September 11, 2001 at a Special Session of the OAS General Assembly held in Lima, Peru. It provides, among other things, for special procedures for the involvement of the various political organs of the OAS in responding to threats to democracy in OAS member States and sets forth procedures and standards for the imposition of sanctions against governments that fail to respect its requirements. The IAJC took note of the legal issues identified in the Secretary General's report – which include broad questions, such as the precise legal status of the Democratic Charter in relation to the OAS Charter; and more detailed questions, such as whether the term "government," as it is used in the Democratic Charter for purposes of establishing a member State's consent to a mission by the Secretary General, also includes non-executive branches of a government. After an extended debate, with one dissenting vote, the IAJC resolved to revisit this item on its agenda so as to interpret the conditions and the means by which the 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."[27] As of this date, reports by the rapporteurs for this topic have not been submitted.

III. CONCLUSION

As I noted in my introduction, the range of issues addressed by the IAJC is extraordinarily broad, largely because it responds to the ever-increasing requests made by the political organs of the OAS. To be honest, however, as you can see, sometimes the IAJC has been, to use a common expression, "ahead of the curve," anticipating future developments in international law well before political interest, much less support, has crystallized. But even though the IAJC's effectiveness depends on its not being too far ahead of the curve, surely it also risks irrelevance when it fails to anticipate the needs of the future. So, with that humbling reminder of the precarious position of international legal-diplomats, let me thank you for your attention, apologize for the flaws in this presentation, and now invite your questions.

Annex: *Memorandum* - Summary of Questions and Answers at 15 July 2008 Presentation to International Law Commission by Antonio F. Perez on behalf of the Inter-American Juridical Committee of the OAS

MEMORANDUM

TO:	Inter-American Juridical Committee
FROM:	Antonio F. Pérez
SUBJECT:	Summary of Questions and Answers at 15 July 2008 Presentation to International Law Commission by Antonio F. Perez on behalf of the Inter-American Juridical Committee of the OAS
DATE:	July 16, 2008

The following questions and comments were presented after the presentation to the ILC:

Mr. Ian Brownlie (UK) asked about whether there truly was a need for an Inter-American Court of Justice to supplement or replace the International Court of Justice (ICJ), noting that in the arbitration of prior disputes between Latin American countries, such as the Beagle Channel

[26] AG/RES. 2154 (XXXV-O/05) and AG/RES. 2251 (XXXVI-O/06).

[27] INTER-AMERICAN JURIDICAL COMMITTEE. **Follow-up on the Application of the Inter-American Democratic Charter**, CJI/RES. 132 (LXXI-O/07).

controversy, the countries involved had selected arbitrators from outside Latin America, seeking the impartial views of outsiders to the region. In reply, without taking a position, I noted that my understanding was that the primary concern that was expressed was the financial burden for Spanish speaking countries in bringing their cases to the ICJ, which makes provision for proceedings in Spanish only when the parties are prepared to pay those additional costs; but I acknowledged that I had also heard some concerns expressed about the ICJ's alleged misunderstanding of certain doctrines of international, such as *uti possidetis iuris*, which have special significance in the Latin American regional legal system; and I noted that, while calling on outsiders to arbitrate disputes may have the advantage of impartiality, it may also have the disadvantage of risking diminished appreciation for what might be called "local knowledge."

Mr. Stephen Vascianne (Jamaica) asked whether the members of the Juridical Committee had had discussions, and had come to a common understanding, of the difference between legal questions it could answer and policy questions that should better be answered by the OAS General Assembly. My reply was that, while serving as a member, I had not participated in a systematic discussion of the issue, although the issue certainly arose in particular contexts; and my sense was that each member, based on his or her experience and philosophy, brought a private "algorithm" to the question. My personal, quite hesitant generalization, was that lawyers trained in common law legal systems tended to be more receptive to the dynamic and policy-sensitive aspect of legal analysis than their civilian counterparts who tended to focus on textual exegesis.

Mr. Georg Nolte (Germany) asked for clarification of the issue of the meaning of "government" in the Inter-American Democratic Charter, noting that certainly government includes all branches of a government including its judiciary. Without taking a position on the question, particularly since the Juridical Committee has not discussed it in any depth, I noted there was no question that a "judiciary" formed part of the "state" for purposes of "state practice" as a matter of public international law. The question before the Juridical Committee related, rather, to the meaning of the term "government" in the Inter-American Democratic Charter, in respect of the international capacity to speak for the "government" for purposes of the question of State consent, perhaps along the lines of how the question arises for purposes of State capacity under the Vienna Convention on the Law of Treaties. Thus, the narrow question was whether the judiciary of a government possessed such capacity as a kind of *lex specialis* under the Inter-American Democratic Charter.

Ms. Paula Escarameia (Portugal) asked about whether the Juridical Committee was concerned about the possibility of fragmentation of international law – that is to say, the emergence of discrepancies in the decisions of universal and regional international courts – and whether the Juridical Committee systematically took into account the work of the ILC. I replied that, in my experience, the members of the Juridical Committee were extremely sensitive to this question and recognized deviations in regional law from general international law only after the most serious consideration. I added that it was my experience that part of the Juridical Committee's "due diligence" at the beginning of its exploration of any topic on its agenda was the thorough exploration of whether, and to what effect, the topic had been considered by the ILC.

Mr. Houssein Hassouna (Egypt) asked whether there was a common position at the OAS on the International Criminal Court (ICC). I replied that to the best of my knowledge, there was no consensus position on the advisability of adhering to the ICC but that there did appear to be a consensus that the Juridical Committee should assist Member States who wish to adhere to the Statute of the ICC to surmount the technical barriers posed by their own legal systems. In my view, the Juridical Committee's task here was essentially technical in helping member States to learn from each other's experience in facilitating international legal cooperation.

Finally, Mr. Hassouna suggested that the Juridical Committee extend its cooperation not only to the International Law Commission but also should find ways and means to cooperate with other regional organizations, and Ms. Escarameia suggested that the Juridical Committee make a systematic and annual study of the ongoing developments at the International Law Commission as part of its annual agenda, as have some other regional organizations. Thanking them each for their suggestions, I promised to relay them to the Juridical Committee. (Comment: One way of facilitating these contacts would be to invite representatives from the

relevant organizations, starting with the ILC, to give presentations on an annual basis at the Annual Course in Rio, to be coupled with a more informal exchange with the OAS Juridical Committee itself.)

CJI/doc.286/08

**ADDRESS BY DR. MAURICIO HERDOCIA SACASA,
AS REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE BEFORE THE
UNITED NATIONS INTERNATIONAL LAW COMMISSION**

Mr. Ian Brownlie, President of the International Law Commission, Honorable Members of the Commission and Secretariat,

I. FOREWORD

On behalf of the Inter-American Juridical Committee (IAJC) I would like to thank the International Law Commission of the United Nations (ILC) for your kind reception this morning, bringing two organs together at the same time: one of a universal nature and the other of a regional nature, both contemplating the same horizon in the direction of codification and progressive development of International Law. Not in vain did the ILC Statute include, right from the beginning, a provision through which it "recognizes the convenience for the ILC to engage in consultations with intergovernmental organizations such as the Pan-American Union".

Personally, it is deeply rewarding to return to the International Law Commission of the United Nations, a great institution to which I belonged for five years and which has left indelible memories of friendship and cooperation with many colleagues and friends who are still in this house.

I am glad to see among the current members of the Commission two old members of the Inter-American Juridical Committee: Dr. Edmundo Vargas Carreño and Dr. Stephen Vasciannie. In my case, I was honored to take to the Inter-American legal organ the enormous professional and human experience acquired at the Commission.

II. THE CELEBRATION OF THE CENTENARY OF THE INTER-AMERICAN JURIDICAL COMMITTEE

As reported last year before this Commission by our representative, Dr. Jean-Paul Hubert, in 2006 the Inter-American Juridical Committee celebrated its centenary. On behalf of the Committee, I would like to thank you for having designated Ambassador João Clemente Baena Soares to represent the Commission at the splendid celebration held in Rio de Janeiro, as well as for the magnificent message that he delivered.

In this historical city, we commemorated the creation of that very first International Board of Jurists set up in 1906 to prepare an ambitious draft code to rule on the legal international relations of America.

Also marking the originality of this Board, as well as the Juridical Committee, was the emphasis on the work of codifying both Public International Law and Private International Law.

The centenary of the Juridical Committee was an invaluable opportunity to recall the extraordinary work and pioneering contribution of Latin America and the Inter-American System as a whole to International Law, a contribution made visible in so many sectors, such as the very idea of the codification of international law and the identification of sources and principles of the Ius Gentium since the Congress of Panama and its Treaty of Union, League and Perpetual Confederation of 1826.

The Centenary gave us the opportunity to share with the international community the contributions made by the Inter-American Juridical Committee to the so-called Inter-American System of Peace, which gave rise to the American Treaty of Peaceful Settlements – the Bogotá Pact – of 1948, the materialization of the idea of not letting any controversy among the States remain without a definitive solution for a reasonable period of time.

It will never be superfluous to insist that the model peaceful solution of disputes has played an important role – not always given the prominence it deserves – in preventing,

avoiding and dissuading disputes among States, in order that the belligerent furor of events does not allow armies to trespass the borders between neighboring countries, which has only occurred in exceptional cases in the Americas.

Rather, it has been within societies that the fracture of dispute has shown its cruel face, launching a campaign warning of the need to strengthen the structures of democracy and the Rule of Law, as well as opportunities for development and social equality. This explains, for instance, the transcendental value that the Inter-American Democratic Charter has for the international system, in the clear awareness that many times the fractures could come from divided societies with deep democratic vestiges and painful social deficiencies.

Non-Intervention

During the commemorations of the Centenary of the Inter-American Juridical Committee, the birth of the principle of Non-Intervention was remembered. This took place at the Convention on Rights and Duties of the States adopted in 1933, after the initial endeavors made in 1928, conducted under the vigorous leadership of Dr. José Gustavo Guerrero, the universal Central American who presided over both World Courts.

Also consecrated was the principle of Juridical Equality among States, which was to find its place of honor amid the fundamental principles of the Ius Gentium. In this respect we must also not forget that the Inter-American System, unlike the world system, has always excluded the veto of its procedures.

Human Dignity

It is also important to bear in mind that on the 8th of December 1947, the Inter-American Juridical Committee presented for the appreciation of the 9th International American Conference held in Bogotá, the Draft Declaration of the Rights and Duties of Man, which resulted in the "American Declaration of the Rights and Duties of Man" that preceded the Universal Declaration of Human Rights.

The Social Dimension

Since the very beginning, the Juridical Committee has also been committed to social topics; on the 21st of October 1947 an Inter-American Charter of Social Guarantees was drafted, similar to the contribution to a Social Charter of the Americas to complement the Inter-American Democratic Charter.

These efforts very possibly influenced the evolution of Economic, Social and Cultural Rights, which are inseparable from Civil and Political Rights.

The Charter of 1948

In 1948, the 9th International American Conference held in Bogotá adopted the Charter of the Organization of American States (OAS), through which was created the Inter-American Board of Jurists. Its Permanent Committee would be the Inter-American Juridical Committee itself, entrusted with full technical autonomy to undertake preparatory studies and work assigned by certain organs of the Organization. Its advisory character, so essential to its function, also deserves emphasizing.

The San Jose Pact

The 9th Conference requested the Inter-American Juridical Committee to prepare a draft project on the Statute of an Inter-American Court to protect the Rights of Man. The project was later converted into an instrument that has become a pillar in the Americas, as the American Convention on Human Rights – the "San Jose Pact".

Asylum

Another matter addressed involved the contributions of the Juridical Committee on asylum and diplomatic protection, the latter dealt with in the works of the International Law Commission, which finalized the draft articles on diplomatic protection.

Continental Platform

Another issue concerned the results of the Specialized Conference held in Santo Domingo in March 1956 on the Continental Platform, welcomed by the United Nations International Law Commission in its project.

Integration

It should be pointed out that, as reported by García Amador, in 1965 the Board expressed its concern about the legal and institutional problem of the processes of economic, regional and sub-regional integration.

The Buenos Aires Protocol

Later on, in 1967, the 3rd Special Inter-American Conference held in Buenos Aires, Argentina, adopted the Protocol of Amendments of the Charter of the Organization of American States – the Buenos Aires Protocol – which eliminated the Inter-American Board of Jurists, whose functions were transferred to the Inter-American Juridical Committee, thus raising it to the status of principal organ of the OAS.

Ever since then, the contribution of the Juridical Committee has been important in other spheres such as: Extradition; the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance; the Inter-American Convention against Corruption; the Inter-American Convention for the Elimination of all Forms of Discrimination against Handicapped Persons; the Inter-American Democratic Charter; the Inter-American Convention against Terrorism; the Declaration on the Rights of Indigenous Peoples; and Competition Law in the Americas.

As of 1975, in six conferences the institutional mark of the so-called Inter-American Specialized Conferences on Private International Law (CIDIP) allowed the adoption of 26 international instruments, including 21 Conventions, 2 Additional Protocols, 2 uniform instruments and a model law, expanding the spaces for codification and modernization in this field and the formal sources of American Law.

Other important contributions of the Juridical Committee are expressed in the contributions to the concept of an Exclusive Economic Zone, where in March 1971 the Rapporteur of the Law of the Sea theme proposed the idea of a Patrimonial Sea as a maritime space in which the Seaboard State has the right to exploit, explore and conserve the natural resources to promote development of their economies.

This contribution by the Juridical Committee influenced national legislations and the very discussions that would take place in the United Nations on an Exclusive Economic Zone at the 3rd Conference of the United Nations on the Law of the Sea.

Also of note are the contributions to the topic of representative democracy, where the Juridical Committee has shown since 1995 that (CJI/RES.I-3/95):

> Every States in the Inter-American System has the obligation to effectively exercise Representative Democracy in its political organization and system, adding that:
>
> … the principle of non-intervention and the right of each State in the Inter-American System to elect its political, economic and social system, with no outside intervention and to organize itself in the manner most convenient thereto may not include any violation of the obligation to effectively exercise Representative Democracy in the above-mentioned system and organization.

As Chairman of the Juridical Committee during the celebrations of the Centenary, I forwarded that: Democracy is truly a great contribution of the Inter-American System to the 21st century. This right is in the process of universal crystallization. The idea that it contains within itself elements that cannot be altered (separation of powers, free elections and fundamental rights and liberties, for instance), as well as the subsequent responsibility generated by the illicit fact of altering democratic order and the legitimate exercise of power, tends to transform its original political nature into a juridical vehicle proper, as the Juridical Committee anticipated that sooner or later it would have to reach the Charter of the United Nations.

Special Opinions

The Centenary recognized the contribution of the various Opinions of the Juridical Committee in exercising its privileged function as the Organization's "advisory body" in delicate special ambits such as: the extraterritoriality of laws and the limits in the exercise of jurisdiction (the case of the Helms-Burton Act) that can have some connection with the new theme being discussed here in the Commission on Extraterritorial Jurisdiction; the question of the

headquarters of the Organization (the Tünnermann case) that developed the implications and limitations entailed in being the host country to an international organization, as regards the rights and duties of the Permanent Representatives; and the case of a sentence emitted by a tribunal of a member State in respect to a person sequestered from his country to appear before a court (the Álvarez Machain case). The Juridical Committee would reaffirm the violation involving the sovereignty and territorial integrity of the State and the duty that this imposed to repatriate the sequestered person.

Contributions to the Struggle against Corruption

The Juridical Committee also recognized in its opinions many of the great contributions made by the ILC. In its work on diplomatic protection, the International Law Commission consecrated a principle according to which nationality should be acquired "in a manner that does not contradict International Law ".

In this sense, a nationality acquired by fraud or abuse of law is in blatant contradiction with International Law.

During the 66th regular session held in Managua, the Inter-American Juridical Committee emitted an Opinion in which it proposed, as part of the progressive development of International Law, the need for a norm to combat corruption that established the following (CJI/doc.181/05 rev.4):

> In case of a conflict of nationality, the Juridical Committee considers that if the nationality of the requesting State is the dominant or predominant nationality, or the genuine and effective link, extradition should not be refused on the basis of nationality. When nationality is acquired or invoked through fraud or abuse of the law, extradition should not be refused solely on the basis of nationality.

This theme is also unquestionably linked to the theme considered by the Committee on the obligation of Extraditing or Judging (*aut dedere aut judicare*), the principle reflected in many Inter-American Conventions, such as the Inter-American Convention on Extradition; the Inter-American Convention against Corruption, and the Inter-American Convention against the Manufacture and Illicit Traffic of Firearms, Ammunition, Explosives and Other Materials.

The Juridical Committee also collaborates on the large themes of the international agenda, such as the International Criminal Court, and has been requested to prepare a draft model law in cooperation with the Court based on the experiences of the American States which have done so, in an attempt to integrate with these efforts the contributions made by Continental Law and Common Law.

III. FUTURE WORK OF THE INTER-AMERICAN JURIDICAL COMMITTEE

But these reminiscences could not be the only objective of the Centenary; recalling the past can be a useless passion if the challenges of the new times remain unseen. It is of little use to dig up famous ruins and dust the cupboards if work is not also done with a view to building a contemporary International Law in the spirit of solidarity, cooperation, responsibility and a deep sense of humanity.

As the International Law Commission itself has affirmed, its work “should not be limited to traditional topics, but should rather also examine the new questions arising in the sphere of international law and the urgent concerns of the international community”.

This calls for us to look again at the most relevant characteristics of today’s world that I have outlined in the Activities to Commemorate the Centenary and that imply attending to these signs of the times so that in the juridical order of the Inter-American System this can be an effective response to an international community in the process of transformation:

a) The first characteristic is a faster and deeper expansion of the areas of action of international law, areas heretofore reserved for the internal jurisdiction of the States. Today the difference between the world of the United Nations and the first Charter of the OAS is considerable, and international law has expanded the matters subjected to its competence. The menu of international affairs has grown and specialized to the same extent that the world has widened its borders.

As expressed by the Special Study Group on the theme of fragmentation of international law and the difficulties arising from its becoming diversified and expanded:

> In the last 50 years the scope of international law has increased spectacularly. It has come to concern itself with most of the different forms of international activity, from trade to protection of the environment … it is difficult to conceive at present a field of social activity that is not subjected to some type of international juridical ruling.

b) A second note of the modern world is that the monopoly of the State has been broken to open the way for new subjects of international law and other emerging actors who occupy their place of honor at the expanded table of this new international society. Today, next to the powerful Leviathan sit the old subjects, while the human person struggles to establish his centrality.

c) The concept of security has undergone a profound change; today, threats and challenges are interconnected and have a multi-thematic character that goes beyond national marks and demands extraordinary collective efforts and regional bases of action.

d) These hurricane-like, vertiginous days of technology and communication have opened a new space for action for international law which now obliges it to use more force to regulate the visible and invisible world that moves without borders and the classic concepts of territorial division. This reinforces the theme submitted to the consideration of the Commission concerning protection of personal data in the trans-border movement of information.

Such characteristics are accompanied by a prodigious approximation between the normative worlds of the internal law of States and international law. Increasingly stronger and more vigorous, a "permeability" and an interdependence are present within these juridical orders, which literally facilitates the movement of the subjects of international law from one ambit to another, including the individual's leap to the international jurisdictional world in the sphere of human rights and community law, for example. In this sense, individuals and international organizations demand new forms and modalities of interaction that imprint renewed dynamism on international relations.

Finally, the appearance, together with a classic law on the will of the States, of a new common law expressed in imperative norms reflected in the so-called obligations of ius cogens; norms of universal coverage reflected in the so-called erga omnes norms; and above all, special mention should be made of the norms culled from regional systems, reflecting as they do obligations established to protect a collective interest that is essential to the very life of the group of organized States. This is the case of the Inter-American norms related to representative democracy and human rights that comprise an American Regional Public Order inter partes.

A corollary of this statement is the fact that this law is not only collective in the obligations it generates but also projects a joint responsibility based on solidarity to act and cooperate reciprocally to face serious infringements of these obligations.

All this is happening in a world in transition and the shaking that precede a new era settling in a century that began apocalyptically with the acts of terrorism in the United States, Spain, the United Kingdom and other parts of the world. That is why the reflections of the Juridical Committee have insisted on throwing the anchors of transcendent human values precisely to avoid the dangers of being dragged toward a century of terrorism, dehumanization and absolute myths, and to rescue human dimensions, separating them from the reigning chaos and confusion.

International law finds itself at the core of this battle for definitive consolidation of a ius gentium with new social dimensions. One of the latest studies commissioned to the Inter-American Juridical Committee relates precisely to the juridical aspects of the interdependence between democracy and socio-economic development, two key concerns in the Inter-American System that seek a new synthesis.

The Juridical Committee has observed that the obligation toward democracy and the obligation toward cooperation with development have different norms and consequences as to non-compliance, notwithstanding their enshrined interdependence in the Charter of the OAS and in the Inter-American Democratic Charter.

Development has components of economic, social and cultural rights that are fragile and to be applied gradually, and with practically no penalizing elements (unlike civil and political

rights), although they have been enshrined in international and Inter-American declarations and juridical instruments in the sphere of the human rights that are an essential part of democracy, and their growing practice strengthens the legal link and interdependence between democracy, full development and the struggle against poverty, as expressed in the Inter-American Democratic Charter.

Mr. President:

Juridical solidarity is the emerging American principle that transcends simple, smooth cooperation between States to translate the acting capacity of States that are not directly affected in defense of values, principles and norms that constitute an essential and collective interest inherent to the very sense that gave rise to the Organization.

The Draft Articles on State Responsibility for Internationally Illicit Acts opened a door by establishing that all States must cooperate in order to put an end by licit means to any grave infringement of the provisions contained in article 40, that is to say, grave violations of obligations emanating from imperative norms of general international law, and by permitting invocation of responsibility by a different State from the one violated, in certain circumstances.

Collective action vis-à-vis serious changes to the democratic constitutional order or the massive, systematic violations of human rights in any American country is a direct expression of renewed American solidarity as an active juridical commitment to defend democracy and human dignity wherever this is affected, thereby conforming the bases of a new American Public Order.

IV. THE NEW VISION APPLIED TO PRACTICAL WORK

But the Juridical Committee also wants to return to those topics that have a more direct impact on people, which is why it considers themes such as consumer protection, access to information, the right to identity, protection of migrant workers and their families, and the struggle against new or contemporary forms of discrimination.

It is with this new vision that we endeavor to position the new and old themes of the Inter-American agenda. In the first place I underscore the idea of the Juridical Committee strengthening its function as an advisory and autonomous organ in the mission entrusted to it by the Charter of the OAS. It is considered necessary that the Juridical Committee should exercise more and more its own criterion and specialization at the moment it elects the large themes and happenings that – after examining their potential juridical contents – will become part of its agenda.

In this sense, the existence and functioning of the ILC Planning Group is very instructive, enabling organs like ours to identify those themes that require codification or progressive development.

In this ambit the Juridical Committee can go even further – with daring and imagination – given its characteristics as an advisory body, in situations that defy and confront international law.

On this route of navigation, the Juridical Committee has opened a chapter in its agenda dedicated to the theme of reflections on the challenges of the Inter-American Juridical Committee; from this perspective, more specific topics have been dealt with, such as juridical cooperation with Haiti and the idea of an Inter-American Tribunal of Justice that deep down is possibly a reflection of the need to strengthen the adhesion of the American States to the mechanisms and treaties set up in the Inter-American System, discussing in depth the causes – for example – of the scant ratification of the American Treaty of Peaceful Solutions or else the reservations formulated against the jurisdiction of the International Court of Justice. Likewise, the need appears to strengthen the Committee in its role as an advisory body.

V. AGENDA IN CONSIDERATION

5.1 The struggle against discrimination and intolerance in the Americas

The key question consists here in knowing whether it is really necessary to have an additional convention to the International Convention on the Elimination of all forms of Racial Discrimination, in order not to duplicate efforts.

The Inter-American Juridical Committee, following an analysis of the international legislation on the matter, affirms that the present Inter-American instruments on human rights

contemplate all types of discrimination, whether explicitly through a general norm referring to every current or future form of discrimination, as shown in the following regional instruments: the Charter of the Organization of American States (article 5), the American Declaration on 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 Inter-American Juridical Committee considers that the utility of a new instrument lies in its affording express legal treatment to forms of discrimination that have not been explicitly determined or to new forms of discrimination that have appeared after declarations and treaties, due to new circumstances.

In this sense, this Convention would be coherent with the regional and universal instruments in place, broadening the scope of their effective application to control of the new forms of discrimination and intolerance.

5.2 Right to information

The Inter-American Juridical Committee held an extensive dialogue on the topic of access to information and protection of personal data, mentioning the importance of stressing that the objective of the work being carried out is the possible drawing up of Inter-American instruments on these two topics, and approved a questionnaire that was sent to the member States through the General Secretariat, inviting them to contribute in this way to the Committee's study of the matter.

5.2.1 Sentence of the Inter-American Court of Human Rights

In the case of Claude Reyes and Others versus Chile, the Inter-American Court of Human Rights passed an important sentence that reviews a great deal of international evolution of the topic, including that of the Council of Europe since the 70s. In this case it was alleged that a breach was made of the right to access information under the control of the State, requested because of the environmental impact that a foreign investment contract could have. The Court claimed that:

> With regard to the facts of this case, the Court understands that article 13 of the Convention, on stipulating expressly the rights to "search" and "receive" "information", protects the right that each and every person has to request access to information under the control of the State, with the reservations allowed under the system of restrictions of the Convention. Consequently, this article protects the right to receive such information and the positive obligation of the State to provide it… This information must be delivered without any need to reveal any direct interest to obtain it or any personal encumbrance, barring cases in which legitimate restriction applies.

As regards restrictions in this matter, it should be borne in mind that 1) these must be previously established by a law passed for reasons of general interest, on behalf of the common weal; 2) they must pertain to an objective sanctioned by the Convention, and 3) they can only be restrictions that are necessary for a democratic society, and proportional to the interest that justifies them.

The principle of presumption should be emphasized, in other words, all information is in principle accessible.

It is interesting to recall at this point the draft articles of the International Law Commission on Prevention of trans-border damage resulting from hazardous activities, as regards information to the public.

Mention should also be made of the importance of having effective legal resources to guarantee this right to access public information.

One aspect under discussion is the importance of separating the theme of access to information from *Habeas Data* and Protection of Data, including on the international level. At least 12 American countries have laws concerning access to information.

5.3 Administrating justice in the Americas: judicial ethics and access to justice

The General Assembly of the OAS, at its 35th regular session held in Fort Lauderdale in June 2005, through resolution AG/RES. 2069 (XXXV-O/05), "Observations and

Recommendations for the Annual Report of the Inter-American Juridical Committee", resolved to encourage the initiatives that the Committee comes to adopt to carry out studies with other organizations in the Inter-American system in different aspects with a view to strengthening the administration of justice and judicial ethics.

With regard to this theme, the Juridical Committee underscored the close relation that exists between judicial ethics and access to justice, two fundamental topics for the administration of justice and the strengthening of the rule of law in the Americas.

At this juncture, it is important to bear in mind the search for pioneer and alternative mechanisms that the Committee supported with a view to enhancing access to justice in remote rural communities, using judicial facilitators chosen among local persons of influence and recognized moral authority, under the auspices of the national Supreme Courts.

5.4 The legal status of migrant workers and their families in international law

The Inter-American Juridical Committee considers that it is necessary to make an in-depth study of the juridical aspects of human mobility, especially as relates to human rights, to reflect on the treatment of migrant workers.

> This inclusion is favored by the coming into effect of the International Convention on Protection of the Rights of All Migrant Workers and their Families on 1 July 2003; the installation and beginning of the work of the Committee for the Protection of the Rights of All Migrant Workers and their Families, as well as the coming into effect of the Protocol against Smuggling of Migrants by Land, Sea and Air on 28 January 2004, and the Protocol for Preventing, Suppressing and Sanctioning the Traffic of Persons, especially Women and Children, in addition to the Convention of the United Nations against Organized Transnational Delinquency (the Palermo Convention).

These works will necessarily also take into account Advisory Opinion OC-16/99, "The right to information on consular assistance in the framework of the guarantees of due legal process" emitted by the Inter-American Court of Human Rights on 1 October 1999; Advisory Opinion OC-18/03, "The legal status and rights of migrant workers without documents", emitted by the Inter-American Court of Human Rights on 17 September 2003, and the sentence of the International Court of Justice dated 31 March 2004 in the case of Avena and other Mexican nationals; the mandates arising from the Summits of the Americas and the approval of the Inter-American Program for the Promotion and Protection of the Human Rights of Migrant Workers and their Families.

This theme could also bear some relation to the theme "Expulsion of Aliens" presented for the appreciation of the International Law Commission.

5.5 The International Criminal Court

The OAS has assigned a special value to promoting the Statute of the Court and has given a mandate to the Inter-American Juridical Committee to contribute and strengthen the cooperation of the States with the Court and encourage ratification of the Statute.

The Juridical Committee, based on the information provided by 17 States, systematized the mechanisms used to overcome the constitutional and legal problems found in some internal regimes, which may on occasion be quite similar.

Like the International Law Commission, the method of questionnaires has proved very useful in sharing information on the best practices in incorporating the types of crime in the Statute and on the ways to qualify internal legislations to cooperate with the Court and offer recommendations both to the States Parties and Non-Parties and to the Organization as a whole. To date, 23 countries of the Inter-American System are Parties to the Statute and the Juridical Committee is working on a model law of cooperation with the Court.

5.6 The Right to Identity

On 9 March 2007, the Permanent Council held a special session on the theme "Childhood, the right to identity and citizenship", at which it was agreed to request the Inter-American Juridical Committee for an opinion on the scope of the right to identity.

The Inter-American Court of Human Rights has already referred to this theme in the case of the Serrano Cruz Sisters. The International Law of human rights and scholarly opinion have

not yet consolidated a uniform approach to the right to identity. For some it would have the characteristics of an autonomous law, while others see it as a right that is interdependent with the right to be registered, the right to a name, the right to nationality and the right to legal personality. The Court has claimed that the right to identity "has been recognized by jurisprudence and scholarly opinion both as an autonomous right and as the expression of other rights, or as a constitutive element of these".

The Court also claims that "the right to identity is closely connected to the right to recognition of legal personality, the right to have a name, a nationality, a family, and to maintain family relations".

A right in the abstract is not sufficient, it is also necessary for people to be registered and to possess identification that can be carried, shown and handed over. The register is not enough, what is necessary is the document that ensures the identity.

5.7 Seventh Inter-American Specialized Conference on Private International Law

The Juridical Committee considers that the process of Inter-American Specialized Conferences on Private International Law held since 1975 has made an exceptional contribution to this area of law. Now we are approaching the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), and the Juridical Committee has reiterated its full support of the process as the forum par excellence for codifying and harmonizing private international law in the hemisphere, and above all the need to draw up Inter-American instruments in the framework of the CIDIP-VII on the matter, among others, of consumer protection. It also reiterated its support of the participation of the rapporteurs in the preparatory work for the CIDIP-VII, requesting that they keep on participating as representatives of the Inter-American Juridical Committee in the mechanisms for the preparation of Inter-American instruments on consumer protection.

In December 2006, the 1st Meeting of Experts of the Seventh Inter-American Specialized Conference on Private International Law was held to deal with the topic Consumer Protection: Applicable Law, Jurisdiction and Monetary Redress (Conventions and Laws)

5.8 International Humanitarian Law

The General Assembly of the OAS commissioned the Inter-American Juridical Committee to draw up and propose model laws to support the efforts made to implement obligations springing from treaties concerning International Humanitarian Law based on priority themes defined in consultations with the Member States and the International Red Cross.

Mr. President:

I thank you for your patience and reiterate the importance of strengthening the two-way dialogue between the ILC and the IJC, contemplating the possibility of continuing to receive a delegate of the Committee in Rio de Janeiro to exchange opinions and information at such a transcendent moment for the future of International Law, and of course, its participation, through one of its members, in the annual courses on International Law of the Inter-American Juridical Committee and the General Secretariat.

Meetings Held by the Inter-American Juridical Committee

During 2008, the Inter-American Juridical Committee invited the following persons to attend its meetings as guests or paid visits to them:

- Ricardo Dominguez, Chief of Staff to the OAS Secretary General.
- Yusuf Abdulqawi, Director of the UNESCO Office of International Standards and Legal Affairs.
- Geneviève Bastid-Burdeau, professor of international law at the University of Paris I, Panthéon-Sorbonne, France, and former Secretary General of the Hague Academy of International Law.
- Luis Herrera Marcano, former member and former chairman of the Inter-American Juridical Committee.

- Steven C. Vasciannie, former member of the Committee and current member of the United Nations International Law Commission.
- Anton Camen, Legal Advisor for Latin America and the Caribbean of the International Committee of the Red Cross.
- Adriana Dreyzin, lecturer in private international law at the National University of Córdoba, Argentina.
- Ignacio Goicoechea, Legal Liaison Officer for Latin America, The Hague Conference on Private International Law.
- Nuria González Martín, researcher at the Legal Research Institute, National Autonomous University of Mexico.
- Andrés Bertoni, Executive Director of the Due Process of Law Foundation.
- Tercio Waldir de Albuquerque, professor in public and private international law, University for the Development of the State and the Pantanal Region, Campo Grande, MS, Brazil.
- João Carlos Brandes Garcia, Chief Justice of the State of Mato Grosso do Sul.
- José Eduardo Neder Meneghelli, judge for Campo Grande, Mato Grosso do Sul, Brazil.

The Chief of Staff to the OAS Secretary General, Dr. Ricardo Domínguez, visited the headquarters of the Inter-American Juridical Committee on August 4, 2008. After thanking the Chairman for his words, he said he was honored to bring greetings from the Secretary General and expressed his personal satisfaction at having direct contact with the Juridical Committee.

Speaking of the restructuring of the General Secretariat, he referred to the need to strengthen the Organization, to resolve the recurring financial problems, which had worsened in recent years, and to ensure that the OAS can effectively serve as a political forum for the Hemisphere. In that regard, his visit to the Juridical Committee was primarily intended to learn, from the Committee itself as a principal consultative body, what its aspirations with respect to the Hemisphere were, and what proposals and alternatives the members were interested in developing, with the challenge of the General Secretariat being able to contribute its efforts in the context of the ongoing restructuring process.

In turn, the members said they were pleased with this opportunity to be heard, and they reaffirmed the importance to the Juridical Committee of maintaining a direct dialogue with the Secretary General and, at the same time, of strengthening ties with the Secretariat for Legal Affairs and the Department of International Law, the areas that provide the Committee with technical support.

As their first point, the members unanimously stressed the importance of enhancing the Juridical Committee's consultative function, since on many occasions it is not called on to participate in debates on important issues within the Organization. They agreed that the goal should be for the OAS to reassess the position of the Juridical Committee within the inter-American system.

The members spoke with great concern of the Committee's low level of visibility, not only within the Organization, but also externally. They therefore thought it was important to have closer contacts with the Permanent Council's Committee on Juridical and Political Affairs, with a view to developing greater cooperation in other areas of common interest from their respective agendas. At the external level, they emphasized the importance of closer cooperative relations with other similar bodies, such as the UN's International Law Commission and its Sixth Committee, where the IJC's work is of great interest. Exchanges with those bodies would both better guide and increase the value of the Committee's functions.

Regarding the budget, the members noted their great concern at the ever dwindling resources assigned to the Juridical Committee, which was causing a progressive reduction in its periods of sessions, with consequences this year that could affect the performance of its duties.

As an alternative to a more proactive role for the Juridical Committee and also in consideration of the visibility question, it was suggested that the General Secretariat could negotiate with the World Bank, the IDB, or other agencies with resources, to provide the Committee with funds to be used on juridical studies into matters related to the question of legality, access to justice, judicial reform, etc. The Juridical Committee, with its 100 years of experience, is the best agency for making a truly innovative contribution to the codification of international law, be it in connection with the presence of legality within the new global system, or be it by reflecting on new approaches to traditional topics, such as democracy.

Finally, the members requested greater support for disseminating the Course of International Law, which is an activity of great relevance in professional training and also serves to showcase the topics on the Committee's agenda and the new juridical approaches being followed in various branches of international law.

At the end of his visit, Mr. Ricardo Domínguez gave a presentation on the current situation of the OAS, emphasizing its function as a forum for resolving disputes and for creating follow-up mechanisms to construct and maintain democracy and the hemispheric agenda. He stressed there was a great deal of room within the OAS for the work of the Juridical Committee, and once the Committee has identified its field of action, the necessary funds would be sought.

The Chairman thanked Mr. Domínguez for his visit and for the fruitful dialogue that had taken place during the meeting.

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